IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV-2014-092-1026
[2019] NZHC 1915

BETWEEN	MELISSA JEAN OPAI Plaintiff
AND	THE ATTORNEY-GENERAL OF NEW ZEALAND Defendant

Hearing: (On the papers)

Counsel: N Woods for Plaintiff
M F McClelland QC and A Todd for Defendant

Judgment: 7 August 2019

COSTS JUDGMENT OF BREWER J

This judgment was delivered by me on 7 August 2019 at 4:00 pm pursuant to Rule 11.5 High Court Rules.

Registrar/Deputy Registrar

Solicitors:
Rice Craig (Papakura) for Plaintiff
Crown Law (Wellington) for Defendant

Introduction

[1] This is a costs judgment.

[2] In my judgment dated 30 August 2018 I dismissed all five of Ms Opai's causes of action.[1] I did not consider any of the statements or documents to amount to defamation. There was no evidence of harm. All five claims were negated by the defence of qualified privilege and would have also been defeated by the defence of honest opinion had I been required to consider it. Most of the claims were time-barred.

[3] I indicated that the defendant was entitled to costs.[2] Ms Opai appealed my decision. In a minute dated 23 October 2018 I reserved the question of costs pending the Court of Appeal's decision. As of 3 May 2019, that appeal expired and was deemed abandoned. Both parties have now filed memoranda as to costs.

Costs

[4] It is not in dispute that costs will follow the event, nor that this proceeding should be categorised as 2B for costs purposes. The defendant seeks an order for increased costs of 40 per cent under r 14.6. The plaintiffs seeks a reduction in costs under r 14.7. There is a dispute over aspects of the defendant's schedule of costs.

Submissions

[5] The parties have agreed the costs of various interlocutory applications and reviews. No costs are sought by either party in relation to those interlocutories and I will not address them.

[6] I will address the disputes over the schedule before turning to the claims for increased/reduced costs.

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1 *Opai v Attorney-General* [2018] NZHC 2267.
2 At [134].

Quantification

[7] At item 36 of the schedule the defendant seeks 2B costs for one-and-a-half days, for matters relating to the admissibility of the plaintiff's brief of evidence. The sum is $3,345. The work includes a detailed notice under r 9.11 challenging the admissibility of evidence, a mentions hearing before Toogood J on 17 May 2018 and a detailed reply to the plaintiff's response filed 8 June 2018. Justice Lang issued minutes on the matter on 7, 8, 11 and 12 June 2018 and a judgment on 13 June 2018 upholding the parts of the defendant's challenge to admissibility that had not been resolved.

[8] Counsel for the defendant submits this process took significant time and effort shortly before trial, hence the defendant seeking one-and-a-half days.

[9] The plaintiff submits the defendant's notice of objections was excessively prolix and the majority of objections raised were either taken no further or rejected by the Court. Further, the plaintiff was required to file notice in response. The plaintiff submits these pre-trial skirmishes did not have a clear or even equivocal winner, and as such costs in respect of the objections regarding admissibility of evidence should lie where they fall.

[10] I accept the plaintiff's submission that the parties had mixed success and costs should lie where they fall. While some evidence was ultimately excluded, and some was consensually amended, the majority of the issues raised by the defendants were ultimately either minor objections or better dealt with through trial than through the pre-trial process.

Disbursements

[11] The defendant claims $1,319.97 as the cost of air travel and $3,336.00 as the cost of accommodation for counsel located out of Auckland.

[12] The plaintiff submits it would be unjust to require her to pay those sums. Counsel submits they would not have been incurred if local counsel had been instructed, as had been the case at earlier stages in the proceedings.

[13] Whether such costs are a proper disbursement will turn on the details of the case.[3] Generally the Court has required particular circumstances making it reasonable to instruct out of town counsel, such as legal complexity or the location of the client.[4]

[14] I do not consider the circumstances of this case sufficient to grant these disbursements. The legal issues were not novel, the case was not complex, and it appears to have been largely run out of the Auckland office of Crown Law. The defendant may not recover the cost of air travel or accommodation.

Increased costs

[15] Rule 14.6 provides for orders to pay increased costs. Various circumstances in which the Court may make such orders are listed at r 14.6(3). Of these, the defendant emphasises that the Court may make an order for increased costs against a party who has contributed unnecessarily to the time or expense of the proceeding by:

(a) taking or pursuing an unnecessary step or an argument that lacks merit;[5] or

(b) failing, without reasonable justification, to accept an offer of settlement whether in the form of an offer under r 14.10 or some other offer to settle or dispose of the proceeding;[6] or

(c) where some other reason exists which justifies the court making an order for increased costs despite the principle that the determination of costs should be predictable and expeditious.[7]

[16] The threshold for such a departure is unreasonable conduct by the party opposing costs.[8] That conduct must be in relation to the proceeding, not after or before it was commenced.[9] Uplift will be justified to the extent the failure to act reasonably

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3 *Buis v Accident Compensation Corporation* (2010) 19 PRNZ 585 (HC) at [25].
4 See discussion in *Ainsworth & Collinson Ltd v Edmunds* (2009) 19 PRNZ 565 (HC) at [5]–[9].
5 Rule 14.6(3)(b)(ii).
6 Rule 14.6(3)(b)(v).
7 Rule 14.6(3)(d).
8 *Bradbury v Westpac Banking Corp* [2009] NZCA 234, [2009] 3 NZLR 400 at [27].
9 See *Paper Reclaim Ltd v Aotearoa International Ltd* [2006] 3 NZLR 188 (CA) at [160].

contributed to the time or expense of the proceeding.[10] The party seeking increased costs bears the onus of convincing the Court they are justified.[11]

[17] When making an order for increased costs the Court uplifts from scale, rather than awarding a percentage of actual costs.[12] This is usually calculated on a step by step basis. However, where they are awarded because an argument lacked merit and was inherently unlikely to succeed, increased costs apply to all steps.[13]

[18] I note that financial hardship is not a ground for declining to make a costs order[14] and impecuniosity is not a shield from a costs award.[15]

Submissions

[19] The defendant submits this is an appropriate case for an increase of 40 per cent on scale costs for the following reasons:

(a) None of the five causes of action was capable of succeeding for multiple reasons, including that the words were not defamatory; there was no publication; there was insufficient harm; qualified privilege applied; the lack of improper advantage or ill-will; honest opinion likely applied; and the time bar.

(b) There was no basis for the defamation claim given the employment context and the fact that the statements in question were part of a formal workplace process.

(c) The defamation claim was brought for an improper purpose, being that the potential yield in damages was greater in the High Court than the Employment Relations Authority.

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10 *Commissioner of Inland Revenue v Chesterfields Preschools Ltd* [2010] NZCA 400, (2010) 24 NZTC 24,500 at [165].

11 *Strachan v Denbigh Property Ltd* HC Palmerston North CIV-2010-454-232, 3 June 2011.

12 *Holdfast NZ Ltd v Selleys Pty Ltd* (2005) 17 PRNZ 897 (CA) at [40].

13 *NR v M*R [2014] NZCA 623, (2014) 22 PRNZ 636; and *Broadspectrum (New Zealand) Ltd v Nathan* [2017] NZCA 434, (2017) 15 NZELR 398 at [57].

14 *Bruns v Gay* HC Auckland CIV-2004-404-0297, 28 October 2004.

15 *Teitiota v Chief Executive of the Ministry of Business, Innovation and Employment* [2013] NZHC 3401 at [6].

(d) Qualified privilege was always going to provide a complete defence and the plaintiff led no credible evidence of ill-will or improper advantage to counteract it. Associate Judge Bell and Katz J in interlocutory decisions both identified the defence of qualified privilege as a significant hurdle for the plaintiff.[16]

(e) The plaintiff alleged multiple instances of publication but in large part called no evidence to establish them.

(f) The plaintiff made serious and personalised allegations regarding senior Police officers but led no evidence to support them.

(g) The plaintiff filed a lengthy brief of evidence including irrelevant and therefore inadmissible material.

(h) The plaintiff did not accept, or even respond to, an offer of settlement on behalf of the defendant dated 15 May 2018.

[20] The defendant submits he was wholly successful and that this case lacked any particular importance and did not clarify the law.

[21] The plaintiff submits this is not a case warranting increased costs. Instead counsel argues a reduction in costs may be appropriate.[17]

[22] The plaintiff argues that multiple pre-trial determinations relating to the defamatory meanings, the de minimis threshold, and the jurisdiction of the High Court to hear a case regarding defamation in the workplace confirmed that the defamatory meanings for various statements pleaded were reasonably arguable.[18] As such, the argument had some merit.

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16 *Opai v Culpan* [2016] NZHC 3004 at [82]; and *Opai v Culpan* [2017] NZHC 307 at [80].
17 High Court Rules 2016, r 14.7(e) and (g).
18 *Opai v Culpan* [2017] NZHC 1036; *Opai v Culpan* [2017] NZHC 668; *Opai v Culpan* [2017] NZHC 307; and *Opai v Culpan* [2015] NZHC 2010.

[23] The plaintiff contends she directed her argument at trial towards the issue of whether qualified privilege applied and might have ceased to apply due to malice or improper purpose. As such, her claims failed due to the Court's finding on both parties' evidence, rather than due to being unreasonably argued. The plaintiff notes that no adverse findings of credibility were made in relation to her witnesses.

[24] The plaintiff submits this case did clarify aspects of the law of defamation in an employment context. Counsel submits it also had some wider significance relating to public confidence in the Police internal integrity reporting systems, reflected by media coverage of the case.

[25] The plaintiff submits her claim was not brought before the High Court for an improper purpose (the larger yield in damages) but because the Employment Relations Authority's jurisdiction expressly excludes claims in tort. As such, the defamation proceeding could only be brought in the High Court. The defendant twice attempted to strike the proceeding out on a jurisdictional basis and failed. The fact that defamation awards are historically larger than those obtained through the Employment Relations Authority is irrelevant.

[26] The plaintiff notes that a 40 per cent increase on costs would be at the very high end of any possible increase, given the daily recovery rate is two-thirds of the daily rate considered reasonable for the particular proceeding. Instead, some reduction may be appropriate to reflect the public interest and other argued factors.[19]

[27] Finally, the plaintiff submits that the settlement offer dated 15 May 2018 should not affect my decision on costs as it was in respect of the Employment Relations Authority proceeding as well as this one, and also required that she resign from her position.

Discussion

[28] At the outset I make clear I am not influenced by the rejected settlement offer. It was tied to the separate employment proceeding and went only to allowing costs to

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[19] High Court Rules 2016, r 14.7(e) and (g).

lie where they fell. My decision on increased costs will turn on whether Ms Opai clearly pursued an argument without merit.

[29] I accept the defendant's description of the defects in the plaintiff's case. None of the five pleaded causes of action could succeed for multiple reasons: the words were not defamatory, there was no publication, there was no harm for the purpose of the test, qualified privilege applied, the defence of honest opinion was likely available, and the majority of the claims were time-barred.

[30] The plaintiff was forewarned that qualified privilege posed a particular obstacle. Associate Judge Bell in his interlocutory judgment on strike-out was clear that qualified privilege appeared to plainly apply to the various statements in question.[20] On appeal, Katz J overturned aspects of that decision but was nonetheless relatively frank about Ms Opai's prospects, though did not go so far as to state the cause was hopeless:[21]

> [80] Ms Opai is likely to face considerable hurdles at trial, including in overcoming the qualified privilege defence. Nevertheless, the Attorney-General's application to strike out the entirety of the claim as an abuse of process on triviality/disproportionality grounds was declined by the Judge. The Attorney-General has not challenged that decision. Ms Opai will therefore have her day in Court. If judgment is entered in her favour, her reputation will be vindicated.

[31] While these judgments were clear that qualified privilege would be a significant issue, Ms Opai's claim was not struck out. At trial, arguments on her behalf were directed towards the proposition that qualified privilege might not apply, as well as the proposition it might have ceased to apply due to ill-will or the taking of improper advantage.

[32] However, these arguments never came close to mounting a serious challenge to the defence. At the close of the case Ms Opai remained a significant distance away from proving multiple essential elements of each of the five causes of action. On the evidence, that was inevitable.

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20 *Opai v Culpan* [2016] NZHC 3004.
21 *Opai v Culpan* [2017] NZHC 1037; and *Opai v Culpan* [2017] NZAR 1142.

[33] This was an employment dispute, and its framing in defamation was misconceived. I am satisfied a defamation claim in the High Court was brought, at least in part, because the potential yield in damages exceeded that possible in the Employment Relations Authority. The problem for Ms Opai with doing that was her case ceased to be about relationships at work and the duties owed to her by a reasonable employer. Instead, she had to address strict legal tests in an unrelated area. Her case was simply unsuited for that.

[34] Beyond the implications inherent in the allegations of defamation, Ms Opai further made personalised allegations about the character and behaviour of particular police officers that were not supported by any evidence beyond her own.

[35] The threshold for an order of increased costs is high. More is required than simply the failure of a factual or legal argument.[22] There must be a lack of merit. I am conscious that the default position limits potential plaintiffs' liability and thereby promotes access to justice, which is an important consideration underpinning the normal approach.[23] Given this case involved a claim against the Police, I am aware of the need not to create an unwarranted deterrent.

[36] Nonetheless, I am satisfied that Ms Opai bringing this particular claim in this particular forum was unreasonable and put the defendant to significant expense. Discouraging unmeritorious claims has been recognised as coming within the "catch all" provision in relation to increased costs.[24] For the reasons set out it is appropriate to award order increased costs for all steps in the proceeding.

[37] It follows that I do not consider this an appropriate case for reduced costs. This case did not meaningfully clarify the law of defamation, nor did its focus on internal Police functions serve any recognisable public interest.

[38] With that said, Ms Opai largely conducted the case in good faith and has not deliberately disregarded or violated the law or the processes of the Court. Ms Opai, sadly, lost perspective in an employment dispute in which she felt deeply wronged.

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22 *Nandro Homes Ltd v Datt* HC Auckland CIV-2008-404-006676, 12 July 2009, at [11].
23 *Bradbury v Westpac Banking Corp*, above n 8, at [28].
24 *Victoria University of Wellington v Alton Lee* [2001] ERNZ 305 (CA).

Indemnity costs would not be appropriate.[25] I consider the 40 per cent uplift sought by the defendant, which is at the higher end of potential awards, to be excessive. I consider an uplift of 25 per cent on scale costs appropriate.

Result

[39] Costs on a category 2B basis amount to $55,527.00. A 25 per cent uplift brings that total to $69,408.75.

[40] The defendant claims $7,227.91 in disbursement costs. Minus the $4,655.97 for accommodation and air travel costs that figure is $2,571.94. Allowable costs and disbursements together produce a figure of $71,980.69.

[41] I order that the plaintiff is to pay the defendant $71,980.69.

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Brewer J

[25] High Court Rules 2016, r 14.6(4).