

**IN THE EMPLOYMENT COURT OF NEW ZEALAND
AUCKLAND**

**I TE KŌTI TAKE MAHI O AOTEAROA
TĀMAKI MAKĀURAU**

**[2024] NZEmpC 110
EMPC 164/2023**

IN THE MATTER OF an application for leave to extend time to file
 a challenge to a determination of the
 Employment Relations Authority

AND IN THE MATTER OF an application for costs

BETWEEN JOHN ROTHWELL HERRETT
 Applicant

AND ECO FRAME AND MIRROR LIMITED
 Respondent

Hearing: On the papers

Appearances: T Mackenzie and AJ McInnes, counsel for applicant
 G Patching, agent for respondent

Judgment: 20 June 2024

COSTS JUDGMENT OF JUDGE KATHRYN BECK

Background

[1] On 27 October 2023, the Court granted Mr Herrett leave to file a challenge out of time to a determination of the Employment Relations Authority.¹ In its decision, the Court indicated that Mr Herrett was entitled to costs on his application, noted that costs ought to be able to be agreed, and permitted him to apply for costs within 21 days of the date of the judgment if necessary.²

¹ *Herrett v Eco Frame and Mirror Ltd* [2023] NZEmpC 184.

² At [33].

[2] Unfortunately, the parties were unable to agree concerning the issue of costs. Mr Herrett applied for costs on 20 November 2023.³ He seeks costs of \$3,824 on a category 2B basis: \$1,434/0.6 days for filing the interlocutory application and \$2,390/1 day for preparation of written submissions.

[3] On 12 December 2023, Mr Patching, agent for the respondent, indicated at a directions conference that he was going to seek leave to file an appeal in the Court of Appeal in relation to the Court's decision to allow the challenge to be filed out of time. After communicating with the parties, the Court indicated that Mr Herrett would have until 16 February 2024 to file an appeal, and that if no appeal was filed, he would have until 26 February 2024 to file any memorandum in response to the plaintiff's costs memorandum.⁴

[4] On 21 February 2024, counsel for Mr Herrett indicated that he wished to withdraw his substantive challenge. However, he sought that the outstanding issue of costs on his application to file a challenge out of time be resolved first. On 2 April 2024, Mr Herrett filed a notice of discontinuance withdrawing his challenge.

[5] During this period, in correspondence with the registry Mr Patching raised concerns that he was not well. As a result, on 19 April 2024, the Court issued a minute directing Mr Patching to either file submissions in response to the plaintiff's costs memorandum (filed on 20 November 2023) by 6 May 2024 or provide a medical certificate confirming that he was unable to provide such submissions, along with a timetable for when he would be likely to be able to do so.⁵

[6] On 6 May 2024, Mr Patching filed a memorandum of submissions on costs. He submitted that costs have deferred or reverted back to Mr Herrett as a result of him withdrawing his challenge.

³ Although 20 November 2023 is not within 21 days of 27 October 2023, the Court remains able to consider the application under s 221 of the Employment Relations Act 2000, as with the rest of the late documentation in this matter.

⁴ *Herrett v Eco Frame and Mirror Ltd* EmpC Christchurch EMPC407/2023, 12 December 2023.

⁵ *Herrett v Eco Frame and Mirror Ltd* EmpC Christchurch EMPC164/2023, 19 April 2024.

Costs principles

[7] The Court has a broad discretion as to costs.⁶ The discretion is augmented by reg 68(1) of the Employment Court Regulations 2000, which enables the Court to have regard to the conduct of the parties tending to increase or contain costs.

[8] To assist the Court in exercising the discretion, a Guideline Scale is used, the objective being to achieve predictability, consistency and expediency in determining costs. The scale does not displace the Court's discretion.⁷

Analysis

[9] Mr Patching submits that costs should not follow the event because Mr Herrett's substantive challenge has been resolved. He is correct that Mr Herrett is presumptively liable for any costs arising from the substantive challenge.⁸

[10] However, Mr Patching, as director, represented the defendant as its agent, so the defendant is not necessarily entitled to costs in this case.⁹ In any event, the defendant has not applied for costs, so that matter is not presently before the Court.

[11] Additionally, the fact that a substantive challenge is withdrawn or unsuccessful does not mean that no costs can be awarded to the plaintiff on prior successful interlocutory applications which took place before the withdrawal.¹⁰ Mr Herrett is not seeking costs in respect of the substantive challenge; he is only seeking them in relation to the application for leave to file a challenge out of time. He remains entitled to costs in relation to that application.

⁶ Employment Relations Act, sch 3 cl 19.

⁷ "Employment Court of New Zealand Practice Directions" <www.employmentcourt.govt.nz> at No 18.

⁸ High Court Rules 2016, r 15.23.

⁹ *McGuire v Secretary for Justice* [2018] NZSC 116, [2019] 1 NZLR 335 at [55]–[56] and [82]–[88]; *Ngawaka v Global Security Solutions Ltd* [2022] NZEmpC 79 at fn 5; and *Re Collier (A Bankrupt)* [1996] 2 NZLR 438 (CA); but see *Hutchison v Nelson City Council* [2014] NZEmpC 202 at [16]–[18].

¹⁰ High Court Rules, rr 14.2(1)(a) and 14.8; and *Chapman v Badon Ltd* [2010] NZCA 613, (2010) 20 PRNZ 83 at [12].

[12] Applying category 2B of the Court's Guideline Scale, the items sought by Mr Herrett are not inaccurate. However, Mr Herrett was not represented when he filed his application and related documentation on 20 April 2023. He only engaged counsel to represent him in late June 2023.¹¹ Therefore, he is not entitled to that item of costs.¹²

[13] Turning to the submissions filed by counsel for Mr Herrett, their substantive contents were just over one page in length. The costs memorandum seeks a full day of scale costs for those submissions. I consider that to be unreasonably high given the simplicity of the application. Further, although Mr Herrett was successful in his application, the Court's order was something of an indulgence given the need for the application arose as a result of delay on his part.

[14] In the circumstances, I consider that an award of costs of \$500 is appropriate.

Outcome

[15] Eco Frame and Mirror Ltd is ordered to pay costs to Mr Herrett of \$500 within 21 days of the date of this judgment.

[16] There is no issue of costs on this costs application.

Kathryn Beck
Judge

Judgment signed at 2.45 pm on 20 June 2024

¹¹ *Herrett v Eco Frame and Mirror Ltd*, above n 1, at [6].

¹² See above n 9.