



Employment Court of New Zealand

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A v N Limited [2019] NZEmpC 196 (19 December 2019)

Last Updated: 31 December 2019

IN THE EMPLOYMENT COURT OF NEW ZEALAND AUCKLAND

I TE KŌTI TAKE MAHI O AOTEAROA TĀMAKI MAKĀURAU

[\[2019\] NZEmpC 196](#)

EMPC 269/2018

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
AND IN THE MATTER OF	an application as to costs
BETWEEN	A Plaintiff
AND	N LIMITED Defendant

Hearing: On the papers

Appearances: S R Fraser, counsel for plaintiff
M Beech, counsel for defendant

Judgment: 19 December 2019

COSTS JUDGMENT OF JUDGE M E PERKINS

[1] On 17 September 2019 this Court issued a judgment on a non-de novo challenge.¹ The challenge related to a determination of the Employment Relations Authority dated 10 August 2018 in which the plaintiff had been only partially successful in respect of a grievance claim commenced against the defendant, her former employer.²

[2] The judgment on the non-de novo challenge resulted in the plaintiff obtaining a further remedy against the defendant in the form of reimbursement of six weeks' wages, reduced by 10 per cent to take account of the plaintiff's contributory behaviour.

¹ *A v N Ltd* [2019] NZEmpC 129.

² *A v N Ltd* [2018] NZERA Auckland 248.

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This sum amounts to \$5,977.54. In the Authority the plaintiff had been awarded compensation of \$10,000 (reduced by 10 per cent) and a further reduction of \$1,680 for arrears of rent on a cottage owned by the defendant and occupied by the plaintiff. Compensation therefore amounted to \$7,320.

[3] Even though the matter of costs was reserved by the Authority in its determination, no application for costs was made to the Authority and it never awarded costs.

[4] The plaintiff now claims costs in respect of both the Authority and the Court proceedings.

[5] The plaintiff was in receipt of a grant of legal aid in respect of both the proceedings before the Authority and the non-

de novo challenge commenced in the Court.

[6] The plaintiff seeks costs in respect of the Authority proceedings in line with the daily tariff of \$4,500. The total costs incurred by the plaintiff in those proceedings amounted to \$6,166.06. However, this amount includes charges for attendances leading up to the dismissal for which party and party costs should not be claimable.

Such costs might be recovered as a head of special damage.³

[7] Insofar as the Employment Court proceedings are concerned, the actual costs incurred amount to \$14,977.66 plus GST. Counsel for the plaintiff, in her submissions, has also provided the Court with a calculation in accordance with the Court's Guideline Scale, which amounts to \$21,510.

[8] The defendant made Calderbank offers to the plaintiff prior to the Authority's investigation meeting and prior to the Court hearing. The offer made prior to the Authority's investigation meeting exceeded the compensation awarded by the Authority after the percentage for contributory behaviour and rent arrears were deducted. However, it would not have been sufficient to cover costs incurred by the plaintiff to that point.

³ See, for instance, *Binnie v Pacific Health Ltd* [2003] NZCA 69; [2002] 1 ERNZ 438 at [7].

[9] There were two Calderbank offers made in respect of the Court proceedings. The second offer prior to the Court hearing fell short of the total amount eventually awarded in favour of the plaintiff by approximately \$500. This total recovery included the compensation which had been awarded in the Authority.

[10] The defendant submits that in all the circumstances, including what it regards as reasonable offers made prior to both the Authority investigation and the Court hearing, that costs should lie where they fall. The overall circumstances leading to reductions for contributing behaviour by the plaintiff are referred to in the Court's judgment of 17 September 2019.

[11] The Court's jurisdiction in respect of costs is contained in cl 19(1) of sch 3 of the [Employment Relations Act 2000](#) (the Act) which provides as follows:

19 Power to award costs

(1) The court in any proceedings may order any party to pay to any other party such costs and expenses ... as the court thinks reasonable.

[12] Regulation 68(1) of the [Employment Court Regulations 2000](#) (the Regulations) provides:

68 Discretion as to costs

(1) In exercising the court's discretion under the Act to make orders as to costs, the court may have regard to any conduct of the parties tending to increase or contain costs, including any offer made by either party to the other, a reasonable time before the hearing, to settle all or some of the matters at issue between the parties.

[13] The Court is, therefore, entitled to take account of any offer made by either party to the other in the context of the conduct of the parties and whether that tends to increase or contain costs.⁴ The regulation is sufficiently wide for the Court to consider Calderbank offers which may or may not exceed the remedies recovered by the opposing party.⁵ In this case I consider that the offers of settlement made by the defendant to the plaintiff were genuine attempts to resolve the matter without the

4. See, for example, *Stevens v Hapag-Lloyd (NZ) Ltd* [2015] NZEmpC 137, [2015] ERNZ 1080 at [21]- [24].

⁵ See High Court Rules, r 14.11.

incurring of further costs to prepare for and attend the Authority's investigation meeting or the Court hearing.

[14] The submission is also made by the defendant that in any event, as no application was made to the Authority for costs, it is now not open to the Court to revisit the issue of costs in the Authority proceedings. I do not accept that submission. This case involved a non-de novo hearing where the Court was being asked to reconsider matters where the plaintiff was only partially successful on some matters and unsuccessful on others in the Authority. Costs may have been a difficult matter to resolve on the outcome of the Authority's determination as it stood prior to the challenge. The position might be different if the Authority had made a final determination on costs and there was no challenge against that

determination. Even then, however, the Act and Regulations provide a basis upon which extensions of time for filing a challenge can be brought. The discretion of the Court to award costs, in my view, is sufficiently wide so that in circumstances such as exist in this case, the Court is not deprived of the ability to visit the issue of costs in the Authority.

[15] In exercising the discretion, I take account of the fact that the plaintiff was successful in challenging that part of the Authority's determination which held that she was not entitled to reimbursement of wages. The award was obviously not for a significant amount. Prior to the hearing she also withdrew her challenge against the quantum of compensation which had been awarded by the Authority. This had the effect of reducing the length of the hearing.

[16] In addition, as submitted by counsel in submissions in reply as to costs, the plaintiff had valid reasons other than the quantum of the award in bringing the proceedings to the Employment Court. This case did involve matters of principle relating to whether or not the defendant as employer could dismiss the plaintiff as its employee for refusing to take a drug test for which there was no contractual requirement. Nevertheless, the fact that the costs incurred have exceeded the monetary remedies awarded to a significant degree is another matter to be considered. The eventual outcome has meant the proceedings have been an uneconomical exercise and disproportionate to the amounts at stake.

[17] I have already indicated in the substantive judgment that the proprietors of the defendant faced a very difficult situation in the running of their farm, as a result of the behaviour of the plaintiff and another farm hand employed by them. Nevertheless, if draconian procedures for drug testing are to be required of an employee, there must be watertight contractual provisions in place and, where appropriate, notice has been given to the employee. The defendant fell short of those requirements in this case.

[18] In all the circumstances, I consider that an appropriate award in favour of the plaintiff in respect of costs in the Authority should be \$3,000. Insofar as the proceedings in the Court are concerned, in order to keep some proportionality between the outcome and the costs incurred, I award costs in favour of the plaintiff of \$7,000.

[19] In summary, therefore, the defendant is ordered to pay the plaintiff costs amounting in total to \$10,000 these and being party and party costs in respect of both the Authority and Court proceedings.

M E Perkins Judge

Judgment signed at 4 pm on 19 December 2019

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