



# Employment Court of New Zealand

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## Ale v Kids at Home Limited [2016] NZEmpC 26 (22 March 2016)

Last Updated: 6 April 2016

### IN THE EMPLOYMENT COURT AUCKLAND

#### [\[2016\] NZEmpC 26](#)

EMPC 108/2015

IN THE MATTER OF      a challenge to a determination  
                                 of the  
                                 Employment Relations  
                                 Authority

AND IN THE MATTER   of an application for costs

BETWEEN                ANNA ALE Plaintiff

AND                        KIDS AT HOME LIMITED  
                                 Defendant

Hearing:                By submissions filed on 5 and 25 January  
                                 2016

Appearances:        A Hope, counsel for plaintiff  
                                 E Burke, counsel for defendant

Judgment:             22 March 2016

### COSTS JUDGMENT OF JUDGE CHRISTINA INGLIS

[1] The plaintiff applies for costs following her challenge<sup>1</sup> to a determination of the Employment Relations Authority dismissing aspects of her disadvantage grievance on the basis that it had not been raised within the statutory 90-day timeframe for doing so.<sup>2</sup> The parties have been unable to agree costs and have filed memoranda.

[2] The starting point is cl 19 of sch 3 of the [Employment Relations Act 2000](#). It confers a broad discretion as to costs, providing that:

(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.

<sup>1</sup> *Ale v Kids at Home Ltd* [\[2015\] NZEmpC 209](#).

<sup>2</sup> *Ale v Kids at Home Ltd* [2015] NZERA Auckland 103.

ANNA ALE v KIDS AT HOME LIMITED NZEmpC AUCKLAND [\[2016\] NZEmpC 26](#) [22 March 2016]

(2) The court may apportion any such costs and expenses between the parties or any of them as it thinks fit, and may at any time vary or alter any such order in such manner as it thinks reasonable.

[3] Regulation 68(1) of the [Employment Court Regulations 2000](#) also deals with costs. It provides that, 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".

[4] The discretion to award costs, while broad, is to be exercised judicially and in accordance with principle. The primary principle is that costs follow the event.<sup>3</sup> The usual starting point in ordinary cases is 66 per cent of actual and reasonable costs. From that starting

point factors that justify either an increase or decrease are assessed.<sup>4</sup>

[5] It is necessary to traverse briefly the history of these proceedings. The plaintiff raised a number of matters which she wished to pursue in the Authority and which the defendant took issue with, including an unjustified disadvantage grievance relating to an allegedly unfair performance appraisal process, workplace bullying, workplace stress through an overload of work and unjustified actions resulting in the plaintiff taking sick leave. The Authority's determination effectively limited the plaintiff's grievance to a claim of unjustified dismissal and of unjustified

disadvantage relating to an incident involving a work vehicle.<sup>5</sup> It was the scope of

the disadvantage claim that the plaintiff took issue with on her challenge. In her statement of claim she sought a declaration that the personal grievance relating to the performance appraisal process<sup>6</sup> had been raised within time.

[6] The parties filed an outline of written submissions in advance of the hearing. This helped clarify the plaintiff's position. It was submitted on her behalf that aspects of the process complained about were part of an ongoing grievance; alternatively that the defendant had impliedly consented to a disadvantage grievance relating to the performance appraisal process being pursued out of time; and if not

these events were part of the relevant evidential background.

<sup>3</sup> *Victoria University of Wellington v Alton-Lee* [2001] NZCA 313; [2001] ERNZ 305 (CA) at [48].

<sup>4</sup> *Binnie v Pacific Health Ltd* [2003] NZCA 69; [2002] 1 ERNZ 438 (CA) at [14].

<sup>5</sup> *Ale v Kids at Home Ltd*, above n 2, at [31].

<sup>6</sup> In particular the requirement for a second appraisal and the subsequent alleged upgrading of the appraisal meeting to a performance management meeting which occurred after 15 August 2013.

[7] Following the plaintiff's de novo challenge, two grievances were found to have been raised within the 90-day timeframe. The first related to a demand to attend a further appraisal meeting one month after the first. The second related to an allegation that the defendant had unjustifiably elevated the appraisal meeting into a performance management meeting. I accepted (contrary to the defendant's submission) that, when viewed objectively and in context, the defendant had so conducted itself that it could reasonably be taken to have consented to a disadvantage grievance being raised out of time in relation to the performance appraisal process from 15 August 2013. I did not accept the plaintiff's submission that a separate disadvantage grievance had been raised within time in relation to a meeting on 2 August 2013. Nor did I accept that the defendant had consented to such a grievance being raised out of time. I observed that evidence in relation to the meeting was likely to be contextually relevant to the plaintiff's in-time claims.

[8] The defendant contends that instead of an order of costs in the plaintiff's favour the position should be reversed and it ought to be awarded costs, in light of the limited nature of the plaintiff's success on her challenge. While not succeeding on every issue, the plaintiff did enjoy overall success in broadening the scope of her unjustified dismissal claim in relation to the performance appraisal process. There may be circumstances in which it is appropriate to have regard to the fact that although a party has succeeded overall, they failed in relation to an issue which

significantly increased the costs of the party opposing costs.<sup>7</sup> In the present case the

plaintiff failed in respect of her primary arguments in respect to the 2 August meeting. However I found that evidence relating to the meeting was likely to be contextually relevant. I do not consider that, on their own, the issues on which the plaintiff failed could be said to have contributed significantly to the defendant's costs.

[9] I do not accept the submission that the challenge would not have been necessary, and could have been resolved by agreement, had the plaintiff's arguments been clearly articulated from the outset. The statement of claim made it clear that

the plaintiff wished to draw the performance appraisal process into her claim of

<sup>7</sup> See High Court Rules, r 14.7(d).

unjustified disadvantage and written submissions filed in advance clarified the arguments being advanced on her behalf.

[10] The plaintiff seeks a contribution to her costs of \$2,106.22, representing

66 per cent of claimed actual costs. I accept that the plaintiff incurred actual costs of the quantum identified in submissions and supported by invoices before the Court. The costs claimed by the plaintiff do not include the costs associated with an application for leave to amend the statement of claim. Mr Hope accepts that those costs should be excluded. I agree.

[11] While it may have been possible to deal with the challenge on the papers, as Ms Burke points out, I do not accept that costs were unnecessarily increased because a hearing was convened or because the plaintiff elected to proceed by way of de novo hearing. In the event the hearing occupied half a day, written submissions were filed in advance and further written submissions followed to deal with a jurisdictional point that emerged during the course of argument.

[12] I record that both counsel asserted more generally that the other engaged in conduct which increased costs. I do not consider it necessary to dwell on this point. Support for both views can reasonably be discerned from the documentation before the Court.

[13] I accept that the plaintiff's actual costs were reasonable. An appropriate contribution to costs is the rounded down figure of \$2,100. The defendant also seeks a contribution towards the costs associated with seeking costs, which I accept is appropriate and which I set at \$300.

[14] I do not understand the defendant to be taking issue with the disbursements sought by the plaintiff, which were reasonable and necessarily incurred in these proceedings.

### **Conclusion**

[15] The defendant is ordered to pay the plaintiff the sum of \$2,100 by way of contribution to costs; \$300 contribution to costs in seeking costs and \$322.84 by way of disbursements.

Christina Inglis

Judge

Judgment signed at 3.30 pm on 22 March 2016

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