



Employment Court of New Zealand

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Barry v C I Builders Limited [2021] NZEmpC 130 (16 August 2021)

Last Updated: 20 August 2021

IN THE EMPLOYMENT COURT OF NEW ZEALAND AUCKLAND

I TE KŌTI TAKE MAHI O AOTEAROA
TĀMAKI MAKĀURAU

[\[2021\] NZEmpC 130](#)
EMPC 331/2020

IN THE MATTER OF an application for declaration under
 s 6(5) of the [Employment Relations
Act 2000](#)

AND IN THE MATTER OF an application for costs

BETWEEN ROSS BARRY
 Plaintiff

AND C I BUILDERS LIMITED
 Defendant

Hearing: On the papers

Appearances: G Pollak, counsel for plaintiff J
 Burley, counsel for defendant

Judgment: 16 August 2021

COSTS JUDGMENT OF CHIEF JUDGE CHRISTINA INGLIS

[1] Mr Barry has applied for costs following his successful application for a declaration of employment status.¹ The parties have been unable to resolve costs. This judgment deals with the issue.

[2] The starting point for costs in the Court is cl 19 of sch 3 to the [Employment Relations Act 2000](#) (the Act). It confers a broad discretion as to costs. A scale has been adopted to guide the setting of costs. As the guidelines make clear, the scale is intended to support (as far as possible) the policy objective that the determination of

1 *Barry v C I Builders Ltd* [\[2021\] NZEmpC 82](#).

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costs be predictable, expeditious and consistent.² It is not intended to replace the Court's ultimate discretion as to costs.

[3] Generally, costs are assessed by applying the appropriate daily rate to the time considered reasonable for the steps reasonably required in relation to the proceeding. This is the conventional approach adopted by counsel for Mr Barry in seeking costs on behalf of his client. Costs calculated in accordance with category 2B (the categorisation agreed to by counsel for these proceedings during the course of the initial directions conference on 9 December 2020) are sought. That sum totals

\$29,875.00.

[4] The calculation submitted by counsel for Mr Barry is slightly lower than that produced by a strict application of the guidelines.³ The sum sought is \$28,799.50. Disbursements of \$557.11 are also sought in respect of filing and hearing fees.

[5] The defendant company submits that costs based on category 2B are inappropriate in the present case. That is because, it is said, there was a narrow issue involved and that category 2A ought to be applied. Reference is also made to “without prejudice” correspondence to settle the proceedings; that correspondence is not before the Court. The short point is that absent details of the offer, including as to its terms and the stage of the proceedings it was made, I do not propose to accord it any weight in assessing an appropriate contribution to Mr Barry’s costs.

[6] As I have said, the proceedings were assigned category 2B for costs purposes during the course of a telephone directions conference. By the time that conference occurred the nature of the issue was perfectly clear – was Mr Barry an employee (as he said) or an independent contractor (as the company contended)? While that issue is, in one sense, narrow it is not without difficulty as the case law under [s 6](#) of the Act reflects. I see no reason to depart from the original costs categorisation, having regard to what was

2. “Employment Court of New Zealand Practice Directions” www.employmentcourt.govt.nz at No. 16.
3. Mr Barry claimed 2 rather than 3 days for the commencement of a proceeding other than a challenge. He also claimed 0.25 days for a case management conference; the correct step is 0.2 days for a directions conference. Finally, the hearing lasted 1.5 days, not 2 days.

reasonably required to pursue the proceedings. Nor do I see any reason to depart from the costs figure claimed in the memorandum filed on behalf of the plaintiff.

[7] Standing back, I am satisfied that an order of costs ought to be made in Mr Barry’s favour in the sum of \$28,799.00 (rounded down) and disbursements of \$557.11. Such sums are to be paid to Mr Barry by the defendant company within 20 working days of the date of this judgment.

Christina Inglis Chief Judge

Judgment signed at 10.50 am on 16 August 2021

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