



Employment Court of New Zealand

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Best Health Foods Limited v Berea [2021] NZEmpC 190 (3 November 2021)

Last Updated: 8 November 2021

IN THE EMPLOYMENT COURT OF NEW ZEALAND CHRISTCHURCH

I TE KŌTI TAKE MAHI O AOTEAROA ŌTAUTAHI

[\[2021\] NZEmpC 190](#)

EMPC 398/2020

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
AND IN THE MATTER	of an application for costs
BETWEEN	BEST HEALTH FOODS LIMITED Plaintiff
AND	ROXANNE BERA Defendant

Hearing: (on the papers)
Appearances: J Gu, agent for Best Health Foods Ltd
R Berea in person
Judgment: 3 November 2021

COSTS JUDGMENT OF JUDGE B A CORKILL

[1] In my judgment of 20 September 2021,¹ I dismissed the challenge brought by Best Health Foods Ltd (BHFL) to a determination of the Employment Relations Authority,² which had dealt with issues arising from a termination of Ms Roxanne Berea's employment with that entity. I reserved costs.

[2] I noted that although Ms Berea had been unrepresented at the hearing, if she had in fact incurred legal costs or any relevant disbursements in dealing with the challenge, she could make an application for a contribution to those.³

¹ *Best Health Foods Ltd v Berea* [\[2021\] NZEmpC 155](#).

² *Berea v Best Health Foods Ltd* [\[2020\] NZERA 474 \(Member Beck\)](#).

³ *Best Health Foods Ltd v Berea*, above n 1, at [102].

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[3] This duly occurred. She said she had engaged a lawyer to assist her with pre-hearing matters, incurring costs of \$3,450. That said she sought scale costs which she submitted would amount to \$4,770 on a Category 1B basis.

[4] Mr Gu filed a submission in response. He indicated that BHFL did not accept certain factual findings I had made in the judgment. I place those to one side as the Court has no jurisdiction to revisit those at the costs stage.

[5] He went on to submit that traditionally legal fees were awarded based on a legal representative's appearance at a hearing. He argued that since no such appearance had occurred, there should not be a contribution to Ms Berea's costs. He also submitted that the time spent by Ms Berea's lawyer was clearly to assist her in crafting a case built on a "fabricated story". Consequently, no order as to costs should be directed.

[6] I requested particulars of the legal fees which had been incurred by Ms Berea. The lawyer involved, Ms Kirsten Maclean,

prepared a letter outlining these. In summary, she stated that in the first of two invoices, 3.5 hours of her time had been devoted to reviewing the Authority's determination and providing advice as to the steps Ms Berea would need to take in resisting the challenge. The second invoice related to five hours of her time, which involved assistance in drafting briefs of evidence and submissions.

[7] Mr Gu was invited to comment on the content of Ms Maclean's letter, but no comment was tendered on this point.

[8] Under cl 19 of sch 3 of the [Employment Relations Act 2000](#), the Court has a broad discretion to order any party to pay to any other party such costs and expenses as the Court thinks reasonable. The principles are well established, as set out in several Court of Appeal judgments.⁴

4. *Victoria University of Wellington v Alton-Lee* [2001] NZCA 313; [2001] ERNZ 305 (CA) at [48]; *Binnie v Pacific Health Ltd* [2003] NZCA 69; [2002] 1 ERNZ 438 (CA) at [14]; and *Health Waikato Ltd v Elmsly* [2004] NZCA 35; [2004] 1 ERNZ 172 (CA) at [17].

[9] The primary principle is that costs follow the event. As to quantification the principle is one of reasonable contribution to costs actually and reasonably incurred.⁵

[10] The Court's scale is not intended to replace the Court's ultimate discretion under the statute as to whether to make an award. It is a factor in the exercise of the Court's discretion.

[11] I am satisfied that legal costs were incurred appropriately by Ms Berea, for the purposes of dealing with the challenge brought against her. I do not accept that her evidence was fabricated, or that her lawyer assisted in the preparation of incorrect evidence.

[12] I also note that an award of costs is not conditional on a party's lawyer having appeared at the hearing. The broad discretion as to costs bestowed on the Court allows it to award costs in circumstances such as the present.

[13] I turn to quantum. Had I applied the Court's scale in this case, I would have certified for Items 2 (commencement of defence to challenge by defendant) and 36 (defendant's preparation of briefs of evidence) on a Category 1B basis.⁶ At a daily rate of \$2,390 the total award would have been \$5,565. This exceeds actual costs incurred. It is inappropriate therefore to rely on the scale.

[14] Rather, it is preferable to adopt the approach which applies where a scale assessment does not apply, that is, a 66 per cent contribution to fair and reasonable costs. I accept Ms Maclean's costs are fair and reasonable; a two-thirds proportion is

\$2,277.

⁵ *Victoria University of Wellington v Alton-Lee*, above n 5.

6. <https://www.employmentcourt.govt.nz/assets/Documents/Publications/Employment-Court-Practice-Directions.pdf>.

[15] BHFL is accordingly ordered to pay \$2,277 to Ms Berea as a contribution to her costs, within 14 days.

B A Corkill Judge

Judgment signed at 3.30 pm on 3 November 2021