



Employment Court of New Zealand

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Butt v Attorney-General [2022] NZEmpC 49 (21 March 2022)

Last Updated: 25 March 2022

IN THE EMPLOYMENT COURT OF NEW ZEALAND AUCKLAND

I TE KŌTI TAKE MAHI O AOTEAROA TĀMAKI MAKĀURAU

[\[2022\] NZEmpC 49](#)

EMPC 317/2020

IN THE MATTER OF an application to reopen file EMPC
396/2019

AND IN THE MATTER OF an application to exclude evidence

AND IN THE MATTER OF an application to strike out proceedings

AND IN THE MATTER OF an application for costs

BETWEEN SUSHILA DEVI BUTT
First Plaintiff

AND ARTHUR ROYD WILSON BUTT
Second Plaintiff

AND THE ATTORNEY-GENERAL SUED ON
BEHALF OF THE MINISTRY OF
HEALTH
First Defendant

AND THE ATTORNEY-GENERAL SUED ON
BEHALF OF THE HONOURABLE
ANDREW LITTLE IN HIS CAPACITY AS
MINISTER OF HEATH
Second Defendant

Hearing: On the papers

Appearances: A Till and J Perrott, counsel for plaintiffs
W Aldred and O Wilkinson, counsel for
defendants

Judgment: 21 March 2022

COSTS JUDGMENT OF JUDGE KATHRYN BECK

(Costs on interlocutory applications)

SUSHILA DEVI BUTT v THE ATTORNEY-GENERAL SUED ON BEHALF OF THE MINISTRY OF HEALTH [\[2022\] NZEmpC 49](#) [21 March 2022]

[1] Mr and Mrs Butt have applied for costs following their successful opposition to the defendants' applications to exclude evidence¹ and strike out their claim.²

[2] They are seeking full indemnity costs for the legal costs incurred in defending the applications. These amount to \$59,785.50, plus GST, which takes the total figure to \$68,753.32.

[3] In the alternative they seek \$37,506.25 calculated in accordance with the [High Court Rules 2016](#) on a Category 3C basis.

[4] The defendants say that this matter does not meet the threshold for indemnity costs, there is no basis for an uplift in costs, and the applications were not sufficiently complex to justify Category 3. They submit that Category 2B and an amount of \$18,223.75 are appropriate.

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

[6] 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.

[7] The Court 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.

Increased or indemnity costs

[8] The plaintiffs note that the Court's broad discretion to award costs includes the discretion to award indemnity costs. They submit that this is a case for the exercise of that discretion on the basis that the applications were unnecessary, lacked merit, unnecessarily prolonged the litigation process and increased the costs to the plaintiffs.

[9] Further, they say that the Crown has substantial resources compared to them, that their case has public significance and that it is part of a larger vein of law being developed.

1 *Butt v The Attorney-General sued on behalf of the Ministry of Health* [2021] NZEmpC 151.

2 *Butt v The Attorney-General sued on behalf of the Ministry of Health (No 2)* [2021 NZEmpC 228].

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

[10] The defendants submit that the threshold for an award of indemnity costs is "exceptional and require[s] exceptionally bad behaviour."⁴ They say neither of their applications meets this threshold.

[11] It is correct that, in deciding costs, the Court may have regard to any conduct of the parties tending to increase or contain costs.⁵ Indemnity costs may be awarded in circumstances where a party has acted vexatiously, frivolously, improperly or unnecessarily in commencing, continuing or defending a proceeding.⁶ As already noted by the defendants, the Court of Appeal has noted that such circumstances are exceptional and require exceptionally bad behaviour.⁷

[12] The plaintiffs, in their submissions in reply, have clarified that there is no suggestion that the applications were improper but say that it is enough that they were unnecessary and lacked merit. They say the proceedings have put them to unnecessary cost which they cannot otherwise fully recover.

[13] While the defendants' applications were unsuccessful, I do not consider that the making of them, or the way in which they were conducted, met the criteria for awarding costs on an indemnity basis or an uplift. They do not amount to exceptionally bad behaviour; nor were they vexatious or frivolous.

[14] While it is frustrating for the plaintiffs that they are unable to recover their full costs, as I noted at the outset, the normal principle applying in these circumstances is one of reasonable contribution to costs, not indemnity. That principle is only displaced in exceptional circumstances; there are no such circumstances here.

Scale costs

[15] If they are unable to obtain full indemnity for their costs, the plaintiffs argue that scale costs should apply on a category 3C basis. They say the admissibility application required an analysis and understanding of the rules of evidence and their application in the Employment

4 *Bradbury v Westpac Banking Corp* [2009] NZCA 234, [2009] 3 NZLR 400 at [28].

5 [Employment Court Regulations 2000](#), reg 68(1).

6 [High Court Rules 2016](#), r 14.6(4)(a) applying via the [Employment Court Regulations 2000](#), reg 6(2)(a)(ii).

7 *Bradbury*, above n 4, at [28].

Court context. They argue that the strike-out matter was complex, requiring them to speak to strike-out, misrepresentation, accord and satisfaction, and jurisdictional issues.

[16] The defendants submit that the applications were not outside the usual run of matters that come before the Employment Court and there is nothing about the proceeding that would require counsel to have special skill or experience in the Employment Court. They argue that category 2B is appropriate for both applications.

[17] Both parties have provided a breakdown of how the scale applies for each application, applying their respective views of categorisation.

[18] There is no issue between the parties as to the breakdown of the steps in the proceedings, just the value that should be attributed to them.

[19] I agree that the application in relation to admissibility of evidence was of average complexity requiring a normal amount of time. Category 2B is an appropriate categorisation and, accordingly, I award \$6,2148 by way of costs in relation to this application.

[20] In relation to the strike-out application, however, the position is different. The applications before the Court were a protest to jurisdiction and an application to strike out the proceedings. A number of grounds were advanced by the defendants in the applications, but these were refined on the day of hearing to focus on the grounds for strike-out being that the matter had previously been settled between the parties. The defendants also approached the objection to jurisdiction, which was premised on an argument of estoppel, as being better characterised in terms of the other grounds of strike-out.

[21] This was a helpful and appropriate way to approach the applications on the day of hearing. The plaintiffs had, however, prepared their written submissions on the basis of the applications before the Court which necessitated a broad range of complex matters to be dealt with and more time to be expended on preparation. I consider that category 2C is an appropriate categorisation for this aspect of the proceeding with a slight uplift in relation to the time

$8 \times 2.6 \text{ days} \times \$2,390 = \$6,214.$

allocated for submissions from 1.5 to two days. Accordingly, I award \$19,418.759 by way of costs in relation to this application.

Costs on costs

[22] The plaintiffs have belatedly sought costs on their costs application in their submissions in reply. Such an award is relatively rare and more appropriate for complex applications.¹⁰ This is not such an application. I do not consider that this is an occasion where such an award is appropriate. No costs on the costs application are awarded.

GST

[23] The plaintiffs have also sought that GST be payable on top of any costs award given that the plaintiffs are individuals and not in a position to claim it back.

[24] The claim is limited to GST on indemnity costs but I do not see any reason in principle why it would not also apply to any other costs award.

[25] I accept that, as Mr and Mrs Butt are not registered for GST, they are entitled to an uplift to include GST on the costs awarded.

Conclusion

[26] The defendants are accordingly ordered to pay the plaintiffs the sum of \$25,632.75 plus GST within 14 days of the date of this judgment.

Kathryn Beck Judge

Judgment signed at 11 am on 21 March 2022

$9 \times 8.125 \text{ days} \times \$2,390 = \$19,418.75$

¹⁰ *Nisha v LSG Sky Chefs New Zealand Ltd* [2018] NZEmpC 33, [2018] ERNZ 108.
