Employment Court of New Zealand

Citadel Capital Limited v Miles [2024] NZEmpC 111 (21 June 2024)

Last Updated: 3 July 2024

IN THE EMPLOYMENT COURT OF NEW ZEALAND AUCKLAND

I TE KŌTI TAKE MAHI O AOTEAROA TĀMAKI MAKAURAU

[2024] NZEmpC 111
EMPC 100/2024

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
AND IN THE MATTER OF	an application for costs on an interlocutory application for stay of proceedings
BETWEEN	CITADEL CAPITAL LIMITED First Plaintiff
AND	FORTLAND CAPITAL LIMITED Second Plaintiff
AND	EOIN MILES Defendant

Hearing:	On the papers
Appearances:	G Credo, counsel for plaintiffs O Wensley, advocate for defendant
Judgment:	21 June 2024

COSTS JUDGMENT OF JUDGE KATHRYN BECK

(Application for costs on application for stay of proceedings)

Background

[1] On 22 March 2024, the Court declined the plaintiffs' application for a stay of an investigation meeting in the Employment Relations Authority.1 In its decision, the Court indicated that Mr Miles was entitled to costs.2

1 *Citadel Capital Ltd v Miles* [2024] NZEmpC 51.

2 At [42].

[2] On 5 April 2024, Mr Miles's advocate filed an application seeking costs of $5,855.50 on a category 2B basis and calculated in the following manner:

Step	Description	Days	Total
29	Filing opposition to interlocutory application	0.6	$1,434
30	Preparation of written submissions	1	$2,390

31	Preparation of bundle for hearing	0.6	$1,434
32	Appearance at hearing	0.25	$597.50
	TOTAL	**2.45**	**$5,855.50**

[3] Mr Credo, counsel for the plaintiffs, submits that Mr Miles is not entitled to costs because he is represented by his sister, Ms Wensley, who, he claims, is neither a lawyer nor carrying on business as an advocate. He submits that the Court's guidelines do not account for costs where family members are representing a party and that Ms Wensley could not render invoices to Mr Miles from which liability could arise. Therefore, he submits that no costs award can be made.

[4] In terms of items claimed, the plaintiffs submit that neither party prepared written submissions and no bundle was prepared so that those items cannot be claimed. Finally, he submits that if the Court is minded to award costs, it ought to wait until the Authority releases its determination as the proceedings are all intertwined.

[5] In response, Ms Wensley confirmed on behalf of Mr Miles that his actual costs exceeded the sum claimed in the application for costs. Counsel for the plaintiffs responded, submitting that there is no evidence of actual costs incurred and that the Court cannot assume that the defendant has paid Ms Wensley.

[6] Ms Wensley also confirmed that she is an enrolled barrister and solicitor of the High Court. She submitted that fact distinguishes the present case from situations where courts have declined to award costs in favour of parties who have been represented by family members.

Costs principles

[7] The Court has a broad discretion as to costs.3 The discretion is augmented by reg 68(1) of the Employment Court Regulations 2000, which enables the Court to have regard to the conduct of the parties tending to increase or contain costs.

[8] To assist the Court in exercising the discretion, a Guideline Scale is used with the objective being to achieve predictability, consistency and expediency in determining costs. The scale does not displace the Court's discretion.4

Analysis

[9] Three issues arise. First, can costs be awarded? Second, are the claimed items reasonable? Third, should the resolution of the costs application be deferred?

[10] In support of its submission that costs should not be awarded, the plaintiffs relied on *McGuire v Secretary for Justice* where the Supreme Court upheld the rule that litigants in person are not normally entitled to costs while also upholding the lawyer in person exception.5 That decision has subsequently been followed in this Court.6 The High Court has previously held that the lawyer in person exception only applies to lawyers with a current practising certificate.7

[11] Counsel for the plaintiffs also relied on *Gyenge v Clifford Lamar Ltd* where Judge Ford held:8

... there are no exceptional circumstances in the present case which would justify a departure from the established principle disallowing costs to lay litigants, which in my view includes immediate family members.

3 Employment Relations Act 2000, sch 3 cl 19.

4. "Employment Court of New Zealand Practice Directions" <www.employmentcourt.govt.nz> at No 18.
5. *McGuire v Secretary for Justice* [2018] NZSC 116, [2019] 1 NZLR 335 at [55]–[56] and [82]– [88].
6. See *Ngawaka v Global Security Solutions Ltd* [2022] NZEmpC 79 at fn 5; and *Caisteal An Ime Ltd v A Labour Inspector of the Ministry of Business, Innovation and Employment* [2024] NZEmpC 83 at [20]–[21].

7 *Dow v Cameron* HC Dunedin A56/84, 8 March 1995 at 3.

8. *Gyenge v Clifford Lamar Ltd* [2011] NZEmpC 10 at [7]. Similar principles apply in the District Court's accident compensation appellate jurisdiction, see *Bellamy v Accident Compensation Corporation* [2022] NZACC 17.

[12] In the same set of proceedings, the Court of Appeal similarly held: "As the respondent was represented by her mother, a lay person, she is not entitled to costs."9

[13] In the present case, Mr Miles was represented, so he was not a litigant in person. He was not represented by a lawyer with a current practising certificate, but the Employment Relations Act 2000 (the Act) permits non-lawyers to act as lay representatives in the Court.10 The longstanding practice of this Court has been to allow costs for lay representatives.11 This is reflected by the Court's Guideline Scale, which, in contrast to the High Court Rules 2016, refers to representatives

rather than counsel. It is not necessary for such representatives to be undertaking business as an advocate, although many take advantage of the exception in the Act and make a career of employment advocacy.12

[14] The present case is therefore distinguishable from the Supreme Court's decision in *McGuire* because Mr Miles is not a litigant in person and does not need to rely on the lawyer in person exception. Instead, he is able to rely on the well-established principle that litigants in the employment jurisdiction who are represented by lay representatives are as much entitled to costs as litigants represented by counsel.

[15] The present case is also distinguishable from the Court's decision in *Gyenge* because although Ms Wensley may be Mr Miles's sister, she is legally qualified and is an admitted barrister and solicitor of the High Court. That she does not currently have a practising certificate is not of any note in this instance. Many of the advocates who appear before the Court are in a similar position. Further, Mr Miles has confirmed that his actual costs exceed the sum claimed. Therefore, even if the litigant in person rule generally applies to family members who appear as representatives, the present circumstances are sufficiently exceptional as to warrant a departure from that principle. The Court of Appeal's decision in the same proceedings is also distinguishable in that it is governed by a separate framework for representatives and costs.

9 *Clifford Lamar Ltd v Gyenge* [2011] NZCA 208 at [12].

10 Employment Relations Act, s 236.

11 See *Hutchison v Nelson City Council* [2014] NZEmpC 202.

12 At [16]–[18].

[16] Turning to consider the items of costs sought by Mr Miles, the plaintiffs do not raise any objection to items 29 and 32 in relation to the notice of opposition and the appearance at the hearing. I observe, however, that the opposition which was filed to the stay application was included as part of the statement of defence to the plaintiffs' challenge. I consider that 0.6 days for that part of the application is too high.

[17] On the other hand, the plaintiffs object to costs being granted in relation to items 30 and 31, which relate to preparing written submissions and a bundle for the hearing. I accept that no costs can be ordered in relation to item 31 as no bundle was filed for the hearing. However, I consider that Mr Miles should be entitled to costs for some pre-hearing preparation, particularly because a memorandum was filed on his behalf on 18 March 2024, prior to the hearing of the stay application, which spoke briefly to some of the factual and legal issues arising. Overall, I consider that Mr Miles is reasonably entitled to 0.75 days (total) for opposing the application and preparing for the hearing. He is also entitled to 0.25 days for the appearance at the hearing itself. This means that Mr Miles is entitled to total costs of $2,390.

[18] Finally, the plaintiffs submit that costs should be deferred. I disagree. The Court clearly did not have jurisdiction to make the application sought, and there was in any case no basis for making the orders sought.13 Even if the plaintiffs' concerns about how the Authority has conducted its investigation are legitimate, their application for a stay was not the appropriate pathway for them. In any case, the Authority has now released its determination.14 Therefore, nothing can be gained by delaying the resolution of this costs application.15

Outcome

[19] The plaintiffs are ordered to pay costs to Mr Miles of $2,390 within 21 days of the date of this judgment.

13 *Citadel Capital Ltd v Miles,* above n 1, at [41].

14 *Miles v Citadel Capital Ltd* [2024] NZERA 285.

15 See also High Court Rules 2016, r 14.8.

[20] There is no issue of costs on this costs application.

Kathryn Beck Judge

Judgment signed at 4.45 pm on 21 June 2024