



Employment Court of New Zealand

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Crossen v Yangs House Limited [2021] NZEmpC 144 (7 September 2021)

Last Updated: 12 September 2021

IN THE EMPLOYMENT COURT OF NEW ZEALAND CHRISTCHURCH

I TE KŌTI TAKE MAHI O AOTEAROA ŌTAUTAHI

[\[2021\] NZEmpC 144](#)

EMPC 256/2020

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

AND IN THE MATTER of an application for costs

BETWEEN CHRISTINE CROSSEN
Plaintiff

AND YANGS HOUSE LIMITED
First Defendant

AND LIU YANG
Second Defendant

EMPC 330/2020

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

BETWEEN YANGS HOUSE LIMITED
First Plaintiff

AND LIU YANG
Second Plaintiff

AND CHRISTINE CROSSEN
Defendant

Hearing: On the papers

Appearances: H Holderness and J Hobcraft, counsel for Mrs
Crossen P Brown, advocate for Yangs House Ltd
and Ms Yang

Judgment: 7 September 2021

COSTS JUDGMENT OF JUDGE K G SMITH

CHRISTINE CROSSEN v YANGS HOUSE LIMITED [\[2021\] NZEmpC 144](#) [7 September 2021]

[1] Christine Crossen was unsuccessful in seeking to establish that a settlement agreement with her former employer, Yangs House Ltd (or Ms Yang), did not bar a subsequent claim for wages and holiday pay allegedly unpaid. Her other claim, about a penalty being imposed on Yangs House, was also unsuccessful.¹

[2] Yangs House and Ms Yang were unsuccessful in their separate challenge attempting to increase the costs awarded to them by the Authority.²

[3] Costs for these proceedings were reserved. The parties' attention was drawn to the [Legal Services Act 2011](#) because Mrs Crossen was legally aided.

[4] Yangs House and Ms Yang have now applied for costs. Mr Brown, their advocate, submitted that Mrs Crossen should be ordered to pay costs because there are exceptional circumstances to justify that outcome. He sought costs of \$5,671, assessed as 50 per cent of the actual costs incurred by Yangs House, and Ms Yang, without taking into account GST.

[5] Mr Brown acknowledged that the application did not follow the Court's Guideline Scale, but he seemed to consider a departure from it would be just in this case.³ He did not explain why. As an alternative, if the scale was to be applied, he sought costs of "approximately \$3,345" which he submitted would be "both very modest and appropriate". That sum came from an assessment that the hearing took one and a half days and by using the Guideline Scale's daily rate.

[6] As an alternative, if no order was made, the Court was asked to specify what costs would have been awarded but for the grant of legal aid, so that an application could be made to the Legal Services Commissioner under [s 45\(5\)](#) of the [Legal Services Act](#).

1 *Crossen v Yangs House Ltd* [2021] NZEmpC 102.

2 *Crossen v Yangs House Ltd* [2020] NZERA 394 (Member O'Sullivan).

3. "Employment Court of New Zealand Practice Directions" <www.employmentcourt.govt.nz> at No. 16.

[7] Mrs Crossen is opposed to an order being made because she considers there are no exceptional circumstances.

[8] Under [s 45\(2\)](#) no order of costs may be made against an aided person in a civil proceeding unless the Court is satisfied that there are exceptional circumstances. Where an order is made, [s 45\(1\)](#) requires it not to exceed an amount (if any) that is reasonable for the aided person to pay having regard to all the circumstances, including the means of the parties and their conduct in connection with the dispute.

[9] What is meant by exceptional circumstances is in [s 45\(3\)](#). That section reads:

In determining whether there are exceptional circumstances under subsection (2), the court may take account of, but is not limited to, the following conduct by the aided person:

(a) any conduct that causes the other party to incur unnecessary cost:

(b) any failure to comply with the procedural rules and orders of the court:

(c) any misleading or deceitful conduct:

(d) any unreasonable pursuit of 1 or more issues on which the aided person fails:

(e) any unreasonable refusal to negotiate a settlement or participate in alternative dispute resolution:

(f) any other conduct that abuses the processes of the court.

[10] The Court of Appeal has held that in considering [s 45\(3\)](#) the circumstances said to be exceptional must be "quite out of the ordinary".⁴

[11] Mr Brown relied on [s 45\(3\)\(a\)](#) and (d); that is, a claim that there was conduct that caused the other party to incur unnecessary cost and the unreasonable pursuit of issues on which the aided person fails.

[12] For the reasons that follow I do not accept Mr Brown's submissions. There are no exceptional circumstances warranting an order that Mrs Crossen pay costs.

4. *Ngati Tama Custodian Trustee Ltd v Phillips* [2020] NZCA 252 at [7]; citing *Laverty v Para Franchising Ltd* [2005] NZCA 436; [2006] 1 NZLR 650 (CA) at [31].

[13] The claim for exceptional circumstances was based on:

(a) The rejection by Mrs Crossen of a settlement offer of \$1,000 in a letter written to her without prejudice except as to costs.⁵

(b) The fact that Mrs Crossen's claim was unsuccessful in both the Authority and Court, and her refusal to accept the finality of the settlement agreement.

[14] Mr Brown referred to several cases to support this application. They were *Reid v New Zealand Fire Service Commission*, *Ogilvy & Mather (NZ) Ltd v Darroch*, *Tomo v Checkmate Precision Cutting Tools Ltd* and *Bachu v Davie Motors Ltd*.⁶

[15] Those cases do not assist in establishing exceptional circumstances. In *Reid* the Chief Judge outlined, for the benefit of

the plaintiff who was a litigant in person, basic principles that applied to fixing costs in the mid-1990's. The passage quoted by Mr Brown, to the effect that a losing party who has brought an unmeritorious claim might end up paying higher costs than usual, does not assist.⁷ In *Reid* the plaintiff had been placed on notice by the Court of severe shortcomings in his case but, despite knowing that, continued on. That did not happen in this case. *Reid* is about the general principles applying to costs. It is not relevant to this case.

[16] *Ogilvy & Mather* does not assist either. The passages relied on by Mr Brown explain what is meant by a *Calderbank* offer and how it is regarded by the Court when fixing costs.⁸ That case did not involve legal aid or any discussion of exceptional circumstances.

[17] Similarly, *Tomo* does not assist this costs application. That case was about whether costs might be reduced because of the paying party's personal circumstances. It did not discuss or illustrate what is meant by exceptional circumstances.

5 Commonly called a *Calderbank* offer; see *Calderbank v Calderbank* [1975] 3 All ER 333.

6. *Reid v New Zealand Fire Service Commission* [1995] NZEmpC 192; [1995] 2 ERNZ 38 (EmpC); *Ogilvy & Mather (NZ) Ltd v Darroch* [1993] NZEmpC 172; [1993] 2 ERNZ 943 (EmpC); *Tomo v Checkmate Precision Cutting Tools Ltd* [2015] NZEmpC 2, [2015] ERNZ 196; *Bachu v Davie Motors Ltd* [2011] NZEmpC 45.

⁷ *Reid*, above n 6, at 46.

⁸ *Ogilvy & Mather*, above n 6, at 953.

[18] In *Bachu* there was a discussion of exceptional circumstances in fixing costs payable by an aided person. At that time the [Legal Services Act 2000](#) applied. Under s 40 (the equivalent of s 45 in the present legislation) exceptional circumstances might result in an award of costs against an aided person.

[19] The circumstances in *Bachu* were exceptional but have no parallel in this case. In *Bachu* there were long delays in lodging a claim the Authority, further delays during the investigation process, a subsequent failure to comply with the requirements for pleadings and to address interlocutory applications in the Court, incomplete or inadequate applications necessitating delays, evasiveness on the part of the plaintiff in giving evidence, an unmeritorious application was made for an adjournment, and the pursuit of a challenge was described by the Court as "clearly without merit".⁹ Nothing of that sort happened in this case.

[20] Mrs Crossen's claim was efficiently conducted and it was not dogged by the types of problems the Court dealt with in *Bachu*. Her claim was unsuccessful but it could not properly be characterised as lacking merit. The settlement agreement she placed in issue was poorly drafted and, therefore, open to interpretation. The case put forward by Mrs Crossen was certainly arguable. Nothing said or done by her could have caused the defendants to incur unnecessary or unreasonable costs.

[21] Mr Brown attempted to bolster the argument about exceptional circumstances with an unsupported statement that Mrs Crossen owns real estate and can therefore afford to pay. Attached to his submissions was a copy of the document attributed to her, described by Mr Brown as an application for mortgage finance. Mr Brown stated that this application was retrieved from a computer owned by Yangs House.

[22] The implication was that Mrs Crossen's financial position is actually far better than being the recipient of legal aid suggests and she could actually fund a reasonable costs order. This submission was an attempt to mirror the High Court decision in *Dowd v Gubay*.¹⁰ Mr Hobcraft submitted that, in fact, Mrs Crossen does not own any

⁹ *Bachu*, above n 6, at [4](f).

¹⁰ *Dowd v Gubay* [1991] NZHC 1811; (1991) 6 PRNZ 154 (HC).

real estate and the information provided by Mr Brown was out of date. The parties did not produce evidence either way.

[23] Even if evidence had been produced showing that Mrs Crossen owns property that would not have made this case look like *Dowd*. In *Dowd* the High Court found there were exceptional circumstances for two reasons. The first of them was that the plaintiff's case had no merit owing to what the Court described as the largely woeful inadequacy and unreliability of his own evidence. The second reason was that the High Court noted that, while the plaintiff was eligible for legal aid, he owned a property in Auckland having a value of somewhere between \$650,000 and \$1m. The Court was satisfied that it offended "all reason and justice" not to order the plaintiff to make a proper contribution to the costs of the successful defendant. The Court was not concerned about the ownership of property generally, but in this case the value of property made it something out of the ordinary (at least in 1991 terms). It was the combination of a woefully inadequate case and a valuable property that held sway and resulted in a costs order being made.

[24] Mr Brown's reference to *Dowd* was not helpful. Mrs Crossen's case could not be described as either woefully inadequate or having failed as a result of her evidence. *Dowd* has no relevance to this case.

[25] When Mr Brown's submissions were reduced to their essential elements, what he claimed as exceptional circumstances amounted to no more than Mrs Crossen's claims not succeeding and, before she filed her challenge, a low settlement offer had been made and rejected. Those circumstances are not "quite out of the ordinary" and come nowhere near the test for exceptional circumstances in s 45(2).¹¹

[26] The costs application is unsuccessful.

[27] Mr Brown sought an order under s 45(5) as an alternative. The section provides that, if no order for costs is made against an aided person, the Court may specify what order would have been made if the section had not affected the aided person's liability.

¹¹ *Ngati Tama*, above n 4; *Laverty*, above n 4.

The purpose of making such a declaration is to facilitate an application to the Legal Services Commissioner for a contribution to the successful party's costs.¹²

[28] Mr Brown's submissions did not take into account that Yangs House and Ms Yang brought their own unsuccessful challenge to the Authority's costs determination. Since both parties enjoyed success, I would not have made a costs order in favour of Yangs House and Ms Yang. Instead I would have ordered that costs lie where they fall.

K G Smith Judge

Judgment signed at 3.05 pm on 7 September 2021

¹² [Legal Services Act](#), s 46.

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