



# Employment Court of New Zealand

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## D'Arcy-Smith v Natural Habitats Limited [2015] NZEmpC 172 (30 September 2015)

Last Updated: 2 October 2015

### IN THE EMPLOYMENT COURT AUCKLAND

#### [\[2015\] NZEmpC 172](#)

ARC 57/14

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

AND IN THE MATTER   of an application for costs

BETWEEN                GRAHAM D'ARCY-SMITH  
                                 Plaintiff

AND                        NATURAL HABITATS LIMITED  
                                 Defendant

Hearing:                By memoranda filed on 24 August, 7 and 24 September  
                                 2015

Appearances:        Plaintiff in person  
                                 L Herzog, counsel for defendant

Judgment:             30 September 2015

### COSTS JUDGMENT OF JUDGE CHRISTINA INGLIS

[1] The defendant has applied for costs following the plaintiff's unsuccessful challenge to a determination of the Employment Relations Authority (the Authority) dismissing his personal grievance.<sup>1</sup> The parties have been unable to agree costs and have subsequently filed memoranda. The defendant did not comply with the timetabling orders for the exchange of memoranda, and sought leave to extend time to file a memorandum in reply. Mr D'Arcy-Smith objected to the late filing, but I

am satisfied that it is in the broader interests of justice to grant leave.

[2] The defendant seeks an award of costs of \$20,000 (including disbursements). The basis on which this is sought is set out in a memorandum of counsel. Counsel

<sup>1</sup> *D'Arcy-Smith v Natural Habitats Ltd* [2015] NZEmpC 123.

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confirms that the defendant's legal costs in these proceedings amounted to \$35,000, including disbursements of \$500. The plaintiff submits that the application for costs is inadequately supported, that some of the costs claimed would not have related to Mr Herzog's attendances (given the change in counsel that occurred prior to the hearing), requests that his financial circumstances (which are already before the Court) be taken into consideration and submits that costs ought to lie where they fall.

[3] The starting point is cl 19 of sch 3 of the [Employment Relations Act 2000](#) (the Act).<sup>2</sup> It confers a broad discretion as to costs providing that:

(1) The Court in any proceedings may order any party to pay to any other party such costs and expenses ... as the Court thinks

reasonable.

(2) The Court may apportion any such costs and expenses between the parties or any of them as it thinks fit, and may at any time vary or alter any such order in such manner as it thinks reasonable.

[4] The discretion to award costs, while broad, is to be exercised judicially and in accordance with principle. The primary principle is that costs follow the event.<sup>3</sup>

The usual starting point in ordinary cases is 66 per cent of actual and reasonable costs. From that starting point factors that justify either an increase or decrease are assessed.<sup>4</sup>

[5] I accept that the defendant's legal fees on the challenge amounted to \$34,500. It is the legal costs incurred in respect of the proceeding, rather than in respect of simply Mr Herzog's attendances, which are relevant to an assessment of costs. As Mr D'Arcy-Smith points out, no supporting documentation has been provided in support of the application for costs. The omission was unhelpful in this case and invites a cautious approach. However, given my knowledge of the proceeding and the steps reasonably required to respond to Mr D'Arcy-Smith's challenge, I am satisfied that the claimed legal costs were reasonable. The defendant necessarily incurred costs relating to the preparation and attendance at a two-day hearing, responding to requests for information and documentation, witness briefing and the

costs associated with finalising the bundle for hearing.

<sup>2</sup> See also reg 68(1) of the [Employment Court Regulations 2000](#).

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

<sup>4</sup> *Binnie v Pacific Health Ltd* [2003] NZCA 69; [2002] 1 ERNZ 438 (CA) at [14].

[6] Mr D'Arcy-Smith is plainly in straitened financial circumstances. While the Court may, in its broad discretion, reduce costs if an award would cause undue financial hardship, I am not persuaded that it is appropriate to do so in the circumstances of this case. Mr D'Arcy-Smith says that he owes hundreds of thousands of dollars to creditors. Accepting that this is so, it is difficult to see how an order of costs in these proceedings would itself cause undue financial hardship.

As I have previously observed,<sup>5</sup> a successful litigant is entitled to a costs order in its

favour even if it does not appear to the Court that there is any immediate prospect of recovery. Judge Perkins has recently made the point in *Vince Roberts Electrical Ltd*,<sup>6</sup> that the fact that a litigant may face bankruptcy or the need to enter into an arrangement with his/her creditors is not a ground to reduce a costs award. As he said, such an approach could result in substantial prejudice to the party in whose favour a reduced costs award was made, in terms of his/her position in relation to

other creditors. I agree.

[7] The defendant seeks a contribution to costs of \$19,500, excluding disbursements. This is less than the 66 per cent of reasonable costs that generally applies. I accept that a costs award of \$19,500 is appropriate in the circumstances of this case.

[8] The defendant seeks reimbursement of its claimed disbursements (of \$500). The disbursements relate to counsel's travel and accommodation costs. I am not persuaded that the claim for disbursements has been properly made out. While the defendant was entitled to instruct counsel of its choosing, including out of town counsel, I am not satisfied that it was necessary to do so. Accordingly, I disallow the

claim for disbursements.<sup>7</sup>

<sup>5</sup> *Tomo v Checkmate Precision Cutting Tools Ltd* [2015] NZEmpC 2 at [21].

<sup>6</sup> *Vince Roberts Electrical Ltd v Carroll* [2015] NZEmpC 161 at [12].

<sup>7</sup> See *Baker v St John Central Regional Trust Board* [2013] NZEmpC 109 at [45].

[9] The plaintiff is ordered to pay to the defendant contribution towards its costs of \$19,500. No order for disbursements is made.

Christina Inglis

Judge

Judgment signed at 3.45 pm on 30 September 2015