



Employment Court of New Zealand

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Gate Gourmet New Zealand Limited v Sandhu [2022] NZEmpC 50 (22 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 50](#)

EMPC 217/2020

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
AND IN THE MATTER	of an application for costs
BETWEEN	GATE GOURMET NEW ZEALAND LIMITED First Plaintiff
AND	SHAUN JOILS Second Plaintiff
AND	SUHKJEET SANDHU First Defendant
AND	HUIPING WU Second Defendant
AND	SELLIAH NESUM NIRANJALA Third Defendant
AND	ROSALINA LEANNA Fourth Defendant
AND	SUTHARSHINI ANTHONY RUPS MIRANDA Fifth Defendant

Hearing: On the papers

Appearances: E Butcher, counsel for plaintiffs
M W O'Brien, counsel for defendants

Judgment: 22 March 2022

COSTS JUDGMENT OF CHIEF JUDGE CHRISTINA INGLIS

GATE GOURMET NEW ZEALAND LIMITED v SUHKJEET SANDHU [\[2022\] NZEmpC 50](#) [22 March 2022]

Introduction

[1] The defendant employees (who brought a claim in the Employment Relations Authority and defended the company's challenge in this Court) have applied for costs and disbursements following their successful appeal to the Court of Appeal. The Court of Appeal set aside the Employment Court's orders; referred the proceeding back to the Authority to determine any outstanding matters in light of the Court's decision; ordered Gate Gourmet New Zealand Ltd (the company) to pay disbursements in the Court of Appeal; and ordered costs before the Employment Court to be determined by this Court in light of the outcome of the Court of Appeal's judgment.

[2] The defendant employees seek an order for costs calculated in accordance with this Court's guideline scale² (of \$33,535),

together with an uplift (of 25 per cent, namely \$8,383.75), disbursements (of \$7,059.68) and costs on the application for costs (of \$6,707).

[3] The application for costs is opposed by the plaintiffs for reasons which can be summarised as follows:

- the proceedings involved a test case and costs should lie where they fall;
- the disbursements claimed are properly characterised as costs, and there is no legal basis for a separate award in respect of them;
- there is no improper conduct which justifies an uplift in costs;
- costs on costs are not provided for in the Court's guideline scale and the amount sought is, in any event, unreasonable;
- regard should be had to a Calderbank offer made by the company which was unreasonably rejected by the defendant employees.

1 *Sandhu v Gate Gourmet New Zealand Ltd* [2021] NZCA 591.

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

Approach

[4] The starting point for costs in the Court is cl 19 of sch 3 to the [Employment Relations Act 2000](#) (the Act). It confers a broad discretion as to costs. A guideline scale has been adopted to guide the setting of costs. As the guidelines make clear, the scale is intended to support (as far as possible) the policy objective that the determination of costs be predictable, expeditious and consistent.

[5] The guideline scale is not intended to replace the Court's ultimate discretion as to costs. Relevant in this case is an overarching point which bears emphasis. These proceedings involved a claimed breach of minimum entitlements. The defendant employees, through their union, pursued that claim - ultimately successfully. This type of litigation differs from much commercial or mainstream litigation; rather it is in the nature of a broader public interest claim. The corollary of that is that the Court can, and should, take into account the potential chilling effect of an adverse costs award, or a nil costs award, in exercising its broad discretion. In my view the Court can, and should, also take into account two further considerations of particular importance in this jurisdiction: behaviour modification and access to justice. I return to these considerations below.

Test case?

[6] The plaintiffs contend that costs should lie where they fall because the case was a test case. There is an irony in its current position, given they actively sought a substantial costs award (in excess of \$50,000) against the defendant employees following their success in this Court and prior to the Court of Appeal's judgment against them.

[7] It is well established that the Court may exercise its discretion to allow costs to lie where they fall in circumstances involving a test case.³ There is no doubt that this case raised important issues, including beyond the parties. The point was emphasised by the Court of Appeal in granting leave.⁴ Importance beyond the parties

3 See, for example, *Blue Water Hotel Ltd v VBS* [2019] NZEmpC 24, [2019] ERNZ 40 at [38]- [39].

4 *Sandhu v Gate Gourmet New Zealand Ltd* [2021] NZCA 203, [2021] ERNZ 255 at [14].

is not, however, the deciding criteria for test case status, particularly in this jurisdiction. If it were otherwise it would draw in a very wide range of employment cases, as Mr O'Brien (counsel for the defendants) points out. But even if this case can reasonably be characterised as a test case it is not determinative, as Ms Butcher (counsel for the plaintiffs) acknowledges. It is but one factor in the exercise of the Court's discretion.⁵

[8] The reality is that allowing costs to lie where they fall in a case such as this would likely have a chilling effect on litigants such as the defendant employees, through their union, bringing important cases to the Court. That is because, as the summary of costs and claimed disbursements itemised by counsel for the defendant employees makes clear, the financial impact of the claim has been significant. The union which supported the claim on behalf of its members is a small one - currently comprising 12 members. It would not be consistent with the broader interests of justice to load the defendant employees (and their union) down with the cost of bringing an important case involving minimum entitlements to the Court for determination.

[9] It follows that even if I accepted that this case did fall within the conventional definition of a test case, I do not accept that it is appropriate for costs to lie where they fall.

[10] The appropriate costs categorisation of these proceedings was agreed by counsel. It was provisionally assigned Category 3B for costs purposes. That remains the appropriate categorisation. That leads to a starting point of costs of \$33,535.

Uplift?

[11] I do not accept that an uplift is warranted. The claimed basis for an uplift hinges on the introduction of evidence in the proceeding and delays in an agreed statement of facts put before the Court on the day of hearing. While I agree that it was regrettable that agreement could not have been reached earlier, I am not prepared (on

5. *Services & Food Workers Union v Vice Chancellor of the University of Otago (No 2)* [2003] NZEmpC 171; [2003] 2 ERNZ 707 (EmpC) at [18].

the material before the Court) to conclude that the plaintiffs should shoulder the responsibility for that or that the failure to agree should sound in an uplift in costs. Nor am I satisfied that increased costs are justified because of evidence filed by the plaintiffs in relation to the matters at issue. Accordingly I decline to uplift costs as sought by the defendant employees.

Disbursements – legal research

[12] I turn to the issue of claimed disbursements. The sum of \$7,059.68 is sought for legal research conducted by external legal providers. The plaintiffs say that such costs are not disbursements and ought not to be allowed, relying on *Todd Pohokura Ltd v Shell Exploration NZ Ltd* as authority for this proposition.⁶ In that case the High Court declined to allow online legal research as a recoverable disbursement. That was because such costs are usually absorbed by a party's solicitors.

[13] Disbursements are defined in the [High Court Rules 2016](#) as:⁷

...an expense paid or incurred for the purposes of the proceeding that would ordinarily be charged for separately from legal professional services in a solicitor's bill of costs...

[14] The first point is that the Act confers a broad discretion on the Court and refers to recoverability of costs and "expenses".⁸ The definition of disbursements in the [High Court Rules](#) makes it clear that a disbursement is a subset of expenses. To put it another way, Parliament has made it plain that the Employment Court's power to order "costs and expenses" under cl 19 sch 3 is broader than the parallel costs and disbursements provision in the [High Court Rules](#).

[15] Second, employment litigation tends to have a number of distinct features. Parties are entitled to be represented by non-lawyers and it is not uncommon for unions to be heavily involved in the litigation process. In such circumstances what is generally undertaken by a solicitor in the course of trial preparation is less of an issue than what was actually incurred for the purposes of the proceeding and why, and

6. *Todd Pohokura Ltd v Shell Exploration NZ Ltd* HC Wellington CIV-2006-485-1600, 1 July 2011 at [61] and [70].

7 [High Court Rules 2016](#), r 14.12(1)(a).

8 [Employment Relations Act 2000](#), sch 3 cl 19(1).

whether it ought to be recoverable as an expense. A similar point was made in *Auckland Waterfront Development Agency Ltd v Mobil Oil New Zealand Ltd* in relation to outsourced electronic discovery.⁹ As Katz J observed, what is ordinary for one firm may well not be ordinary for another. That is particularly so in this jurisdiction, and given the range of representatives permitted under the Act. I also respectively agree with and adopt the Court's broader statement of principle, namely that:¹⁰

[80] The costs rules must therefore be interpreted and applied in such a way as to best secure the just, speedy and inexpensive determination of proceedings. In *British Columbia (Minister of Forests) v Okanagan Indian Band* the Supreme Court of Canada considered the functions and objectives of costs rules in that jurisdiction and concluded that *modern costs rules should serve purposes beyond the traditional objective of indemnifying the prevailing party for the costs and expenses it has incurred in the lawsuit. The court suggested that costs should be used for two additional functions: behaviour modification and access to justice.* In my view those observations are equally apt in a New Zealand context and are consistent with the just, speedy and inexpensive determination of proceedings.

[16] In a jurisdiction such as this, the financial pressure on parties is often intense - a worker may have been dismissed and wish to bring proceedings seeking reinstatement; a small union (such as in this case) may wish to pursue a claim for minimum entitlements for its members; a financially strapped employer may wish to defend a claim against it in respect of a redundancy process. The list goes on. All of this reinforces in my mind the imperative for the Employment Court to have regard to the two additional functions identified by the Supreme Court of Canada (behaviour modification and access to

justice) in dealing with costs applications. That imperative applies equally, in my view, to those practicing in this jurisdiction, requiring them to keep the two functions clearly in focus when incurring costs and expenses on behalf of their clients.

[17] I return to the claim for disbursements in this case, bearing in mind the foregoing observations. It is apparent that the union, through its solicitor (Mr O'Brien; Mr Cranney argued the case in both the Employment Court and Court of Appeal), sourced legal research services for the specific purpose of these proceedings. Research

9. *Auckland Waterfront Development Agency Ltd v Mobil Oil New Zealand Ltd* [2015] NZHC 470, (2015) 23 PRNZ 200.

10 Footnotes omitted. Emphasis added.

was conducted via both the New Zealand Law Society (charged at \$160 per hour) and employment relations consultants in the United Kingdom (charged at \$200 per hour).

[18] There are difficulties with the claim for full recoverability of these amounts. The defendants have sought a contribution to costs calculated in accordance with the Court's guideline scale. Legal research is incorporated in the scale for steps taken in a proceeding. That means that the assumed costs of preparation (including research) have already been allowed for and have already been claimed on behalf of the defendants. Allowing both a contribution to the costs under the scale and full recoverability by way of expense would almost certainly involve an element of double-dipping.

[19] Even if I accepted that this objection did not arise, I would not accept that the costs associated with out-sourced legal research in this case ought to be fully recoverable.¹¹ There are two reasons for that. First, because they squarely fall within the nature of legal services ordinarily provided by a lawyer or advocate. Allowing full recoverability would lead to perverse results and run the risk of encouraging steps to be taken which would cut across the two factors (behaviour modification and access to justice) identified above. The following example (based on the usual approach to actual and reasonable costs) illustrates the point:

- Party X instructs an advocate to represent them in a claim. The advocate out-sources all legal research at a cost of \$10,000. Party X is successful and claims the costs of the out-sourced legal research as a fully recoverable expense. They are awarded \$10,000.
- Party X instructs a lawyer to represent them in a claim. The lawyer undertakes all legal research at a cost of \$10,000. Party X is successful and claims the costs of the legal research. They are awarded \$6,600 (66 per cent of \$10,000).

11 See, for example, *Nisha v LSG Sky Chefs New Zealand Ltd* [2017] NZEmpC 8, (2018) 15 NZELR 483 at [250] where Judge Corkill held that the expenses incurred by way of document support obtained from an external provider, which were in the nature of legal attendances, would be recoverable at 66 per cent.

[20] In any event, I do not accept (based on the evidence before the Court) that the costs incurred by way of legal research were reasonable in the circumstances.

[21] I do not allow the claimed disbursements in relation to legal research.

Calderbank offers

[22] Ms Butcher submits that the Court should have regard to a Calderbank offer made by the plaintiffs. The offer appears to be directed at a number of proceedings and recipients and to reflect a proposed global contribution to costs. I do not consider the offer to be sufficiently certain as to its terms to render it effective, and decline to take it into account.¹²

Costs on costs

[23] It is true, as Ms Butcher points out, that the Court's guideline costs scale does not specifically refer to costs on costs. It might be noted that the same objection did not prevent the plaintiffs from claiming \$2,500 by way of costs on costs in its application for costs following its success in the Employment Court.

[24] The guideline is a guideline - it is not a decision-making straight-jacket. Further, the Court has previously ordered a contribution to the costs incurred in seeking costs when it has considered it appropriate to do so.¹³

[25] In the present case I accept that the defendant employees ought to have a contribution to the costs of applying for costs in the absence of agreement. The application is effectively an interlocutory application.

[26] I do not accept that costs of \$6,707 are reasonable in the circumstances. The claim for such costs was incorporated in a relatively brief memorandum and supporting affidavit; no appearance was required. A further memorandum was filed in response to matters raised by the plaintiffs. The key points requiring focus were not

12 *Southall v Tuau* [2015] NZEmpC 177 at [29] and [31].

13. See, for example, *Nisha v LSG Sky Chefs New Zealand Ltd* [2018] NZEmpC 33, [2018] ERNZ 108 at [11]- [18].

overly complex, and it is desirable that parties resist the temptation to spend significant amounts of money in seeking orders for costs. In the circumstances, and having particular regard to the policy considerations applying to an assessment of costs in this jurisdiction, I set the contribution at \$1,000.

Conclusion

[27] The plaintiffs are ordered to pay the defendant employees the following sums within 14 days of the date of this judgment:

- (a) \$33,535 (by way of contribution to costs on the claim in the Employment Court).
- (b) \$1,000 (by way of contribution to costs on the application for costs).

Christina Inglis Chief Judge

Judgment signed at 4.30 pm on 22 March 2022

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