



# Employment Court of New Zealand

You are here: [NZLII](#) >> [Databases](#) >> [Employment Court of New Zealand](#) >> [2015](#) >> [\[2015\] NZEmpC 156](#)

[Database Search](#) | [Name Search](#) | [Recent Decisions](#) | [Noteup](#) | [LawCite](#) | [Download](#) | [Help](#)

## Hoff v The Wood Lifecare (2007) Limited [2015] NZEmpC 156 (14 September 2015)

Last Updated: 23 September 2015

IN THE EMPLOYMENT COURT CHRISTCHURCH

[\[2015\] NZEmpC 156](#)

CRC 19/13

IN THE MATTER OF a challenge to a determination of the

Employment Relations Authority

BETWEEN DEBORAH HOFF Plaintiff

AND THE WOOD LIFECARE (2007) LIMITED

Defendant

Hearing: (on the papers by way of submissions filed on 3, 19 and 29 June 2015 )

Appearances: A Sharma, counsel for the plaintiff

J Goldstein and L Ryder, counsel for the defendant

Judgment: 14 September 2015

### COSTS JUDGMENT OF JUDGE A D FORD

#### Introduction

[1] In May 2011, Mrs Hoff was dismissed from her position as a caregiver at the defendant's retirement village in Nelson, known as "The Wood". She subsequently brought a claim in the Employment Relations Authority (the Authority).<sup>1</sup> She was partially successful, recovering a little over \$6,000 in respect of lost wages and compensation for hurt and humiliation together with costs.<sup>2</sup>

[2] Mrs Hoff then challenged the whole of the Authority's determination in this

Court. In my substantive judgment dated 6 May 2015, I upheld her claim of unjustified dismissal and awarded her the sum of \$8,257.04 for lost remuneration

<sup>1</sup> *Hoff v The Wood Lifecare (2007) Ltd* [2013] NZERA Christchurch 53.

<sup>2</sup> *Hoff v The Wood Lifecare (2007) Ltd* [2013] NZERA Christchurch 136.

and \$20,000 for humiliation compensation.<sup>3</sup> The remedies awarded were reduced by

10 per cent on account of Mrs Hoff's contribution. I also recorded that Mrs Hoff was entitled to costs on her de novo challenge. As the parties have not been able to reach agreement on that issue, it now falls to the Court to make an appropriate award.

[3] The Court has received commendably succinct submissions from both counsel. The parties, nevertheless, are clearly a significant way apart. Ms Sharma, counsel for the plaintiff, has stated that Mrs Hoff's actual costs and disbursements amounted to \$92,417.50 (plus GST). She seeks an unspecified uplift in the

66 per cent normal contribution towards a successful party's costs based upon what the Court considers just. Mr Goldstein, counsel

for the defendant, submits that the Court should not order his client to make a contribution towards Mrs Hoff's costs in excess of \$33,000.

### Relevant principles

[4] Under cl 19(1) of sch 3 of the [Employment Relations Act 2000](#) and reg 68(1) of the [Employment Court Regulations 2000](#), the Court has a broad discretion in fixing costs which must always be exercised according to principle. The relevant principles are well established.<sup>4</sup> The Court looks to determine what would be reasonable costs for the successful party in conducting the particular litigation in question and then decides what, in all the circumstances, would be a reasonable

contribution for the unsuccessful party to make towards those costs. Normally a

66 per cent contribution of the reasonable costs so determined is regarded as fair and reasonable but that percentage contribution may need to be adjusted upwards or downwards depending upon the circumstances.

[5] Somewhat unusually, both parties in the present case claim that the

66 per cent contribution figure should be adjusted in their respective favours on account of Calderbank offers made in the course of the proceedings and the alleged

<sup>3</sup> *Hoff v The Wood Lifecare (2007) Ltd* [2015] NZEmpC 58.

<sup>4</sup> *Victoria University of Wellington v Alton-Lee* [2011] ERNZ 305 (CA) at [48]; *Binnie v Pacific Health Ltd* [2003] NZCA 69; [2002] 1 ERNZ 438 (CA) at [14]; *Health Waikato Ltd v Elmsly* [2004] NZCA 35; [2004] 1 ERNZ 172 (CA).

conduct of the other party in unnecessarily prolonging the hearing time. I will outline the position in relation to both matters.

### The Calderbank offers

[6] In another recent costs judgment - *Rodkiss v Carter Holt Harvey Ltd*,<sup>5</sup> this Court reviewed the principles relating to Calderbank offers. I will not repeat them. One of the necessary exercises the Court had to carry out in that case, which is an issue that has arisen again in the present case, was to ascertain whether the Calderbank offer beat the award made in this Court's substantive judgment. As noted above, in the present case the award was made up of \$8,257.04 for lost remuneration and \$20,000 for humiliation compensation. Those amounts were reduced by 10 per cent on account of the plaintiff's contribution, resulting in a net award of \$25,431.33 (together with costs). In gauging the success or otherwise of the Calderbank offers, the value or benefit of the offers need to be compared with the quantum of the judgment combined with any likely order as to costs as at the date of

the offer in question.<sup>6</sup>

[7] Ms Sharma made Calderbank offers to the defendant on behalf of Mrs Hoff on 21 February and 8 September 2014. Mr Goldstein put forward Calderbank offers on behalf of the defendant on 15 July 2013 and 25 February 2014. The respective offers were made in a timely way but they were rejected by the other party. Neither counsel relies upon their initial Calderbank offer and so I do not need to refer to them any further. Each, however, seeks to place reliance on their subsequent offer. I will deal with each in turn beginning with the defendant's offer of 25 February 2014.

[8] The defendant's Calderbank offer of 25 February 2014 was made up of humiliation compensation in the sum of \$25,000 and \$15,000 (plus GST) on account of costs making a total monetary sum of \$40,000. Ms Sharma said that the offer was rejected by Mrs Hoff on the grounds that it "failed to take into account the Authority's cost award of \$10,500 combined with costs that had at that stage been

incurred by her in taking the challenge forward."

<sup>5</sup> *Rodkiss v Carter Holt Harvey Ltd* [2015] NZEmpC 147.

<sup>6</sup> *Rodkiss v Carter Holt Harvey Ltd*, above n 54, at [35]-[36].

[9] In response, Mr Goldstein submitted that the compensation offered of

\$25,000, "was a tax-free payment in settlement of all the plaintiff's claims, including the claim for reimbursement of lost wages and compensation". Counsel further submitted that, "once income tax is deducted from the gross award of wages it is apparent that the Plaintiff failed to obtain an award that was equal to or greater than the tax free amount of \$25,000". There was no evidence as to the taxation position and, in any event, I do not consider that it is an appropriate matter for the Court to have to consider in relation to Calderbank offers.

[10] Assessing a likely order as to costs as at the date of the Calderbank offer is a more complex exercise. As Mr Goldstein noted, the timesheets produced by Ms Sharma showed the costs Mrs Hoff had incurred up until the time of the February Calderbank offer were in the vicinity of \$30,000. That amount is in addition to costs in respect of the Authority investigation for which Mrs Hoff had been awarded

\$10,500. Regardless of the amounts shown on the timesheets, the matter to be determined is the likely costs order a Court would

have made as at the date of the offer. In my view, the \$30,000 was excessive. I note that it included significant time for "research" which I would not be prepared to allow unless the law involved was novel or unusually complex. That was not a feature of the present case. I consider that reasonable costs for attendances between the date of the Authority's determination and February 2014 would have been no more than \$15,000. On the standard 66 per cent basis, any costs order made by the Court would, therefore, have been for around \$10,000.

[11] The end result of this exercise is that the quantum of the judgment (\$25,431.33) plus the likely order as to costs (\$10,000), coupled with the existing costs award made by the Authority of \$10,500, all of which totals \$45,931.33, exceeds the value of the Calderbank offer (\$40,000) by almost \$6,000. In other words, the defendant's Calderbank offer of 25 February 2014 did not exceed the judgment sum plus costs and is, therefore, not relevant to the costs award the Court now has to make.

[12] Mrs Hoff's Calderbank offer of 8 September 2014 (putting to one side the costs awarded in the Authority) was presented as follows:

Compensation: \$20,000.00

Loss of wages: \$9,459.39

Costs in connection with the Challenge: \$18,000.00 (plus GST) \$2,700.00

**TOTAL: \$50,159.39**

[13] Ms Sharma submitted that the "offer was reasonable" and was "on near par with the award of the Court".

[14] The award of the Court was \$25,431.33. Even accepting for the moment that the Court was likely to then make an order as to costs in the amount of \$18,000 (excluding GST), as claimed by Mrs Hoff, that would result in a total of \$43,431.33 which was still less than the amount of the offer. In other words, the defendant would not have been any better off accepting the offer than it would have been if it had allowed the matter to proceed to a hearing. To that extent, it cannot be said that Mrs Hoff's Calderbank offer of 8 September 2014 was successful and, as Mr Goldstein correctly submitted, Mrs Hoff, therefore, is not entitled to any uplift in costs on that count.

[15] In summary, I am not satisfied that either Calderbank offer is relevant to the costs award exercise before the Court.

### **Conduct of the parties**

[16] It has long been established that in fixing costs this Court may take into account considerations of whether the conduct of a party has added or unnecessarily added, to the costs incurred by the other party or whether the applicant for an order for costs has incurred some part of the costs unnecessarily or unreasonably. Whether the hearing was lengthened or shortened by the conduct of either party is especially

material.<sup>7</sup>

*7 Reid v New Zealand Fire Service Commission* [1995] NZEmpC 192; [1995] 2 ERNZ 38, at [42]; *Merchant v Chief Executive of the Department of Corrections* [2009] ERNZ 108, at [24].

[17] In the present case claims and counterclaims have been made about the conduct of the other party. Mr Goldstein was critical of what he referred to as Ms Sharma's "excessive and unnecessary cross-examination" of various witnesses which he alleged added unnecessarily to the length of the hearing. For her part, Ms Sharma submitted that had the defendant called its witnesses in a more conventional order then much of the cross-examination complained about could have been avoided. No objections were raised at the time, however, in relation to the order of calling witnesses and that is not a matter relevant to costs. A number of objections were raised by Mr Goldstein in the course of the hearing about aspects of Ms Sharma's cross-examination but they were ruled upon as they arose. In short, I do not consider it necessary to make any adjustment to costs on account of the conduct complained about.

### **Goods and Services Tax (GST)**

[18] Mrs Hoff has claimed GST on her costs in light of not being registered for GST and therefore being unable to recover GST. In contrast, Mr Goldstein submitted that GST should be excluded in accordance with the High Court neutral-GST approach.

[19] The Court dealt with similar arguments in *Rodkiss*.<sup>8</sup> For the reasons expressed in that judgment, I decline to make any specific award in respect of the GST element of the plaintiff's costs claim.

### **Non-publication order**

[20] After the challenge was filed in this Court, Mrs Hoff applied for a non-publication order which the defendant was required to defend. In the end, the plaintiff withdrew her application but Mr Goldstein seeks costs in relation to his attendances in respect of that matter in the sum of \$5000 plus GST. For her part, Ms Sharma accepts that a discount on Mrs Hoff's costs entitlement is appropriate on account of the abandoned non-publication application but she submitted that an appropriate allowance to be made in this regard would be \$2000 plus GST.

[21] I have considered the submissions and the relevant evidence. No particulars were provided by Mr Goldstein showing how his claim under this head was made up but I accept that the defendant is entitled to reasonable costs on this count which I assess at \$4,000. I make no additional allowance for GST.

### **Costs on the de novo challenge**

[22] Mr Goldstein submitted that Ms Sharma's charge out rate of \$410 an hour was excessive and, with reference to the timesheets, he highlighted and stressed the fact that a number of administrative attendances could have been handled by a less experienced person at a lower hourly rate.

[23] That criticism is answered, however, in the following passage from the Court of Appeal judgment in *Binnie*:9

While details of time involved and charge-out rates are often available and supplied, we do not consider such information is a mandatory requirement in a matter such as this ... We have not reached the point where counsel are obliged to approach charging for their services on that basis. Obviously this kind of information may help, and its absence may invite a degree of caution, but in the end the Court, when considering whether actual costs are reasonable, has to make a judgment, bearing in mind the proper interest of the losing party in the question.

[24] The hearing ran for nine days but it did not involve any unduly complex issues of law or facts and only minimal documentation was involved. In the end, the case was decided on the facts which were relatively straightforward.

[25] One of the matters Ms Sharma stressed in her submissions was that through her challenge, Mrs Hoff sought to vindicate her situation in respect of what counsel described as "claims made against her about her marriage, and the resulting public humiliation that she had suffered." Although Mr Goldstein disagreed, Ms Sharma submitted that the judgment of the Court had served to address that outcome for her.

[26] Having taken all relevant matters into account, I consider that reasonable costs in relation to the challenge could be fixed in the sum of \$70,000. I see no reason to depart from the standard contribution percentage figure of 66 per cent

which would result in an award of \$46,900. From that amount I deduct the sum of

\$4,000 on account of the abandoned non-publication application reducing the contribution figure to \$42,900.

### **Disbursements**

[27] Mrs Hoff has made a claim for disbursements. One of the claims relates to witness attendance fees in respect of Dr Elizabeth Scott in the sum of \$1,120. I am not satisfied, however, that all the invoices produced do, in fact, support that claim. The only invoice referring to Dr Scott's attendance as a witness is that dated

13 October 2014 in the sum of \$414. I am prepared to allow that amount. There is also a "file set up fee" claimed of \$100 which I am not prepared to allow.

[28] I, therefore, accept the claim for disbursements totalling \$4,660.14 comprised as follows:

Filing fees:	\$204.44
Dr Scott:	\$414.00
Court hearing fee:	\$4,007.20
Photocopying bundle:	\$22.50
Courier Bundle:	\$12.00

### **Costs on Submissions**

[29] Finally, Ms Sharma seeks a contribution of \$1,800 plus GST towards the costs of her submissions in relation to the costs application. I am prepared to allow

\$1,000 in respect of that claim.

### **Summary**

[30] In summary, Mrs Hoff is awarded costs against the defendant (rounded off) in the sum of \$48,560 made up as follows:

Costs on de novo challenge: \$42,900

Disbursements: \$4,660.14

Judgment signed at 11.20 am on 14 September 2015

---

NZLII: [Copyright Policy](#) | [Disclaimers](#) | [Privacy Policy](#) | [Feedback](#)

URL: <http://www.nzlii.org/nz/cases/NZEmpC/2015/156.html>