



Employment Court of New Zealand

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Hutchison v Nelson City Council [2014] NZEmpC 202 (12 November 2014)

Last Updated: 17 November 2014

IN THE EMPLOYMENT COURT CHRISTCHURCH

[\[2014\] NZEmpC 202](#)

CRC 9/13

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

BETWEEN ROBYN ANN HUTCHISON
Plaintiff

AND NELSON CITY COUNCIL
Defendant

Hearing: (on documents dated 28 July, 25 August, 21 and 24
October
2014)

Appearances: H Flower, agent for the plaintiff
M E Kirk, counsel for the defendant

Judgment: 12 November 2014

COSTS JUDGMENT OF JUDGE B A CORKILL

Introduction

[1] In the Court's decision of 9 July 2014, I found that the decision of the Nelson City Council (NCC) to dismiss Ms Hutchison was beyond that which a fair and reasonable employer could have done in all the circumstances at the time. This was because none of the conclusions reached as to serious misconduct were appropriate, and that there were significant procedural defects. I concluded that the dismissal

was both procedurally and substantively flawed.¹ I awarded lost wages for a period

of three months reduced by 30 per cent, with interest payable thereon from the date of dismissal to the date of payment. I also awarded the sum of \$8,400 for

¹ *Hutchison v Nelson City Council* [\[2014\] NZEmpC 117](#) [Substantive judgment] at [113].

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humiliation, loss of dignity and injury to feelings.² Costs were accordingly reserved.³

[2] Ms Hutchison through her agent, Mr Flower, has now filed a submission seeking costs. In essence, it is submitted in support of that application that:

Ms Hutchison was successful in her application, but the process had been protracted, complex and time consuming.

Unwarranted additional costs were incurred because of the necessity to obtain leave to raise a personal grievance out of time by application to the Employment Relations Authority (the Authority); because leave was not granted,⁴ a challenge in respect of that decision had to be brought to the Court.

Given the Court's decision that leave should be granted,⁵ Ms Hutchison should no longer be liable for the costs of \$1,750 awarded by the Authority against her.⁶

Ms Hutchison had suffered mental and emotional stress throughout the duration of this process. She should recover ongoing costs associated with regular medical consultation and medications. In addition, she should recover her costs of relocation from Nelson to Wellington. She had been unsuccessful in attempting to sell a Nelson property which resulted in additional costs associated with advertising, agents' commission and furniture removal. Losses had also been suffered because the Nelson property had become vacant, and she had been unable to obtain tenants whilst it was listed for sale.

It was submitted Ms Hutchison's claim was important for the "current

and future protection of staff safety and wellbeing, the end result of

² At [114].

³ At [115].

⁴ *Hutchison v Nelson City Council (No 2)* [2012] NZERA Christchurch 280.

⁵ *Hutchison v Nelson City Council* [2013] NZEmpC 10 [Leave judgment].

⁶ *Hutchison v Nelson City Council* [2013] NZERA Christchurch 51 [Costs determination].

which [would] bring considerable costs savings to the city and the rate-payers of Nelson".

The plaintiff had incurred costs in respect of her former legal representative, Ms A, from 25 October 2011 until 16 December 2011; those costs are currently under dispute.

The plaintiff had opted to represent herself, so that costs of legal representation had not been incurred. She had devoted considerable personal time to her claim. Two weeks before the hearing date she engaged Mr Flower, an experienced court prosecutor, as her agent to ensure efficiency during the court hearing. Accordingly, the Court was asked to consider reimbursement of the costs incurred by having Mr Flower assist her.

[3] The submission was supported by a schedule of costs. Forty-five categories of expenses were said to have been incurred in the proceeding. Relevant invoices and other supporting information were annexed to the schedule. The details of the schedule and its attachments will be considered later in this decision.

[4] Counsel for NCC submitted in response:

The costs order of the Authority had not been challenged. The sum of

\$1,750 accordingly remained owing by Ms Hutchison to NCC.

Counsel referred to the sequence of Minutes which were issued by the Court to ensure that the case was properly prepared for the substantive hearing.

Shortly before the hearing, Ms Hutchison filed a document seeking leave of the Court for Mr Flower to act as her agent in the proceedings. No information was provided at the time to indicate that Mr Flower would invoice his services.

Insufficient information had been provided in respect of Mr Flower's

costs.

Counsel then analysed the various categories of costs contained in the schedule attached to Ms Hutchison's submission, submitting that there was either an insufficient foundation to claim them, or that they did not fall within the scope of the rules relating to costs.

The Court was provided with a Calderbank offer sent on behalf of NCC

to Ms Hutchison on 12 November 2013, wherein settlement was offered in the sum of \$12,000.

Discussion

[5] As I indicated in the substantive judgment, costs normally follow the event. The issue between the parties, however, is whether the various categories of costs claimed by Ms Hutchison fall within the ambit of the relevant provisions dealing with costs.

[6] Clause 19 of sch 3 to the [Employment Relations Act 2000](#) (the Act) provides:

19 Power to award costs

(1) The court in any proceedings may order any party to pay to any other party such costs and expenses (including expenses of witnesses) 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.

[7] The first issue relates to the status of the costs relating to Mr Flower's

assistance.

[8] Clause 2 of sch 3 to the Act, provides:

2 Appearance of parties

(1) Any party to any proceedings before the court, and any other person appearing before the court, may—

(a) appear personally; or

(b) be represented—

(i) by an officer or member of a union; or

(ii) by an agent; or

(iii) by a barrister or solicitor.

(2) In any proceedings the court may allow to appear or to be represented any person who applies to the court for leave to appear or be represented and who, in the opinion of the court, is justly entitled to be heard; and the court may order any other person so to appear or be represented.

[9] Shortly before the substantive hearing, a memorandum was filed by Ms Hutchison seeking leave for Mr Flower to appear as her agent. The issue was discussed briefly at the commencement of the hearing. Counsel for NCC stated that she had no objection to leave being granted, and would abide by the decision of the Court. The topic of whether costs would thereby be incurred by Ms Hutchison was not raised.

[10] Mr Flower conducted himself appropriately throughout the hearing, and assisted in ensuring that Ms Hutchison's case was presented properly. He was of assistance to the Court.

[11] Counsel for NCC submits that insufficient details have been provided as to how Mr Flower's costs were incurred. His invoice describes attendances from

2 June 2014 to 17 June 2014. There is sufficient detail in the invoice from which I can conclude that appropriate time was devoted to preparing for the trial, meeting with relevant witnesses and preparing submissions, as well as appearing at the hearing and dealing with related issues. Seventy hours have been charged at a rate of

\$180 per hour, for a total of \$12,600 exclusive of GST. Mr Flower is apparently not registered for GST. I consider the invoice to contain an appropriate level of detail.

[12] According to the schedule attached to Ms Hutchison's costs submission, payment has been made to Mr Flower by credit card. I have no reason to doubt the accuracy of that evidence.

[13] I turn now to the question of whether this category of costs falls within the scope of the provisions set out above.

[14] The normal rule applying to proceedings in the civil jurisdiction is that the costs are awarded in respect of representation by a lawyer. This is the conventional

approach which is adopted in the civil jurisdiction of the higher courts.⁷ A party who represents themselves is not entitled to reimbursement for their own costs, except in exceptional circumstances.⁸ This well-established principle includes assistance rendered by immediate family members.⁹

[15] However, in this jurisdiction cl 2 of sch 3 to the Act permits representation by persons other than counsel, such as an officer or member of a union, or an agent.

[16] In *Murphy & Routhan (t/a Enzo's Pizza) v Van Beek*, Chief Judge Goddard said:¹⁰

... costs are not normally awarded to unrepresented litigants because they will not have incurred costs, that term meaning costs paid to a professional advocate. However, they are entitled to make a claim for expenses actually incurred, including in that what has been termed "executive time".¹¹

[17] A professional advocate has often been taken to mean either a lawyer or an advocate. But as already mentioned cl 2 goes further, and refers also to an officer or member of a union, or an agent. The Act itself does not refer to the term "professional advocate". I consider that the dicta in *Murphy & Routhan* should not be taken to mean that it is only professionals who represent a party that can be the subject of an order for costs, that is a person who is either an advocate or a lawyer.

[18] I consider that the term "costs" has a broader meaning in this jurisdiction than it does in other jurisdictions. In my view the term is sufficiently broad to authorise the Court to approve, in appropriate circumstances, the costs of persons who are permitted to appear for a party, and who charge that party for their services, whether that representative is an officer or member of a union, an agent, or a barrister or

solicitor.

⁷ See *Re Collier (A Bankrupt)* [1996] NZCA 481; (1996) 10 PRNZ 145 (CA).

⁸ *Commissioner of Inland Revenue v Chesterfields Preschools Ltd* [2010] NZCA 400, (2010) 24

NCTC 24,500 at [162].

⁹ *Gyenge v Clifford Lamar Ltd* [2011] NZEmpC 10 at [7].

¹⁰ *Murphy & Routhan (t/a Enzo's Pizza) v Van Beek* [1998] NZEmpC 96; [1998] 2 ERNZ 607 (EmpC) at 621.

11 At the time of this decision, s 123 of the [Employment Contracts Act 1991](#) applied; it provided that any party to a proceeding before the Court could appear personally, be represented by an agent, or be represented by a barrister or solicitor. Previous provisions were s 299 of the [Labour Relations Act 1987](#), and s 54 of the [Industrial Relations Act 1973](#). Under the ERA, the only notable change was the addition of an express right of audience for “an officer or a member of a union”. Otherwise the provisions of the ERA are materially similar to those of the preceding provisions.

[19] It is well established that in order to assess costs, the process involves a two step approach. The first step is to decide whether the costs actually incurred were reasonably incurred, making adjustment if need be. The second step is to decide after an appraisal of all factors at what level it is reasonable for one party to contribute to the costs of the other party. Generally a starting point of 66 per cent is regarded as helpful in ordinary cases. However, attention must be given to factors

which might justify an increase or a decrease from that starting figure.¹² These

principles apply in respect of the costs of an agent as they do for any other qualifying representative.

[20] In the present case, I find that the costs of the agent, Mr Flower, fall within the scope of cl 19. I am also satisfied, having regard to the responsible way Mr Flower undertook his role, that the invoiced costs of \$12,600 were reasonably incurred. An appropriate starting point in the circumstances of this case, which was an orthodox personal grievance action, is 66 per cent: \$8,316.00.

[21] Before finalising a figure, it is necessary to consider the Calderbank offer which was made on behalf of NCC. As already mentioned it was for the sum of

\$12,000. It was not accepted. As a result of the Court’s order, the defendant was required to pay to the plaintiff the total sum of \$14,935.64. Because the quantum of the Calderbank offer was less than the sum awarded by the Court, I make no deduction from the two-thirds figure.

[22] Ms Hutchison incurred disbursements with regard to her challenge, which are recoverable, namely:

| | |
|--|------------|
| (a) Filing fee paid to the Employment Court: | \$204.50 |
| (b) Hearing fee: | \$1,001.80 |
| (c) Total: | \$1,206.30 |

[23] Ms Hutchison submits that she should also be reimbursed for travel costs from her current place of residence in Wellington to Nelson for the purposes of the hearing, together with accommodation. Although in some circumstances it is appropriate to consider the travel and accommodation expenses of out-of-town counsel that does not extend to the expenses of a party. These are not recoverable.

[24] There are a number of other categories of costs which should be specifically addressed:

(a) The first relates to the legal costs of Ms A, who represented Ms Hutchison until the time of dismissal. They were not incurred in relation to the present proceeding, and are therefore not recoverable.

(b) When determining Ms Hutchison’s application for leave to bring her challenge out of time, the Court reserved costs, indicating the issue would be decided as part of the Court’s overall consideration when the proceedings were concluded.¹³ The only costs which fall for consideration are those of Mr Zindel. He gave advice to Ms Hutchison before the application was issued, and then rendered an invoice to her. Although he prepared an affidavit to support the application, there is no evidence that he charged her for doing so. Otherwise, Ms Hutchison represented herself for the purposes of the application. No award for costs is made.

(c) A claim has been made, supported by invoices, for various other categories of payments made by Ms Hutchison. These include costs for medical consultations, medications, costs relating to the sale of her property, relocation expenses, and costs of advertising for sale of her property and for tenants. These are not costs of a kind which are contemplated by cl 19 and cannot be considered. Nor were they advanced in support of a remedy at the hearing itself. But in my view such costs would not have been recoverable even had they been sought under s 123 of the Act.

[25] In summary, Ms Hutchison is entitled to costs and expenses as follows:

| | |
|--|------------|
| (a) Agents' costs: | \$8,316.00 |
| (b) Expenses with regard to the substantive hearing: | \$1,206.30 |
| (c) Total: | \$9,522.30 |

[26] The Authority ordered Ms Hutchison to pay costs to NCC in the sum of

\$1,750.14 No challenge in respect of that determination was brought, although I accept that the position was not altogether straightforward from Ms Hutchison's point of view. The chronology is:

(a) On 25 January 2013, counsel for NCC provided submissions to the Authority requesting costs for the two matters previously determined by the Authority;

(b) On 27 January 2013, Ms Hutchison asked what the Authority required from her "... to ensure that costs are held in abeyance at this stage";

(c) By email of 28 January 2013, the Authority's support officer informed Ms Hutchison that the Authority's usual practice was to determine costs even where a party challenged the Authority's determination. The email then stated:

They then become part of the mix before the Court. In this case you seem to be applying to the Employment Court for a stay in the matter before the Authority.

(d) On 8 January 2013, in the decision granting leave for time to commence the challenge, costs were reserved.

(e) On 8 March 2013, the Authority determined the issue of costs.

(f) In the Court itself, although an application for stay in respect of the costs order was made, this did not need to proceed to the point of a decision because NCC agreed not to enforce the costs award.

[27] It would seem that in these circumstances, Ms Hutchison, at that time unrepresented, did not appreciate that she should have lodged a challenge in respect of the Authority's costs. Had she done so, the costs award in the Authority may well have been set aside when the Court granted her challenge. In the unusual circumstances of this case, I consider it is appropriate, utilising the equity and good conscience provisions of s 189 of the Act, to set aside the Authority's costs determination.

Conclusion

[28] The Court concludes:

a. NCC is to pay Ms Hutchison the sum of \$9,522.30 in respect of her costs and expenses.

b) The Authority's costs determination is set aside.

Judgment signed at 9.45 am on 12 November 2014

B A Corkill

Judge