



# Employment Court of New Zealand

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## Noble v Ballooning Canterbury.com Limited [2018] NZEmpC 142 (3 December 2018)

Last Updated: 7 December 2018

IN THE EMPLOYMENT COURT  
CHRISTCHURCH

[\[2018\] NZEmpC 142](#)  
EMPC 85/2018

IN THE MATTER OF            a challenge to a determination of the  
   Employment Relations Authority  
AND IN THE MATTER OF    an application for costs on an  
   application for security for costs  
BETWEEN                     ROBERT NOBLE  
   Plaintiff  
AND                             BALLOONING CANTERBURY.COM  
   LIMITED  
   Defendant

Hearing:                    On the papers  
Appearances:            J Goldstein and L Ryder, counsel for plaintiff  
   A Toohey and G Wakefield, counsel for  
   defendant  
Judgment:                3 December 2018

COSTS JUDGMENT OF JUDGE J C HOLDEN

### (Application for costs on an application for security for costs)

[1] By judgment dated 16 August 2018 Judge Corkill ordered Mr Noble to pay security for costs to be held by the Registrar of the Employment Court.<sup>1</sup> He recorded that it was appropriate for costs on Ballooning Canterbury.com Ltd's (BCL) application to be fixed, and that his provisional view was that the appropriate classification according to the Court's Guideline Scale is Category 2, Band B. He said BCL could apply for costs to be fixed if agreement on costs was unable to be reached.

[2] BCL filed a memorandum seeking costs of \$6,467 but before it could be considered, Mr Goldstein, counsel for Mr Noble, advised the Court that reference was

<sup>1</sup> *Noble v Ballooning Canterbury.com Ltd* [\[2018\] NZEmpC 97](#).

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made in the application to matters that were contentious as between counsel, and also submitted that issues as to costs should not be determined at this point.

[3] Judge Corkill made directions for the filing of memoranda by the parties and directed that those memoranda were to be reviewed in the first instance by another Judge, to consider whether the topic of costs on the application for security for costs should be deferred, having regard to counsel's memoranda; and/or whether a judge other than the trial judge should resolve the question of those costs.

[4] The parties have now filed further memoranda. Mr Noble's memorandum identified two issues for consideration:

- (a) whether the Court ought to reserve the question for costs in regard to the application for security for costs; and
- (b) if the Court does not reserve the question of costs, the level of costs, if any, to be awarded to BCL.

[5] The memorandum does not elaborate on the point apparently made that there were matters in BCL's memorandum that were contentious as between counsel except to say there were issues relating to attempts to settle the security issue. The main submission was that neither the Court's judgment nor BCL's application for costs gave any reason why the Court ought to depart from what Mr Noble said was the Court's usual practice of reserving costs on applications for security for costs.

[6] Mr Noble says that the only discernible reason for fixing costs now, other than the fact that costs normally follow the outcome, is that the Court had been swayed by the content of an affidavit that appeared to indicate that BCL is "somewhat impecunious".

[7] In support of his claim that the Employment Court's usual practice was to reserve costs Mr Noble pointed to other decisions on applications for security for costs from the Employment Court. These indicated that only one of the decisions in the past three years sought to fix costs at the time of judgment rather than reserve them. He says that, for consistency, the Court ought to reserve costs on the current application.

[8] Mr Noble also argues that any costs award made now may only have to be "undone" should Mr Noble later succeed at the preliminary hearing, and further, that the amount of funds held by the Court may be sufficient to meet any awards of costs made on the security application.

[9] On the second issue, Mr Noble says that the Court is not currently able to determine costs in any event because it has not been provided with the level of BCL's actual costs.

[10] BCL responded to Mr Noble's submissions, saying the reference to previous decisions was flawed and pointing to the Court's Guideline Scale and to r 14.8 of the [High Court Rules 2016](#) as supporting an award of costs now.

[11] BCL submitted that the merits of the application for security for costs are separate from the merits of the substantive matter, so there will be no need for the award to be "undone".

[12] As to the level of costs, Ms Toohey, counsel for BCL, attached BCL's invoices to the submissions. These demonstrate that BCL has incurred costs of \$8,625 plus GST for the application for security for costs.

[13] Although Mr Noble said he reserved his right to make further submissions as to the reasonableness of the actual costs incurred, more than six weeks have passed since BCL filed its submissions in response and no further submissions have been received from Mr Noble.

[14] Accordingly, this judgment resolves both issues, which are as identified by Mr Noble.

### **Court has discretion in fixing costs**

[15] The [Employment Relations Act 2000](#) (the Act) sch 3, cl 19 gives the Court a discretion to order costs and expenses as the Court thinks reasonable. In exercising my discretion, I have had regard to r 14.8 of the [High Court Rules](#), which provides for

costs on an opposed interlocutory application in the High Court to be fixed and become payable, unless there are special reasons to the contrary.

[16] Mr Noble has not raised any special reasons in this case. Even adopting a lower threshold, the reasons Mr Noble gives for the Court not awarding costs at this stage are not persuasive. While he refers to previous decisions of the Employment Court there is no indication whether costs were sought at the time, or, if they were, why the Court decided in those cases to reserve them.

[17] The merits of an interlocutory application and the merits of the substantive proceedings are different matters.<sup>2</sup> The outcome of the preliminary hearing would not affect BCL's entitlement to costs on this application. Here Judge Corkill found for BCL in its application and considered that an award of costs in BCL's favour was appropriate. This is consistent with the primary principle that costs generally follow the event.<sup>3</sup>

[18] There is no reason to displace Judge Corkill's view.

## The Court's Guideline Scale provides assistance in fixing costs

[19] As noted, the actual costs incurred by BCL exceed those now sought, which are calculated using the Court's Guideline Scale:

Item	Step	Band B allocation (Days)
28	Filing interlocutory application	0.6
30	Written submissions	1
34	Obtaining judgment without an appearance	0.3
36	Affidavits x 2 (half the available time for briefing given an interlocutory proceeding)	1
2.9 days at \$2,230 per day = \$6,467		

2 *Chapman v Badon Ltd* [2010] NZCA 613, (2010) 20 PRNZ 83 at [12].

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

[20] The claim for obtaining a judgment without an appearance is not allowed. That item does not apply where the parties make written submissions, for which costs are sought and awarded, and the Court issues its judgment direct to the parties after consideration of those submissions. Otherwise the claimed costs are appropriate, leading to an award of \$5,798.

[21] BCL also seeks costs on this application, but does not quantify its claim in that regard. If costs were calculated using the Guideline Scale, even at a Category 1, Band A level, that would suggest an award of over \$1,100. While BCL was required to file a memorandum applying for costs, and submissions, I consider a more modest amount is appropriate and award \$600. This means Mr Noble must pay BCL a total of \$6,398 in costs.

J C Holden Judge

Judgment signed at 2.30 pm on 3 December 2018

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