



Employment Court of New Zealand

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O'Hagan v Waitomo Adventures Ltd [2015] NZEmpC 53 (30 April 2015)

Last Updated: 12 May 2015

IN THE EMPLOYMENT COURT AUCKLAND

[\[2015\] NZEmpC 53](#)

ARC 35/14

IN THE MATTER OF an application to set aside
 judgments

AND IN THE MATTER of costs

BETWEEN BRENT O'HAGAN Plaintiff

AND WAITOMO ADVENTURES LTD
 Defendant

Hearing: By submissions filed on 19 December 2014; 9 and 14
 January
 2015

Appearances: B O'Hagan, in person
 T Braun, counsel for defendant

Judgment: 30 April 2015

COSTS JUDGMENT OF JUDGE CHRISTINA INGLIS

[1] The defendant (Waitomo Adventures Ltd) applies for costs against the plaintiff (Mr O'Hagan). The application arises against the backdrop of a judgment striking out the plaintiff's application to set aside an earlier judgment of the Court dismissing a challenge to a determination of the Employment Relations Authority. The parties were encouraged to agree costs but that has not proved possible and memoranda have been filed.

[2] The principles applicable to awards of costs in this Court are well settled¹ and were traversed in the costs judgment which followed the substantive hearing.²

Clause 19(1) of Schedule 3 to the [Employment Relations Act 2000](#) (the Act) confers

1 See *Victoria University of Wellington v Alton-Lee* [\[2001\] NZCA 313](#); [\[2001\] ERNZ 305 \(CA\)](#), *Binnie v Pacific Health Ltd* [\[2003\] NZCA 69](#); [\[2002\] 1 ERNZ 438 \(CA\)](#) and *Health Waikato Ltd v Elmsly* [\[2004\] NZCA 35](#); [\[2004\] 1 ERNZ 172 \(CA\)](#).

2 *O'Hagan v Waitomo Adventures Ltd* [2103] NZEmpC 58 [\[2013\] NZEmpC 58](#); , [\[2013\] ERNZ 124](#) (costs judgment);

O'Hagan v Waitomo Adventures Ltd [\[2012\] NZEmpC 161](#) (substantive judgment).

BRENT O'HAGAN v WAITOMO ADVENTURES LTD NZEmpC AUCKLAND [\[2015\] NZEmpC 53](#) [30 April

2015]

a broad discretion on the Court to make orders as to costs. The Court's discretion, while broad, must be exercised judicially and in accordance with principle. The fundamental purpose of an award of costs is to recompense a party who has been successful in litigation for the cost of being represented in that litigation. The usual starting point is two-thirds of the costs actually and reasonably incurred by that party, but that proportion may be adjusted up or down according to the circumstances of the case, including the manner in which it was conducted.

[3] The defendant says that it incurred costs of \$16,974 in responding to the plaintiff's application, and has filed a summary of attendances in support of its costs claim. Mr O'Hagan raised an issue as to the extent to which attendances associated with matters in the High Court may have been included in counsel's summary. Mr Braun, counsel for the defendant, clarified (by way of memorandum in reply) that the claim for costs relates solely to the Employment Court matter and does not include any carry-over work from the earlier High Court hearing. I accept, based on the material before the Court, that the defendant incurred actual costs of \$16,974.

[4] I turn to consider whether costs of that magnitude were reasonable. In relation to this issue Mr O'Hagan submits that the defendant has failed to provide details of the costs incurred. However, the Court of Appeal has made it clear that it is not mandatory for counsel to provide details of time involved and charge out rates

when seeking costs. In *Binnie v Pacific Health Ltd* it was observed that:³

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.

[5] While copies of the invoices have not been provided on behalf of the defendant, a summary of the attendances has been. Based on the material before the Court, and my own knowledge of the case, I accept that the actual costs incurred were reasonable in the circumstances. A cross-check against the costs schedule in the High Court Rules results in a comparable amount, once the one-third discount

that has already been incorporated into the scale has been built back in.

3 At [27].

[6] I take a two-thirds starting point. This leads to a figure of \$11,202.84. The defendant submits that it should be fully indemnified for its costs or, alternatively, that an uplift, or at least an award of two-thirds of actual and reasonable costs, is warranted. Mr O'Hagan submits that it would be appropriate for costs to lie where they have fallen.

[7] The submission in support of increased costs is essentially based on three grounds. First, the application to set aside was brought for an ulterior purpose, namely to halt the bankruptcy proceedings being pursued against the plaintiff by the defendant in the High Court. Second, the plaintiff's application to set aside was "hopeless" and had no prospect of success. Third, the plaintiff knew or ought to have known that the allegations of fraud he relied on were irrelevant to the issue of whether or not he had voluntarily resigned from his employment with the defendant company.

[8] As I have observed, this Court has a broad discretion to award costs. The approach adopted to increased costs under the High Court Rules is instructive. It is well established that indemnity costs are reserved for rare cases.⁴ Making allegations of fraud knowing them to be false, and making irrelevant allegations of fraud, may give rise to indemnity costs.⁵ So too can the pursuit of a hopeless case.⁶

In this regard it has been said that consideration may be given to an award of indemnity costs "whenever it appears that an action has been commenced or continued in circumstances where the applicant, properly advised, should have known that he had no chance of success".⁷ Ultimately it is for the Court, in the exercise of its broad discretion, to determine whether increased or indemnity costs are appropriate.

[9] Although it is clear that Mr O'Hagan remains firmly of the view that Mr

Andreef, the defendant's sole director, gave perjured evidence, those allegations

⁴ *Prebble v Huata* [2005] NZSC 18; [2005] 2 NZLR 467 (SC), at [6].

⁵ *Bradbury v Westpac Banking Corp* [2009] NZCA 234, [2009] 3 NZLR 400, at [18], [28].

⁶ At [23]-[24].

⁷ *Fountain Selected Meats (Sales) Pty Ltd v International Produce Merchants Pty Ltd* (1988) 81

ALR 397 (FCA) at 401, relied on in *J Corp Pty Ltd v Australian Builders Labourers Federation Union of Workers (WA Branch) (No 2)* (1993) 46 IR 301; [1993] FCA 70 at 303, cited in *Ben Nevis Forestry Ventures Ltd v Commissioner of Inland Revenue* [2014] NZCA 348 at [17].

were never made out. Nor were they of direct relevance to the ultimate issue that arose for determination – namely whether Mr O'Hagan had been constructively dismissed as a matter of employment law, as he claimed. Further, no new material was identified by the plaintiff that might otherwise have supported the application to set aside.

[10] During the course of argument, Mr O'Hagan made it plain that he had filed the application to set aside because the defendant had pursued bankruptcy action against him. He indicated that he would have been prepared to "live with" the Court's earlier judgment, although he did not agree with it, but for the steps taken by the defendant. Mr O'Hagan submits that he cannot be criticised for pursuing the application for ulterior purposes. That is because he decided to proceed down the route of applying to set aside the Court's substantive judgment on the basis of observations made by the Associate Judge in the High Court. Mr Braun disputes that Mr O'Hagan's recollection accurately reflects the exchange that occurred in the High Court. I am not in a position to resolve this issue. However, even if Mr O'Hagan had the setting-aside option flagged to him in the High Court that does not, of itself, justify the making of an application, although it may help to explain the step that was taken. Ultimately, the application was struck out on the basis that it could not succeed.

[11] Although I accept that there is strength in the arguments advanced on behalf of the defendant, I am not persuaded to exercise my discretion to award indemnity costs having regard to the particular circumstances. An uplift is, however, clearly warranted.

[12] For completeness, I note that while it appears that the plaintiff may be in financial difficulty no submissions were advanced in this regard. In any event, in assessing an appropriate contribution to costs I must be guided by the overall interests of justice. In all of the circumstances I consider that the justice of the case warrants a substantial contributory order of costs. The plaintiff is ordered to pay the

defendant a contribution towards its costs in the sum of \$14,000. That sum is to be paid within a period of 35 days from the date of this judgment.

Christina Inglis

Judge

Judgment signed at 1pm on 30 April 2015

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