Employment Court of New Zealand

Pilgrim v Attorney-General [2024] NZEmpC 230 (27 November 2024)

Last Updated: 4 December 2024

IN THE EMPLOYMENT COURT OF NEW ZEALAND CHRISTCHURCH

I TE KŌTI TAKE MAHI O AOTEAROA ŌTAUTAHI

[2024] NZEmpC 230
EMPC 85/2022

IN THE MATTER OF	a declaration under s 6(5) of the Employment Relations Act 2000
AND IN THE MATTER	of an application for costs
BETWEEN	SERENITY PILGRIM, ANNA COURAGE, ROSE STANDTRUE, CRYSTAL LOYAL, PEARL VALOR AND VIRGINIA COURAGE Plaintiffs
AND	THE ATTORNEY-GENERAL SUED ON BEHALF OF THE MINISTRY OF BUSINESS, INNOVATION AND EMPLOYMENT, LABOUR INSPECTORATE First Defendant
AND	HOWARD TEMPLE, SAMUEL VALOR, FAITHFUL PILGRIM, NOAH HOPEFUL AND STEPHEN STANDFAST Second Defendants

Hearing:	25 July 2024
Appearances:	B P Henry and S Patterson, counsel, and A Kilic, advocate for plaintiffs A Boadita-Cormican and G La Hood, counsel for first defendant P Skelton KC and C Pearce, counsel for second defendants R Kirkness, counsel to assist the Court
Judgment:	27 November 2024

COSTS JUDGMENT OF CHIEF JUDGE CHRISTINA INGLIS

SERENITY PILGRIM, ANNA COURAGE, ROSE STANDTRUE, CRYSTAL LOYAL, PEARL VALOR AND VIRGINIA COURAGE v THE ATTORNEY-GENERAL SUED ON BEHALF OF THE MINISTRY OF BUSINESS, INNOVATION AND EMPLOYMENT, LABOUR INSPECTORATE [2024] NZEmpC 230 [27

November 2024]

Introduction

[1] This judgment deals with an application for costs following the Court's judgments in these proceedings (which I will refer to as the *Pilgrim* proceedings) of 13 July 20231 and 15 December 2023.2 In the 13 July 2023 judgment the plaintiffs were held to be employees; the Overseeing Shepherd was held to be their employer in the subsequent judgment. While the parties were encouraged to agree costs they have been unable to do so.

[2] The plaintiffs seek a contribution to costs against the second defendants (the Gloriavale defendants), uplifted from scale costs, and they seek an order of costs against the Attorney-General (the first defendant). The Gloriavale defendants have raised issues as to whether the plaintiffs have incurred any legal costs but ultimately accept that the Court may grant costs in the circumstances. They say that any award of costs should be significantly less than the costs claimed, which are said to be excessive and unprincipled in a number of respects. The Attorney-General opposes any costs award being made against her, essentially on the basis that she took a watching brief role during the course of the hearings, and that any order of costs would cut across the basis of a Court order in respect of her involvement.

Framework for costs

[3] The Court has a broad discretion as to costs.3 While the discretion is broad it must be exercised on a principled basis,4 consistently with equity and good conscience.5 The Court generally has regard to a Guideline scale for costs.6

[4] While the Guidelines categorise proceedings Category 1, 2 and 3 based on the complexity of proceedings, and Band A, B and C based on a time allowing for each

1 *Pilgrim v Attorney-General* [2023] NZEmpC 105, [2023] ERNZ 454.

2 *Pilgrim v Attorney-General (No 2)* [2023] NZEmpC 227, [2023] ERNZ 1020.

3 Employment Relations Act 2000, sch 3 cl 19; and Employment Court Regulations 2000, reg 68.

4 *Victoria University of Wellington v Alton-Lee* [2001] NZCA 313; [2001] ERNZ 305 (CA) at [47].

5. See *Health Waikato Ltd v Elmsly* [2004] NZCA 35; [2004] 1 ERNZ 172 (CA) at [45]; and Employment Relations Act 2000, s 189.
6. "Employment Court of New Zealand Practice Directions" <www.employmentcourt.govt.nz> at No 18.

step, the Court must avoid a blanket approach; the factual context of each case will be considered in arriving at a fair and just contribution in the particular circumstances.

[5] As the Court of Appeal has previously emphasised, in the field of employment law, parties should have in mind the importance of conducting litigation with proper focus on the issues and on the containing of costs.7 Any time-wasting or conduct that otherwise increases the costs of proceedings, deliberately or otherwise, may appropriately be taken into account when assessing where costs should lie.8 Costs generally, but do not always, follow the event.

Analysis

Any legal costs incurred?

[6] I deal first with the Gloriavale defendants' concerns about whether the plaintiffs have incurred any legal costs. A related concern was also raised that the plaintiffs have received donations towards the costs of their proceedings, the quantum of which is unknown. It was also suggested that if the Court awarded costs to the plaintiffs, Mr Henry (counsel for the plaintiffs) may be in a windfall position, effectively having been paid twice.

[7] I did not understand Mr Pearce (who argued this aspect of the application for the Gloriavale defendants) to go as far as saying the Court should not award costs in the circumstances, rather that these factors may be relevant to an exercise of the Court's discretion as to the amount of costs awarded.

[8] Mr Henry confirmed to the Court that he and his legal team have been proceeding on what he described as a "fair-fee" basis. He said, and I accept, that it is not up to the Court to enquire into the details of the arrangement, a point that counsel appointed to assist the Court (Mr Kirkness) agreed with. I acknowledge also the social value in Mr Henry being prepared to undertake the litigation on behalf of parties who,

7 *Alton-Lee*, above n 4, at [65].

8. *GFW Agri Products Ltd v Gibson* [1995] NZCA 317; [1995] 2 ERNZ 323 (CA) at [329]; and Employment Court Regulations 2000, reg 68(1).

I infer, might otherwise have had difficulty progressing their matter to the Court.9 Mr Henry did not accept the concern about the potential for double-dipping and informed the Court that even if costs were awarded on a full Category 3, Band C basis that would be less than actual costs. I put the issue to one side.

Appropriate categorisation for costs purposes

[9] It was common ground that costs against the Gloriavale defendants ought to be approached by applying the Guideline scale, and I accept that is so. The key issue between the plaintiffs and the Gloriavale defendants was in respect of whether the proceedings were properly characterised as Category 2 (which the Gloriavale defendants contended for) or Category 3 (as the plaintiffs submitted). Further issues arose, including as to whether a reduction ought to be made to reflect time-wasting or whether an increase ought to be made to reflect aggravating conduct. I return to these issues below.

[10] Category 2 is applied to proceedings of average complexity requiring a representative of skill and experience considered average in the Employment Court. Category 3 is reserved for proceedings that, because of their complexity or significance, require a representative to have special skill or expertise in the Employment Court.

[11] Mr Pearce submitted that the proceedings were "business as usual". While it is true that the proceedings involved an application of the s 6 test, it will be evident from a perusal of all of the interlocutory judgments (over 30 in total), substantive judgments (first, were the plaintiffs employees during their time working in the Gloriavale Community and second, who was their employer) and the Court of Appeal's judgment granting leave,10 that an application of the test (while expressed in relatively simple terms within the statute) presented a range of difficult issues.

[12] It would, in my view, be artificial to characterise these proceedings as sitting in the middle of the road in terms of complexity. The reality is that they materially

9 See *Ye v Minister of Immigration* [2008] NZCA 291; [2009] 2 NZLR 596 (CA) at [360].

10 *Temple v Pilgrim* [2024] NZCA 147.

differed from many other cases in which a declaration of employment status is sought, and which are routinely dealt with on a Category 2 basis. These proceedings involved work undertaken by individuals living and working within a unique context, namely an isolated religious community in which the plaintiffs had been born and raised. The unique context gave rise to a number of challenges that reasonably required "special counsel", as Mr Henry submitted.

[13] It is not without significance that the Gloriavale defendants retained senior counsel to assist them in the early stages of the proceedings; they advised that it was financial pressure that led to them self-representing at a later stage. Senior counsel and junior counsel have now re-entered the fray. The relative complexity and significance of the proceedings was also reflected in that fact that counsel was appointed to assist the Court at an early stage. And it is notable that the Attorney-

General supported the appointment of counsel to assist.11

[14] The proceedings were important well beyond the parties, raised complex issues and amply warrant a categorisation of Category 3. This categorisation applies to the entirety of the proceedings, there being no special circumstances that would justify a different category to be applied to any aspect of them.12

Costs for second counsel

[15] The plaintiffs claimed costs for second counsel. I did not understand any issue to be raised in respect of this aspect of the claim and accept that the proceedings warranted the appearance of additional counsel and that it is appropriate that this be reflected in costs.

The steps taken in the proceeding

[16] The Guidelines set out time allocations for each step taken in the proceedings. It is accordingly necessary to identify what steps were taken, whether costs should

11 See *Pilgrim v Attorney-General* EMPC 85/2022, 8 April 2022, at [3].

12 See *Cronin-Lampe v Minister of Education (in respect of the Ministry of Education)* [2024] NZEmpC 125 at [24]- [43]. Contrast *J v J* [2013] NZHC 1822 at [10]- [11], where, for special reasons, 3C was applied instead of 2B to all steps taken after a particular point in the proceeding.

follow those steps and the appropriate band for those steps when determining an appropriate contribution to costs overall.

[17] The Gloriavale defendants prepared a detailed schedule outlining the various steps taken in the proceedings, which they submit are relevant for costs purposes, noting why they did not consider that particular steps claimed for by the plaintiffs should be accounted for. Having reviewed the file as against the schedule I am satisfied it is broadly accurate, and helpfully informs the assessment process.

Appropriate band

[18] Determination of what is a reasonable time for a step in the proceeding is made by reference to different bands: Band A, if a comparatively small amount of time is considered reasonable; Band B, if a normal amount of time is considered reasonable; or Band C, if a comparatively large amount of time for the particular step is considered reasonable.

[19] The plaintiffs effectively submit that all steps warrant a Band C categorisation. The Gloriavale defendants say that the plaintiffs have not explained why such banding ought to apply to all steps and that, in the absence of explanation, what they call "default" Band B should apply to all steps.

[20] A proper assessment of costs requires an assessment of each step in the process and whether each step appropriately warrants a B or C categorisation. That is because what is reasonable, in terms of time allocation between bands, involves an objective assessment of the circumstances relating to each particular step for which a contribution to costs is claimed.

[21] My assessment of the appropriate band for each step is set out in the annexed table. My assessment has been informed by the relevance (for banding purposes) of contextual complexity. In this regard I have no doubt that various steps, including in relation to the preparation for trial, obtaining instructions, briefing evidence, disclosure and seeking to understand the intricacies of the Gloriavale operational and community structure, required a comparatively large amount of time, over and above

what might generally be expected. In short, my assessment is that Band C is appropriate for most (but not all) steps.

[22] As the table reflects, 37 steps were taken in the proceedings. That does not mean that the plaintiffs are entitled to a separate costs contribution on each of the 37 steps; what they are entitled to is the issue I turn to next.

[23] The proceedings were lengthy and involved numerous interlocutory applications. The Gloriavale defendants were successful in some instances, such as in opposing media applications, an application to vary a witness exclusion order13 (which was not opposed) and an application to the Court to undertake a site visit (which was able to be dealt with by agreement).14 I do not consider it necessary or appropriate to reduce the costs that the plaintiffs would otherwise be entitled to, to reflect these 'successes'. The media applications did not involve the plaintiffs and there should be no costs implications for applications they did not oppose. Other steps claimed for were dealt with in the context of the substantive hearings, such as an application by the Gloriavale defendants to exclude evidence15 (which had mixed results), and have been accounted for (in terms of time allocation) there. In relation to one step, filing opposition to evidence admissibility (step 29), the issue was resolved by consent prior to hearing.

[24] Having regard to what was reasonably required in the particular circumstances for each step, I have concluded that some steps are appropriately allocated costs on a Category 3, Band B basis, and others on a Category 3, Band C basis. My analysis, which is set out in the table annexed to this judgment, leads me to a provisional assessment of costs in the sum of $274,427.75.

An uplift?

[25] I now move to consider a submission advanced by Mr Henry that there ought to be an uplift in costs against the Gloriavale defendants to reflect what were described as aggravating factors.

13 *Pilgrim v Attorney-General (No 22)* [2023] NZEmpC 10.

14 *Pilgrim v Attorney-General (No 20)* [2023] NZEmpC 1.

15 *Pilgrim v Attorney-General (No 6)* [2022] NZEmpC 145, [2022] ERNZ 622.

[26] While the Court has the power to uplift costs (including imposing indemnity costs), it needs to be satisfied there is an appropriate basis for doing so.16 I agree with Mr Pearce that conduct relating to the employment relationship (and concerns in respect of that conduct) is a separate issue, and one that is not relevant to assessing an appropriate quantum of costs. It is well-established that costs are not designed to be punitive.17 So, while conduct may inform remedies on any personal grievance, I am not satisfied that conduct of the sort referred to should be taken into account in determining what an appropriate contribution to costs should be.

[27] I agree too with Mr Pearce that analogies with trust litigation, and the approach to costs in that context, is not materially helpful. The Court held that it had no jurisdiction in terms of trusts; it does however have an established approach to costs in the context of employment litigation.18 It is that approach which provides useful guidance.

[28] Mr Pearce drew my attention to the Court of Appeal's decision in *Holdfast New Zealand v Selleys*,19 where the Court observed that since the scale (in that case, High Court scale costs) is intended to reflect two-thirds the amount considered

reasonable in each category, increased costs should not exceed a 50 per cent uplift, as any amount greater than that "would mean that the party paying costs is contributing to the other party's choice of special counsel". And in *ACF v IEN*, the Employment Court said that the prerequisite for increased costs is "unreasonable conduct on the part of the party paying costs...[which] impacted on the costs of the other party".20

[29] I am unable to discern a basis for uplifting costs against the Gloriavale defendants either in respect of any of the interlocutory applications on which costs were reserved and on which the plaintiffs succeeded, or in respect of the conduct of the substantive hearing, and I decline to do so. That leads me back to my provisional assessment of an appropriate quantum which, as Mr Henry accepted, required a relatively broad brush approach.

16. Employment Court Regulations 2000, reg 68(1). See *Xtreme Dining Ltd v Dewar* [2017] NZEmpC 10, [2017] ERNZ 26 at [23]; *Binnie v Pacific Health Ltd* [2003] NZCA 69; [2002] 1 ERNZ 438 (CA) at [14].

17 *Binnie*, above n 16, at [32].

18 Above, n 1, at [178]; and n 2, at [56].

19 *Holdfast NZ Ltd v Selleys Pty Ltd* [2005] NZCA 302; (2005) 17 PRNZ 897 (CA) at [47].

20 *ACF v IEN* [2023] NZEmpC 200 at [5].

GST

[30] Mr Henry claimed that GST should be added to the plaintiffs' claim for costs. The usual approach is not to award GST, but whether a party is GST registered is a factor that may be considered in relation to an uplift.21 If the plaintiffs are not, as I infer, GST registered, there should be an uplift to reflect the GST component in respect of costs.

A downward adjustment?

[31] Issues arose before and during trial as to the nature and scope of the evidence.22 While a considerable amount of evidence was permitted to be put before the Court, some of which was on a provisional basis, various rulings record that issues as to potential costs implications would be addressed at the costs stage.

[32] The Gloriavale defendants argue that the majority of the hearing time was "wasted" on irrelevant evidence, seeking to reduce the amount of days claimed from the actual amount of 39 days to 15. I consider that much of what the Gloriavale defendants label "irrelevant" to have been useful context, given that understanding the real nature of life in the Gloriavale Community was necessary in determining the real nature of the relationship between the parties. However, I accept that some of the evidence given by the plaintiffs and their witnesses (and responded to by the Gloriavale defendants) was not of material relevance to the matters at issue. Alighting on an appropriate reduction is an inexact science, but standing back I consider a time allocation of 25 days is appropriate in the circumstances.

[33] For completeness, no submissions were advanced on behalf of the Gloriavale defendants that costs should be reduced for financial hardship, and I put that issue aside.

[34] Mr Pearce made the point that the claim against the second defendants only succeeded in respect of the Overseeing Shepherd, who was found to be the employer.

21. *Stormont v Peddle Thorp Aitken Ltd* [2017] NZEmpC 159 at [36]; *New Zealand Venue and Event Management Ltd v Worldwide NZ LLC* [2016] NZCA 282.

22 *Pilgrim*, above n 15, at [135].

It was submitted that technically that might lead to the plaintiffs being exposed to costs. However, it was made clear that no such costs were sought.

[35] I have considered whether a reduction is, however, appropriate to account for the fact that Mr Henry acted on a "fair-fee" basis and may have been partially funded already via public donation. Mr Pearce argued that there may otherwise be some windfall for Mr Henry, on the assumption that he will receive both this costs award and the donations. I have already referred to Mr Henry's advice to the Court and decline to make a reduction in the circumstances.

[36] The plaintiffs are entitled to costs on the basis set out in the annexed table. It is appropriate that costs be ordered against the Overseeing Shepherd (position, not individual). I reach that conclusion because the Overseeing Shepherd was held to be the employer and it is the Overseeing Shepherd who is ultimately responsible for all that goes on within the Gloriavale Community. The person in the position of Overseeing Shepherd is currently Howard Temple.

Costs – Attorney-General

[37] I now deal with the issue of costs against the Attorney-General.

[38] I granted the Attorney-General leave to appear at the hearings on the basis of an appearance reserving rights under protest to jurisdiction;23 the Attorney-General was to take no active role unless appropriate to do so and they would neither be entitled to, nor liable for, costs.24

[39] Mr Henry submitted that costs should be awarded against the Attorney- General, primarily because there was a failure to properly investigate concerns about the working relationships within the Gloriavale Community. I do not accept that this is relevant to an assessment of costs, for reasons I have already traversed in respect of the second defendants and because no finding of failure has been made at this stage against the Labour Inspectorate.

23 *Pilgrim v Attorney-General (No 2)* [2022] NZEmpC 83.

24 At [5].

[40] Mr Henry further submitted that the Attorney-General went outside of the scope of the constraints during the course of the hearing, including by cross-examining (at length) a number of the Gloriavale witnesses and other witnesses, and advancing detailed written submissions. This, it was submitted, should lead to an award of costs against the Attorney-General.

[41] Counsel for the Attorney-General, Ms Boadita-Cormican, submitted that this was incorrect. She made the point that counsel for the Attorney-General was present to observe and also took steps, at the invitation of the Court, to identify issues during the course of the hearing in relation to name suppression issues (arising in parallel criminal proceedings). Ms Boadita-Cormican submitted that it was relevant that Mr Henry had not raised any objection during the course of the hearing in respect of counsel's involvement and that if he was proposing to raise an issue of potential costs liability he ought to have done so.

[42] Ms Boadita-Cormican was not counsel during the first hearing. I agree with counsel appointed to assist the Court, Mr Kirkness, that it was not incumbent on Mr Henry to raise an objection during the course of the hearing as to the Attorney-General's involvement, and that any failure to do so does not assist in deciding where costs should lie.

[43] A review of the notes of evidence reveals the following. First, then counsel for the Attorney-General was heard in respect of various admissibility and suppression issues that arose during the hearing. Her identification of possible difficulties as they arose was helpful, and I do not consider any issue can be taken with it.

[44] Second, counsel for the Attorney-General took an active role in relation to some witnesses. Counsel for the Attorney-General cross-examined a witness for the Gloriavale defendants (for approximately 15 minutes); the Overseeing Shepherd (for approximately two and a half hours) and Ms Norris, the Court appointed expert (for just under two hours). This equates to around half a day of additional hearing time.

[45] Having reviewed the notes of evidence and the lines of questioning, I accept that there is a basis for saying that the Attorney-General's interests were appropriately engaged and that no costs order should be made against the Attorney-General.

Disbursements

[46] The plaintiffs asked for expenses to be "fixed by the Registrar".25 Mr Pearce submitted that, absent specific claimed disbursements, it is appropriate only to award the filing fee and hearing fees. I cannot agree. It is quite clear that the plaintiffs incurred costs by way of disbursements, including in respect of counsel travel and accommodation.

[47] It is, however, necessary for the claimed disbursements and expenses to be adequately particularised and verified, and for the second defendants to have an opportunity to comment.

[48] Accordingly, the plaintiffs are directed to file and serve a particularised and adequately supported list of claimed disbursements and expenses in these proceedings within 20 working days; the second defendants are to have 10 working days to provide a response (if any) and the file referred to me for any further directions or orders.

Summary of orders

[49] The Overseeing Shepherd is ordered to pay to the plaintiffs jointly and severally the sum of $274,427.75 by way of contribution to costs, together with an uplift for GST as appropriate. The Overseeing Shepherd is directed to make that payment to Mr Henry, on the plaintiffs' behalf, within 28 days from the date of this judgment.

[50] The fixing of disbursements and expenses is reserved.

[51] No order of costs is made against the Attorney-General.

25. Regulation 36 of the Employment Court Regulations 2000 empowers the Registrar to fix disbursements and witness expenses when directed to do so by a Judge.

[52] No order of costs is made against any of the other named defendants.

Christina Inglis Chief Judge

Judgment signed at 3.30 pm on 27 November 2024

COSTS TABLE

Step	Name (Description)	Band	Days
3	Commencement of other proceeding by plaintiff	C	8
19	Answer to notice requiring better particulars	B	1
11	Preparation for first directions conference (23 March 2022)	C	0.5
13	Initial conference (23 March 2022)	C	0.5
13	Conference for excluding evidence (3 August 2022)	C	0.4
13	Conference for non-publication (24 August 2022)	B	0.2
13	Telephone conference on 1 September 2022	N/A	N/A
13	Telephone conference on 5 September 2022	N/A	N/A
13	Telephone conference on 14 September 2022	N/A	N/A
22	Notice requiring disclosure	B	0.8
22	Memorandum seeking disclosure	B	0.8
22	Supplementary memorandum seeking disclosure	B	0.8
32	Appearance at hearing for disclosure	N/A	N/A
28	Application for urgency	B	0.6
29	Opposition to recusal application	B	0.6
30	Submissions on recusal application	B	1
29	Opposition to evidence not being read application	C	1.5
30	Submissions on evidence not being read	C	1.5
29	Filing opposition to evidence admissibility	N/A	N/A
32	Appearance at hearing for evidence	N/A	0.5
28	Application for AVL	N/A	N/A
28	Application for AVL	N/A	N/A
32	Appearance at hearing for appointing Court expert	N/A	N/A
32	Second counsel for appointing Court expert hearing	N/A	N/A
30	Submissions on evidence admissibility	N/A	N/A
32	Appearance at hearing regarding media site visit	N/A	N/A
28	Seeking orders to suppress witness identity	B	0.6
	TRIAL PREPARATION (employment status)		
42	Preparation of briefs/affidavits	C	5
43	Preparation of list of issues and common bundle	C	4
45	Preparation for hearing	C	4

46	Appearance at hearing	N/A	25
47	Second counsel appearance for hearing	N/A	12.5
30	Written submissions	C	1.5
	EMPLOYER IDENTITY		
30	Written submissions	C	1.5
45	Preparation for hearing	C	4
46	Appearance at hearing	N/A	0.25
47	Second counsel appearance for hearing	N/A	0.125
		TOTAL DAYS	**77.175**