



# Employment Court of New Zealand

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## Prime Range Meats Limited v McNaught [2014] NZEmpC 179 (22 September 2014)

Last Updated: 28 September 2014

### IN THE EMPLOYMENT COURT CHRISTCHURCH

#### [\[2014\] NZEmpC 179](#)

CRC 45/12

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

BETWEEN PRIME RANGE MEATS LIMITED  
Plaintiff

AND KEN McNAUGHT Defendant

Hearing: (on the papers by way of submissions dated 8 and 25 July  
2014)

Counsel: R Chapman, counsel for the plaintiff  
A J Lodge, counsel for the defendant

Judgment: 22 September 2014

### COSTS JUDGMENT OF JUDGE A D FORD

[1] In my substantive judgment of 16 June 2014, I found for the plaintiff.<sup>1</sup> The parties have been unable to reach agreement upon costs and the plaintiff has now made formal application for an award of costs in its favour. Counsel have filed helpful submissions and an affidavit as to means has been filed by the defendant, Mr McNaught.

[2] One of the features of the substantive hearing was that the plaintiff's challenge related to an award of compensation to Mr McNaught by the Employment Relations Authority of \$1,250 which is not a significant amount of money. Normally one would expect such a proceeding to be resolved through mediation but the reality was that this case did not settle and it went to a hard-fought hearing occupying three days. For completeness, I should record that the challenge did result in a

cross-challenge which no doubt complicated the situation but I suspect that the

<sup>1</sup> *Prime Range Meats Ltd v McNaught* [2014] NZEmpC 93.

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defendant's cross-challenge was retaliatory in that it probably would not have been pursued had the plaintiff not made its challenge electing a full hearing de novo.

[3] I accept that from the plaintiff's perspective, there may have been issues of principle or precedent at stake. However, whilst claims based on matters of principle are recognised in this jurisdiction, <sup>2</sup> it could perhaps be argued that in the case of an employer of substance such claims should not be encouraged by generous costs awards, particularly at the expense of an employee's access to justice rights.

[4] In all events the circumstances of each case would need to be considered on its merits. In *Binnie v Pacific Health Ltd* the Court of Appeal noted:<sup>3</sup>

The proposition that party and party costs must never be disproportionate to the money value of the plaintiff's judgment is too

absolute, both in itself and certainly in a case where justified public vindication of reputation is a material factor in the litigation. While it is correct to say that costs payable by a defendant should not lightly be fixed at a level which is disproportionate to the sum recovered by the plaintiff, there will be cases where disproportion is justified in the Court's overall discretion.

[5] The Court of Appeal's observations were made in relation to an award of costs in favour of a successful employee litigant but there is nothing to indicate that the principle should not have equal application to employer litigants. In any event, however, this was not one of the contentions advanced in the present case.

[6] The principles applicable to costs awards in this jurisdiction are well established.<sup>4</sup> I will not repeat them save to confirm that the approach of this Court is to determine what would be reasonable costs for conducting the case for the successful party and then deciding what, in all the circumstances, would be a

reasonable contribution for the unsuccessful party to make towards those costs.

<sup>2</sup> See *Bluestar Print Group (NZ) Ltd v Mitchell* [2010] NZCA 385, [2010] ERNZ 446 at [19] where the Court of Appeal recognised that there may be cases in the employment context where vindication through seeking a statement of principle or reputational factors assume significance over solely economic considerations.

<sup>3</sup> *Binnie v Pacific Health Ltd* [2003] NZCA 69; [2002] 1 ERNZ 438 (CA) at [11].

<sup>4</sup> 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).

[7] Normally a 66 per cent contribution is regarded as fair and reasonable but that percentage contribution may need to be adjusted upwards or downwards depending upon the circumstances.

[8] Although the Court has a broad discretion in relation to costs awards, that discretion must be exercised in accordance with established principle. The overriding principle in any given case is always the interests of justice.

[9] Counsel for the plaintiff, Mr Chapman, seeks an award of costs in the total sum of \$5,704.89 based on the plaintiff's actual costs of \$12,589. The figure put forward by Mr Chapman appears to be reasonable.

[10] Responsibly, counsel for the defendant, Ms Lodge does not challenge the cost figure suggested but she has made out a strong case in support of her basic submission that any award of costs against Mr McNaught would be oppressive and would result in undue hardship.

[11] In his supporting affidavit, Mr McNaught deposed that given his age (68 on

2 December 2014), and health and financial circumstances, he is not in a position to pay any sum by way of costs. He has provided full particulars of his health and financial circumstances. I will not repeat the details he has placed before the Court but I accept that he has serious health issues requiring regular medication and hospital/medical consultations.

[12] Mr McNaught also deposed that he has no savings or assets apart from a car which he estimates to be worth under \$1000 and which he needs, in any event, in order to attend his hospital and medical appointments. He is no longer able to work. He pays rent and his only income is the pension.

[13] Based on the figures and other information he has provided to the Court, I accept that any award of costs made against Mr McNaught would seriously compromise his ability to pay for his ongoing prescriptions and doctor's visits which are important in managing his health issues.

[14] I accept that in the normal situation the plaintiff would be entitled to an award of costs of at least a nominal amount. In all the circumstances of the present case, however, I am satisfied that it would be oppressive and unduly harsh if the Court were to make any award of costs against Mr McNaught. For these reasons, the Court makes no order as to costs.

A D Ford

Judge

Judgment signed at 4.00 pm on 22 September 2014