



# Employment Court of New Zealand

You are here: [NZLII](#) >> [Databases](#) >> [Employment Court of New Zealand](#) >> [2016](#) >> [\[2016\] NZEmpC 22](#)

[Database Search](#) | [Name Search](#) | [Recent Decisions](#) | [Noteup](#) | [LawCite](#) | [Download](#) | [Help](#)

## Ritchies Transport Holdings Limited v Merennage [2016] NZEmpC 22 (17 March 2016)

Last Updated: 5 April 2016

IN THE EMPLOYMENT COURT AUCKLAND

[\[2016\] NZEmpC 22](#)

EMPC 288/2014

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

AND IN THE MATTER of an application for costs

BETWEEN RITCHIES TRANSPORT HOLDINGS  
LIMITED  
Plaintiff

AND KEERITHI MERENNAGE Defendant

EMPC 287/2014

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

AND IN THE MATTER of an application for costs

AND BETWEEN KEERITHI MERENNAGE Plaintiff

AND RITCHIES TRANSPORT HOLDINGS LIMITED

Defendant

Hearing: By memorandum filed on 23 December 2015, 11  
January,  
4 February and 19 February 2016

Appearances: G Mayes and K Amodeo, counsel for plaintiff  
H White, counsel for defendant

Judgment: 17 March 2016

**COSTS JUDGMENT OF JUDGE CHRISTINA INGLIS**

RITCHIES TRANSPORT HOLDINGS LIMITED v KEERITHI MERENNAGE NZEmpC AUCKLAND [\[2016\] NZEmpC 22](#) [17 March 2016]

### Introduction

[1] Mr Merennage has applied for costs following my earlier judgment dismissing Ritchies Transport Holdings Limited's (Ritchies/the plaintiff) challenge to a substantive determination of the Employment Relations Authority and upholding Mr Merennage's cross-

challenge.<sup>1</sup>

[2] The application raises a number of matters which the parties are at odds over, including the vexed issue of GST.

### **Framework**

[3] The starting point is cl 19 of sch 3 of the [Employment Relations Act 2000](#) (the Act). It confers a broad discretion as to costs providing that:

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

[4] Regulation 68(1) of the [Employment Court Regulations 2000](#) (the Regulations) also deals with costs. It provides that, in exercising the Court's discretion under the Act to make orders as to costs, the Court may have regard to "any conduct of the parties tending to increase or contain costs."

[5] The discretion to award costs, while broad, is to be exercised judicially and in accordance with principle. The primary principle is that costs follow the event.<sup>2</sup> The usual starting point in ordinary cases is 66 per cent of actual and reasonable costs. From that starting point, factors that justify either an increase or decrease are

assessed.<sup>3</sup> I approach this application for costs on that basis.

<sup>1</sup> *Ritchies Transport Holdings Ltd v Merennage* [2015] NZEmpC 198.

<sup>2</sup> *Victoria University of Wellington v Alton-Lee* [2001] NZCA 313; [2001] ERNZ 305 (CA) at [48].

<sup>3</sup> *Binnie v Pacific Health Ltd* [2003] NZCA 69; [2002] 1 ERNZ 438 (CA) at [14].

### **Actual costs**

[6] It appears from the invoices before the Court that Mr Merennage is claiming that he incurred actual legal costs of \$48,298.80 (including GST). This amount reflects the costs associated with Ms White's attendances and the attendances of her instructing solicitor, Mr Clearwater. It excludes disbursements.

[7] The plaintiff takes issue with these claimed actual costs, primarily on the basis that the invoices provided in support of the application for costs post-date the judgment. This, it is submitted, raises a question as to what Mr Merennage would have been charged had the outcome been different. However, the key issue is the quantum of actual costs Mr Merennage is liable to pay in respect of the proceedings, not the timing of the invoices or whether he would have been invoiced the same amount had Ritchies' challenge succeeded.

[8] Ms Mayes and Mr Amodeo (joint counsel for the plaintiff) point out that the invoice narration for the period 5 November 2014 to 13 November 2015 refers to Mr Clearwater's attendances relating to the Authority's costs determination. Such attendances, they submit, have nothing to do with the Court proceeding. Given Ritchies challenged both the substantive and costs determinations of the Authority that cannot be correct.

[9] I accept, based on the material before the Court, that Mr Merennage has incurred a liability of \$48,298.80 (including GST) in relation to legal costs in these proceedings. I return to the issue of GST below.

### **Were the actual costs reasonable?**

[10] Counsel for Ritchies take issue with the reasonableness of Mr Merennage's claimed costs, submitting that they are excessive, reflect unnecessary and unreasonable expenditure and duplicated effort.

[11] It is submitted that Ritchies incurred legal costs of \$16,750 and that an award

in Mr Merennage's favour of 66.6 per cent of those costs (rather than his own) would

be appropriate. That would lead to a contribution of around \$11,000. Somewhat ironically, an award of this sort would be considerably lower than Mr Merennage could reasonably expect in the Authority applying the generally applicable daily tariff in that forum of \$3,500, which was applied by the Authority in this case in its costs determination.<sup>4</sup> Not surprisingly, costs in this Court are generally higher.

[12] While Ritchies may have incurred very modest costs of \$16,750 for what turned into a four-day hearing, I do not accept that it follows that they should be applied as a benchmark for assessing whether the defendant's actual legal costs were reasonable. It is immediately apparent that, absent discounting factors, an award of

\$11,000 would not represent an appropriate quantum having regard to the nature and duration of the hearing. While not directly applicable the High Court scale provides a useful cross check.<sup>5</sup> Such a cross check results in a considerably higher amount. A brief perusal of recent costs judgments of this Court reinforces the point. I therefore reject Ritchies' suggested methodology for assessing whether the plaintiff's costs were reasonable.

[13] An assessment of whether actual costs were reasonable ultimately depends on the particular features of the case, including steps at an interlocutory stage and the attendances reasonably required.

[14] A number of interlocutory matters arose, each on Ritchies' application. The first was an application for non-publication orders, which was not opposed and which was granted following a brief hearing by telephone and the filing of memoranda.<sup>6</sup> Costs were reserved.

[15] The second was an application for an adjournment filed two working days before the fixture. The application was advanced on the basis that Ms Mayes, counsel for Ritchies, had been unexpectedly incapacitated and would be unable to appear if the hearing proceeded. The application was dealt with on an opposed basis.

In the event, and following a relatively brief telephone hearing and the filing of

<sup>4</sup> *Merennage v Ritchies Transport Holdings Ltd* [2015] NZERA Auckland 50 at [15].

<sup>5</sup> See High Court Rules, r 14.3-14.5; schs 2 and 3.

<sup>6</sup> *Merennage v Ritchies Transport Holdings Ltd* [2015] NZEmpC 88.

memoranda, an order was made adjourning the hearing on conditions.<sup>7</sup> As I understand Ritchies' position, it is submitted that costs should lie where they fall because the adjournment was required through no fault of its own. While that is so, it is not a point of particular relevance in assessing the reasonableness of Mr Merennage's costs. The fact is that a late adjournment inevitably increases costs for the opposing party in terms of wasted preparation time. As I recorded in my judgment, Mr Merennage is entitled to costs on the application (together with any

reasonable disbursements).<sup>8</sup>

[16] Ritchies also advanced a number of other interlocutory applications, namely an application for leave to file an amended statement of claim after setting down, an application for stay of execution of the Authority's costs determination and an earlier application for a stay of execution of the Authority's substantive determination. Mr Merennage reasonably incurred some costs in respect of each of these applications, although they were ultimately able to be dealt with on an agreed basis. Mr Merennage pursued a cross-challenge in relation to the Work and Income overpayment issue. I do not understand the plaintiff to be submitting that he is not entitled to a reasonable contribution to his costs on that challenge.

[17] I accept Ms White's submission that the nature of the allegations against Mr Merennage in these proceedings raised reputational and other interests which he was entitled to treat seriously and which required a comprehensive response.

[18] The hearing ultimately consumed four days, with additional time required for the interlocutory attendances I have already referred to. Counsel for the plaintiff observe that Mr Merennage confronted language difficulties during the course of the hearing and that extra time was required because of this. The relevance of this point is unclear. If the submission is that Mr Merennage's language difficulties and the associated increase in hearing time should be taken into account in making a downwards adjustment in terms of costs, I do not accept it. Any increase in time was reasonably required to enable Mr Merennage to engage adequately in the

proceedings and defend the challenge.

<sup>7</sup> *Merennage v Ritchies Transport Holdings Ltd (No 2)* [2015] NZEmpC 87.

<sup>8</sup> At [11].

[19] I have no difficulty concluding that the actual costs in responding to Ritchies' claim and in prosecuting the cross-challenge were well within the range in terms of reasonableness. My assessment has been informed by my own knowledge of the case, the nature of the scope of the matters at issue and steps taken in the proceedings.

[20] I adopt a starting point of \$32,000 being around 66 per cent of actual costs assessed as reasonable. This figure is GST inclusive, for reasons I will come to.

### **Adjustment?**

[21] Ms White submits that an uplift from the starting point is justified having regard to seven factors, namely:

(a) Mr Merennage's limited financial resources;

(b) the blamelessness of Mr Merennage with regard to the adjournment; (c) the reasonableness of the resources spent, including the charge out

rate of counsel and lack of second counsel;

(d) the relevance of new evidence that was uncovered and would otherwise have been unavailable to the Court but was known to Ritchies;

(e) the similarity of the outcome on the challenge;

(f) the strong likelihood of that outcome given the facts and law was well known to Ritchies;

(g) the lack of a Calderbank offer. I deal with each in turn.

[22] No authority or argument has been cited or advanced in support of the proposition that Mr Merennage's parlous financial state is relevant in assessing an appropriate contribution to costs in his favour. As is pointed out in *The Law of Costs*:<sup>9</sup>

The relative wealth of the parties to litigation affords no sufficient basis for awarding special costs to the less wealthy party; litigants have the same rights before the court irrespective of their means. Whilst impecuniosity will not normally be allowed to stop a party from presenting an arguable case to the court, it is insufficient to entitle a party to treatment different to that of most successful litigants.

[23] It may be arguable that this Court's historic willingness to have regard to an unsuccessful party's ability to pay<sup>10</sup> could be used as a springboard for a submission that the usual 66 per cent approach may not represent a reasonable contribution to an impecunious successful litigant's legal costs, as any shortfall may have a disproportionately negative impact on them. However, this would represent a significant departure from the usual approach to costs, would undermine the

principle of predictability in costs awards and raise issues as to whether (for example) a well resourced litigant, while succeeding, ought reasonably to be awarded less by way of contribution to costs.

[24] I am not persuaded that an uplift in recognition of the defendant's financial position is warranted in the circumstances and in the absence of full argument on the point.

#### *Adjournment costs*

[25] I accept that Mr Merennage faced increased costs having regard to the adjournment. I have already taken the costs into account in assessing whether the

defendant's actual costs were reasonable but accept that an uplift is appropriate to

9 G E Dal Pont *Law of Costs* (3rd ed, LexisNexis Butterworths, Australia, 2013) at [16.49] (footnotes omitted).

10 See, for example, the discussion in *Tomo v Checkmate Precision Cutting Tools Ltd* [2015] NZEmpC 2 at [21].

reflect the increased wasted preparation costs he incurred shortly before the hearing. I make an upwards adjustment of \$1,000.

#### *Reasonableness of costs*

[26] An uplift is sought on the basis of the low fees charged. I have already dealt with the reasonableness of the actual costs incurred by Mr Merennage. The modest level of cost incurred is not a factor which warrants an increase in costs, and no argument or authority was advanced in support of the assertion that it was.

#### *New evidence*

[27] I infer that it is submitted that an increase in costs is appropriate having regard to the conduct of the plaintiff's case insofar as evidence of communications with the New Zealand Transport Agency is concerned. The parties are at odds as to what occurred and what underpinned the need to summons a witness. In the event that evidence was not required. The facts do not emerge with sufficient clarity to warrant an adjustment and I decline to do so.

#### *Outcome*

[28] The fact that the Court reached largely the same conclusion as the Authority does not, of itself, justify an increase in costs. Parties have a statutory right to pursue a de novo challenge.<sup>11</sup> Ritchies exercised its right in this case. While there is authority for the proposition that increased or indemnity costs may follow an unmeritorious claim or one which is pursued for ulterior purposes this case does not fall within that sort of category.

#### *Lack of Calderbank offer*

[29] No explanation is provided as to the asserted relevance of the absence of a

Calderbank offer and I am unable to discern any basis for such a factor justifying an uplift.

<sup>11</sup> [Employment Relations Act 2000, s 179.](#)

[30] Mr Merennage seeks a contribution to costs based on GST inclusive figures. That is on the basis that the actual costs incurred by him include a 15 per cent component for GST. Ms White relies on the approach I adopted in *Booth v Big Kahuna Holdings Ltd*<sup>12</sup> in support of this submission. Counsel for Ritchies submit that GST must be excluded, citing other judgments of this Court in which what is described as a "GST neutral" approach is adopted. I drew a more recent authority to counsels' attention<sup>13</sup> and invited further submissions on the GST point.

[31] The well established starting point for costs in ordinary cases in this Court is an assessment of the actual costs incurred by the successful party. Consideration is then given to whether those actual costs were reasonable. If so the general approach is recovery of 66 per cent, subject to adjustment. This contrasts with the approach adopted under the High Court scale. As the Court of Appeal observed in *Health Waikato v Elmsly*<sup>14</sup> under the current High Court costs regime the actual level of costs incurred is irrelevant for general purposes.

[32] The actual costs incurred by a party in litigation are affected by a range of factors. GST is one of them. It is significant as it has the potential to impact on a party's actual costs by 15 per cent. In this jurisdiction the impact is most likely to be acutely felt by employees. Counsel for Ritchies submit that it is inappropriate to take the GST component of legal costs into account because GST is a tax under a statutory regime which only allows for deductions in the prescribed manner. This, it is submitted, should not be artificially thwarted. It is further submitted that:

Ultimately, if the approach in *Knapp* was applied, it would result in the defendant effectively receiving a "benefit" which other members of public would not get under tax law. The reasoning behind such an approach would also appear to potentially circumvent tax law and be against the compelling weight of the decided authorities including of this Court.

[33] I do not consider that recognising the cost of the GST component of the actual costs incurred by Mr Merennage engages the GST regime in the sense

<sup>12</sup> *Booth v Big Kahuna Holdings Ltd* [2015] NZEmpC 4 at [51].

<sup>13</sup> *Knapp v Locktite Aluminium Specialities Ltd* [2015] NZEmpC 124.

<sup>14</sup> *Health Waikato v Elmsly* [2004] NZCA 35; (2004) 17 PRNZ 16 (CA) at [50], [51].

contended for. There is a distinction between GST sought on a costs order and the recognition of the GST component of the actual costs incurred by a party in litigation. In the first situation the party ordered to pay costs is not paying for a service provided to it by the other party or its lawyers. The present case does not raise this issue. It is the amount actually incurred by Mr Merennage by way of costs and which he is liable to pay that is relevant to this Court's inquiry. Indemnity costs proceed from the same starting point. As one commentator, Andrew Beck, observes, "... there cannot be a proper determination of the full recovery amount without

knowing the GST liabilities of the successful party."<sup>15</sup> In this regard, and as noted

by the High Court in *Dunedin Catering Supplies v Mr Chips Ltd*,<sup>16</sup> there is a difference in position between a successful party who is entitled to a GST credit input and one who is not. This was illustrated in *Mr Chips* by reference to two cases. In *Jin v North Shore District Court*<sup>17</sup> Wylie J included GST in claimed costs on the presumed basis that the second respondents (a couple who had purchased a residential property) were unable to claim back GST. The costs judgment was not disturbed on appeal<sup>18</sup> and the Supreme Court subsequently declined leave to appeal.<sup>19</sup> In *Hogan v Commercial Factors Ltd*<sup>20</sup> the Court of Appeal held that because there was no entitlement to an input tax credit an indemnity order must

cover the costs actually incurred on a GST inclusive basis.

[34] While the plaintiff advocates for what is described as a "GST neutral" approach that description is in my view a misnomer. Ignoring the GST component of a party's costs liability in cases involving an assessment of actual costs results in a far from neutral result. I attempted to explain the impact in *Knapp v Locktite*

*Aluminium Specialities Ltd*.<sup>21</sup> There I observed:<sup>22</sup>

[14] The position in relation to GST on costs is not beyond doubt in this Court and has been the subject of differing approaches. In *Air New Zealand Ltd v Kerr* what was described as a "GST-neutral" approach was adopted. This was recently followed in *Wills v Goodman Fielder New Zealand Ltd*, where it was said that costs between the parties must be GST neutral as the

<sup>15</sup> Andrew Beck "Costs Awards and GST" [2009] NZLJ 69 at 70.

<sup>16</sup> *Dunedin Catering Supplies v Mr Chips Ltd* [2013] NZHC 1815, (2013) 21 PRNZ 798 at [40], [41].

<sup>17</sup> At [41]; *Jin v North Shore District Court* [2013] NZHC 810 at [20]–[21].

<sup>18</sup> *Jin v North Shore District Court* [2013] NZCA 475, [2014] NZAR 205.

<sup>19</sup> *Jin v North Shore District Court* [2014] NZSC 1.

<sup>20</sup> *Hogan v Commercial Factors Ltd* CA 225/03, 7 March 2005.

<sup>21</sup> *Knapp v Locktite Aluminium Specialities Ltd* [2015] NZEmpC 124.

<sup>22</sup> (footnotes omitted).

unsuccessful party making a contribution to costs is not paying for a service provided to it by the successful party.

[15] In *Burrows v Rental Space Ltd* the High Court observed that:

Costs between parties are GST neutral. The party ordered to pay costs is not paying for a service provided to it by the other party or its lawyers.

[16] As one commentator (Andrew Beck) has pointed out, to be "GST neutral" the party seeking GST does not have to account to Inland Revenue for GST on a costs award, and the party paying costs is not able to claim back a GST component from Inland Revenue. As noted in *Burrows*, this is because no GST-attracting service is being provided by the claimant to the party paying costs. In other words,

the issue of GST neutrality relates to the cost claim transaction *not* to the underlying transactions giving rise to the costs incurred by the claimant party in a proceeding. In relation to those transactions, GST will have been included in virtually all cases. If the claimant is GST registered, they will have been able to claim the GST back. If they are not GST registered they will not have been able to claim the GST back. In my view the GST neutrality principle applies to the extent that costs awards do not, of themselves, attract GST. However this is a different consideration to whether or not a claimant can properly include GST in the amount sought by way of a costs award.

[17] GST has obvious implications for the net quantum of actual costs incurred by the parties, and implications for the first stage of an assessment of costs generally adopted by this Court – namely, an assessment of actual costs. That is because, depending on whether or not the claimant is GST registered, they have the potential to claim back the GST component from Inland Revenue. If they are, then their actual costs are the GST exclusive amount. If they are not, their actual costs will be the GST inclusive amount. At the current GST rate of 15 per cent the difference can be significant. It is employees who more likely to be adversely affected.

[18] In *Wills* Judge Corkill held that:

Any circumstances which might otherwise have justified the inclusion of GST in an assessment of costs can still be ameliorated by the Court through an uplift in its eventual award beyond the standard 66 per cent starting point.

I favour the latter approach which permits the Court to exercise a discretion as may be appropriate in the circumstances. In the present case, I allow a modest increase for this factor since the plaintiff is not GST registered.

[19] I prefer a different approach. As I have already observed, the usual starting point for costs in ordinary cases in this Court is 66 per cent of actual and reasonable costs. In my view a determination of the actual costs incurred by the claimant party requires knowledge of whether or not they are GST registered. A simple example reflects the inequities, generally against employees, that can arise depending on the approach that is followed:

Under the *Wills* approach:

**Scenario 1: Employer A** has succeeded on a claim against Employee B and has incurred legal costs of \$11,500 (GST inclusive). Employer A is GST registered, so has actual costs of

\$10,000 given that they are able to claim the GST component back from Inland Revenue. Employee B is ordered to pay a contribution to costs of \$6,600 (being 66 per cent of \$10,000). Employer A's true

recovery is \$8,100 (being \$1,500 GST plus the \$6,600 costs award), which represents approximately 70 per cent of the GST inclusive costs they incurred.

**Scenario 2: Employee B** has succeeded on a claim against Employer A and has incurred legal costs of \$11,500 (GST inclusive).

Employee B is not GST registered, so has actual costs of \$11,500. Employer A is ordered to pay a contribution of \$6,600 (being 66 per cent of \$10,000). However Employee B's actual costs were \$11,500. Only recovering \$6,600 represents approximately 57 per cent of actual costs incurred.

Under an actual costs incurred approach:

**Scenario 1: Employer A** has succeeded on a claim against Employee B and has incurred legal costs of \$11,500 (GST inclusive).

Employer A is GST registered, so has actual costs of

\$10,000 given that they are able to claim the GST component back from Inland Revenue. Employee B is ordered to pay a contribution to costs of \$6,600 (being 66 per cent of \$10,000).

**Scenario 2: Employee B** has succeeded on a claim against Employer A and has incurred legal costs of \$11,500 (GST inclusive).

Employee B is not GST registered, so has actual costs of \$11,500. Employer A is ordered to pay a contribution to costs of \$7,590 (being 66 per cent of \$11,500).

[20] It is immediately apparent that applying the *Wills* approach in Scenario 1 works favourably for a GST registered employer, but under Scenario 2 the starting point for the successful employee (who is not GST registered) is effectively 57 per cent, rather than the usual starting point of 66 per cent, of actual costs.

[21] With respect, I do not consider that a "modest" discretionary uplift adequately addresses the inequities that arise. In *Wills* it appears that an uplift of approximately 7.4 per cent was allowed, well short of what would have been achieved had the claimant been GST-registered.

[22] I consider that the objectives of clarity, consistency and certainty, and the broader objectives of the Act, are best met by assessing the claimant party's net costs at stage one of the Court's inquiry (assessment of actual costs), consistently with the established principle that a party is only entitled to claim the costs which it has actually incurred. If the claimant is GST registered, then the costs they have actually incurred is the amount exclusive of GST. If they are not GST registered, then the costs they have actually incurred is the amount inclusive of GST.

[35] As I have said, I invited further submissions on the GST point. Counsel for Ritchies submit that the approach adopted in *Knapp* has not been followed in three subsequent judgments of the Court<sup>23</sup> and that recently a full Court in *Fagotti* declined to express a view on the issue, indicating that it may be appropriate for consideration by a full Court in due course.<sup>24</sup> Counsel submit that in these

circumstances the “GST neutral” approach must continue to be applied. I do not agree that I am bound to apply such an approach simply because a full Court has indicated that it may, at some future date, consider the issue. A full Court has not yet done so and accordingly I do not have the advantage of its views. Nor am I bound by other judgments of this Court.

[36] I have considered each of the three judgments referred to by counsel for Ritchies, namely *Shanmuganathan v Powernet Ltd*; *Smith Crane and Construction Ltd v Hall* and *Sealord Group v Pickering*. None contain an analysis of the GST issue and in two (*Shanmuganathan* and *Smith Crane*) Judge Corkill records that neither party raised the point.<sup>25</sup>

[37] The Court of Appeal, whose judgments do bind this Court, does not appear to have had the opportunity to deal with the issue as it applies in this jurisdiction. However, the following observation by Richardson P and Henry J for the Court in *Commissioner of Inland Revenue v National Insurance Company of New Zealand*

*Ltd* captures the point and succinctly answers the plaintiff’s objections:<sup>26</sup>

*In our view all that needs to be said on this issue is that where a Court decides to take into account the amount of a party’s solicitor and client costs, the appropriate figure to use for that purpose is the amount actually payable by that party, including where applicable the GST component of that liability.* The amount of the actual award will however remain in the discretion of the Court in the usual way, and in exercising that the Court can take into account all other relevant considerations.

(emphasis added)

<sup>23</sup> *Shanmuganathan v Powernet Ltd* [2015] NZEmpC 160; *Smith Crane & Construction Ltd v Hall*

[2015] NZEmpC 159; *Sealord Group Ltd v Pickering* [2015] NZEmpC 158.

<sup>24</sup> *Fagotti v Acme & Co Ltd* [2015] NZEmpC 135, (2015) NZELR 1 at [112].

<sup>25</sup> *Shanmuganathan v Powernet Ltd* at [13]; *Smith Crane and Construction Ltd v Hall* at [13].

<sup>26</sup> *Commissioner of Inland Revenue v National Insurance Co of New Zealand Ltd* (1999) 19 NZTC

15,135 (CA) at [57], cited in *Mr Chips*, above n 16 at [47].

[38] The actual costs payable by Mr Merennage in defending Ritchies’ challenge and in pursuing his cross-challenge include GST. He is unable to recover that component of his costs liability. His position can be contrasted to the position Ritchies would have been in had the result been different.

[39] I agree with Chief Judge Goddard’s observation in *Davidson v Christchurch*

*City Council* that:<sup>27</sup>

It is unrealistic, when contemplating the costs incurred, to deduct from them the GST component of those costs where the parties, the clients being charged the costs, are unlikely to be registered for GST purposes and are therefore going to be unable to recover the GST. *So the true cost incurred by them is the full amount of the fee including GST.*

(emphasis added)

[40] I would add that where a party is not GST registered and is not entitled to claim input credits, an issue of inequity arises in terms of costs awards in this jurisdiction, illustrated by the comparative examples set out in *Knapp* above. It is employees who are likely to be hit the hardest.

[41] Finally, it is unclear whether the introduction of a scale-costs regime in this Court will put the GST issue to rest. The reality is that a significant percentage of litigants in this Court (employees) are not registered for GST and have no way of recovering the GST component of the legal costs they incur in pursuing, or defending, claims. Adopting a “GST neutral” approach would likely place employees at a 15 per cent financial disadvantage in pursuing or defending litigation in this Court. That appears to me, on its face, to be inequitable and at odds with the broader objectives of the Act. I do not, however, need to decide the point in this case.

[42] For the foregoing reasons I consider it appropriate to assess Mr Merennage’s actual costs as including the GST component he has been charged by his legal representatives, which he is liable to pay and which he has no ability to recover. He

is entitled to a contribution of 66 per cent of his actual costs, which were reasonably

<sup>27</sup> *Davidson v Christchurch City Council* [1995] NZEmpC 95; [1995] 1 ERNZ 523 at 528-529. This case was reversed in part by the Court of Appeal, but the issue of GST was not disturbed; *Christchurch City Council v Davidson* [1996] 2 ERNZ 1 (CA).

incurred, together with the uplift I have already allowed. If I am wrong about this I would exercise my broad discretion as to costs to increase the quantum I would otherwise award to compensate for the incidence of GST, to ensure that Mr Merennage ultimately receives a reasonable contribution to the costs he has incurred in successfully defending the challenge and in prosecuting his cross-challenge. I consider that to be the fairest, most sensible and equitable outcome.

## Disbursements

[43] Mr Merennage is entitled to full recovery of his reasonable disbursements. [44] He claims \$276.99 by way of reimbursement for the cost of reissuing an air

ticket following the plaintiff's successful application for an adjournment. Ritchies takes issue with this claim on the basis that it appears, from earlier correspondence produced in these proceedings, that Mr Merennage had travel insurance. It has not been satisfactorily established that the costs associated with reissuing the air ticket were in fact incurred by Mr Merennage and were not otherwise recoverable by him. Accordingly I make no order for this claimed amount.

[45] The defendant's claimed disbursements include two unspecified bureau fees totalling \$390. Ritchies objects to this aspect of the claim on the basis that it is unclear what the claimed costs relate to. This concern was not addressed by counsel in reply submissions. I am not satisfied that these costs were necessarily incurred and/or are reasonable and I am not prepared to allow them.

[46] The defendant is entitled to the filing fee on his cross-challenge in this Court (\$204.44); the hearing fee on his cross-challenge (\$500.88); and disbursements relating to photocopying costs (\$200).

### **Conclusion**

[47] The plaintiff is ordered to pay the defendant the sum of \$33,000 by way of contribution to costs, together with disbursements of \$204.44 by way of filing fee on

the cross-challenge in this Court; \$500.88 by way of hearing fee on his cross- challenge; and \$200 for photocopying costs.

Christina Inglis

Judge

Judgment signed at 4 pm on 17 March 2016

---

**NZLII:** [Copyright Policy](#) | [Disclaimers](#) | [Privacy Policy](#) | [Feedback](#)

URL: <http://www.nzlii.org/nz/cases/NZEmpC/2016/22.html>