



Employment Court of New Zealand

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Sfizio Limited v Freeborn [2021] NZEmpC 73 (20 May 2021)

Last Updated: 25 May 2021

IN THE EMPLOYMENT COURT OF NEW ZEALAND WELLINGTON

I TE KŌTI TAKE MAHI O AOTEAROA TE WHANGANUI-A-TARA

[\[2020\] NZEmpC 73](#)

EMPC 7/2019

IN THE MATTER OF a challenge to a determination of
 the Employment Relations
 Authority
AND IN THE MATTER of an application for costs
BETWEEN SFIZIO LIMITED
 Plaintiff
AND KATIE FREEBORN
 First Defendant
AND CURTIS PAUL GREGORASH AND
 KATHY LOUISE PARFITT
 Third Parties

Hearing: (on the papers)
Appearances: C Kenworthy, counsel for plaintiff and for third
 parties F Lear, counsel for defendant
Judgment: 20 May 2021

COSTS JUDGMENT OF JUDGE B A CORKILL

Background

[1] This judgment resolves a costs issue which arose following the filing by the plaintiff of a notice of discontinuance on 18 November 2019.

[2] A brief procedural history is necessary. Ms Freeborn placed a relationship problem before the Employment Relations Authority. It was brought against the now third parties. At the Authority's investigation meeting, it substituted the name of the

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third parties with the name of the plaintiff company. Ms Freeborn succeeded in her claims.

[3] On 11 January 2019, Sfizio Ltd (Sfizio) brought a challenge to the Authority's determination.¹ Ms Freeborn, at that stage unrepresented, filed a statement of defence on 15 March 2019. Then, she briefed counsel.

[4] On 8 May 2019, I granted leave for the defendant to file an amended statement of defence, and an application to join parties. These documents were filed on 21 May 2019.

[5] Sfizio filed a notice of opposition, which contained a statement appearing to indicate an intention to withdraw the

challenge. Subsequently, however, Mr Gregorash, as agent for Sfizio, told the Court the challenge would not be withdrawn. Leave was granted for an amended notice of opposition to be filed on 3 July 2019.

[6] The Court then received submissions on the application to join parties, that is, Mr Gregorash and Ms Parfitt. In an interlocutory judgment issued on 11 October 2019, I directed that Ms Freeborn could serve a statement of claim and third-party notice against those third parties by 18 November 2019.² Costs were reserved.

[7] On 5 November 2019, Mr Gregorash sent an email to the Registrar suggesting that the challenge would be withdrawn and advising a memorandum would be sent to the Court the following day. He was informed that if the proceedings were not to be advanced by the plaintiff company, a notice of discontinuance would be necessary.

[8] This did not occur until 18 November 2019. In the meantime, the third-party proceedings brought by Ms Freeborn against Mr Gregorash and Ms Parfitt were filed and served.

¹ *Freeborn v Sfizio Ltd* [2018] NZERA Wellington 112 (Member Loftus).

² *Sfizio Ltd v Freeborn* [2019] NZEmpC 143.

[9] Now that the notice of discontinuance has been filed, Ms Freeborn has applied for costs. Annexed as Appendix A is her assessment of these on a Category 2, Band B basis. A time allocation of 12.95 days produces the claimed sum of \$30,950.50, based on a daily rate of \$2,390. In addition, disbursements of \$55.35 are sought, as well as

\$1,500 in respect of the application for costs.

[10] Counsel for Ms Freeborn, Ms Lear, has confirmed that actual costs incurred by Ms Freeborn total \$32,365, plus GST and disbursements.

[11] The application is opposed. Counsel for the plaintiff and the third parties, Ms Kenworthy, says that the costs amount sought were grossly overestimated.

[12] Ms Kenworthy submitted that some regard needs to be given to the amount which was in issue; the Authority had awarded less than \$3,000 across all remedy categories, so that a claim for \$32,505.86 for costs and a disbursement was unreasonable and disproportionate. She also argued that a discount was appropriate since there was a reasonable possibility that the third parties would not have been held liable after a substantive hearing. Regard needed to be given to the actual costs incurred, when fixing costs under the Court's scale. She went on to submit that there were a number of items claimed according to the scale which were not applicable in the present case.

Analysis

[13] The applicable principles are well known. The Court has a broad discretion in awarding costs.³ That discretion must be exercised on a principled basis and in the interests of justice.

[14] The Court's Guideline Scale has been introduced to support the objective that costs should be predictable, expeditiously determined and consistent.⁴ However, the Practice Direction makes it clear that the Guideline Scale is not intended to replace the Court's ultimate discretion under the statute as to whether to make an award of costs

³ [Employment Relations Act 2000](#), sch 3 cl 19.

⁴ Employment Court "Employment Court of New Zealand: Practice Directions" (1 August 2016)

<<https://employmentcourt.govt.nz/legislation-and-rules/>> at p 18.

and, if so, against whom and how much. It is a factor in the exercise of the Court's discretion.

[15] It is well established that a discontinuing plaintiff is generally liable to pay costs to the defendant up to the date of discontinuance. In that regard, the following comments of Chief Judge Inglis in *Wendco (NZ) Ltd v Unite Inc* are apposite:⁵

[4] No specific procedure has been provided for in relation to costs on a discontinuance under either the [Employment Relations Act 2000](#) or the [Employment Court Regulations 2000](#). That means that the Court must look to dispose of the case as nearly as may be practicable in accordance with the provisions of the [High Court Rules 2016](#). High Court r 15.23 provides that, unless the defendant otherwise agrees or the Court otherwise orders, a plaintiff who discontinues a proceeding against a defendant must pay costs to the defendant of and incidental to the proceeding up to and including the discontinuance. While there remains a discretion under r 15.23, the onus is on the discontinuing plaintiff to persuade the Court to exercise the discretion in its favour. The Court of Appeal has made it clear that the presumption that costs are to be paid is not lightly displaced.

[16] In this case, it is not in issue that costs are payable by the plaintiff. In her submissions, Ms Kenworthy accepted that proposition.

[17] What is in issue is the amount which should, in fairness, be paid.

[18] In my assessment, there are several matters which have to be taken into account.

[19] The first is that the assessment of costs put forward for Ms Freeborn has resulted in an assessment under the correct categorisation, 2B.

[20] The daily recovery rate used for scale purposes should normally be two-thirds of the daily rate considered reasonable in relation to the proceeding: r 14.2(1)(d) of the [High Court Rules 2016](#). I note that in the present case, the amount sought for Ms Freeborn is only slightly less than Ms Freeborn's actual costs, net of GST. This factor is relevant to the assessment of what is fair and reasonable.

5 *Wendco (NZ) Ltd v Unite Inc* [2019] NZEmpC 29 at [4].

[21] Second, I consider that some of the components of counsel's assessment are excessive in the circumstances, particularly those relating to the steps taken in connection with the application to join third parties – for instance, two days to prepare an affidavit in support, two days for the preparation of submissions, and three days for the preparation of the statement of claim against third parties, and third-party notices.

[22] Third, it is necessary to consider the extent to which costs should be awarded in respect of the application for joinder in any event. In part, the application was necessary because Ms Freeborn, who wished to argue that Mr Gregorash and Ms Parfitt were in fact her employers, did not issue her own challenge against the Authority's determination within the statutory period for doing so.⁶

[23] Often, costs for an application to bring a challenge out of time would not be ordered at all, since the grant of leave is an indulgence. However, I need also to take into account that Ms Freeborn was unrepresented at the outset, and the difficulties as to identity of the employer arose because it appears she had not appreciated the significance of the step taken by the Authority to substitute Sfizio as the employing party.⁷ Accordingly, I make a modest discount in respect of the costs incurred in bringing the application for leave.

[24] Fourth, I note that the schedule of claimed costs assumes a daily rate of \$2,390 for all attendances.⁸ In fact, the rate had been \$2,230, changing to the new rate of

\$2,390 on 1 August 2019. A modest adjustment is accordingly necessary for all steps taken prior to that date.⁹

[25] Fifth, it is reasonable to assume Ms Freeborn is not registered for GST; some allowance for this factor is appropriate.

[26] Finally, I am not persuaded that the question of costs should be proportionate to the value of the claim as fixed at first instance. Nor do I regard the potential merits

6. Following the notice of discontinuance, Ms Freeborn has applied for leave to extend time to bring a challenge against those parties.

⁷ *Freeborn v Sfizio*, above n 1, at [5].

⁸ The schedule is attached to this judgment.

⁹ [High Court Amendment Rules 2019](#).

as being relevant to the exercise of the Court's discretion where a discontinuance is filed.

[27] Taking all relevant factors into account, I order Sfizio to pay Ms Freeborn

\$22,000; I consider this sum constitutes a fair and reasonable contribution to her costs. I also order payment of the disbursement of \$55.35.

[28] I am not persuaded that this is a suitable case for costs to be ordered in respect of the application for costs.

Schedule

Defendant's claim for costs

Discontinued proceedings

Step Taken	Time allocation	Suggested time allocation (by way of analogy)
Amended statement of defence		1.5 days (based on item 2)
First directions conference (8 May):		
• Preparation	0.4 day (item 11)	
• Filing memorandum	0.4 day (item 12)	
• Appearance	0.2 day (item 13)	
TOTAL TIME 2.5 days		

Interlocutory judgment: application to join parties

Step Taken	Time allocation	Suggested time allocation (by way of analogy)
Filing interlocutory application to join third parties	0.6 day (item 28)	
Affidavit in support		2 days (based on item 36)
Second directions conference (26 June):		
• Preparation	0.4 day (item 11)	
• Appearance	0.2 day (item 13)	
Written submissions for interlocutory application	1 day (item 30)	
Submissions in reply		1 day (based on item 30)
Supplementary submissions		1 day (based on item 30)
Telephone appearance (4 October)	0.25 days (item 32)	
Statement of claim against third parties		3 days (based on item 3)
Third party notice		0.6 day (based on item 9)
Memorandum of counsel (11 November)		0.4 day (based on item 12)
TOTAL TIME 10.45 days		