



# Employment Court of New Zealand

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## Singh v Eric James & Associates Limited [2010] NZEmpC 25 (23 March 2010)

Last Updated: 26 March 2010

### IN THE EMPLOYMENT COURT

WELLINGTON [\[2010\] NZEMPC 25](#)WRC 18/09

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

AND IN THE MATTER OF an application for costs

BETWEEN NARINDER PAL SINGH

Plaintiff

AND ERIC JAMES & ASSOCIATES LIMITED

Defendant

Hearing: By memoranda of submissions filed on 2 February, 3 and 15 March 2010

Judgment: 23 March 2010

### COSTS JUDGMENT OF CHIEF JUDGE GL COLGAN

[1] The defendant seeks a contribution to its legal costs in this Court two-thirds of its actual costs of representation of \$22,714.87 and full reimbursement of disbursements totalling \$3,560.32. Two-thirds of actual solicitor/client costs of \$22,714.87 is \$14,991.81.

[2] Counsel for the defendant has set out in his submissions a table of how costs have been calculated in stages of the litigation. For those incurred before 16 November 2009, counsel's hourly charge-out rate was \$315 (GST exclusive) and thereafter \$320 (also GST exclusive).

[3] The defendant was successful in defending the plaintiff's claim that he was employed by it. The company (EJAL) sought to claw back overpaid commissions in proceedings issued in the District Court which have been delayed by Mr Singh's assertion that he was an employee of EJAL, meaning that such claims had to be brought in the Employment Relations Authority. The defendant is entitled to a contribution to its costs of litigation.

[4] Counsel for Mr Singh says that the company's entitlement to costs should be refused because of the time and cost to which he was put by it in obtaining disclosure of documents relevant to the dispute and, in particular, e-mails. It is said for the plaintiff that the company resisted disclosure although was ultimately required to do so by this Court's judgment given on 11 November 2009 (WC 24/09). It is said that the defendant put itself to considerable expense in resisting improperly disclosure of documents and so it should not now be entitled to reimbursement of those costs.

[5] Next, the plaintiff says that it was unnecessary for the company to have brought an expert witness to Wellington from Auckland for the sake of the evidence given by that witness. He says that there would have been a number of other witnesses with expertise in insurance practice available in Wellington and, in particular, from the large AMP organisation which is based in Wellington.

[6] The plaintiff points to his financial circumstances and says, correctly, that this Court must take into account his ability to pay costs.

[7] Unusually in this jurisdiction, but helpfully, Mr Singh has filed a statement of his financial means. This discloses that his annual income in the past 12 months has been approximately \$55,000 so that his present weekly income (before tax) is about \$2,500. His expenses for the same period are said to have totalled almost \$67,000 although these include a number of one-off payments including in part repayment of a loan and legal fees. Mr Singh says

that his present weekly expenses are a little less than \$1,000. His assets are said by him to include a modest motor vehicle and shares in his present employer to a value of almost \$21,000. Mr Singh also says that he has unsecured debts of about \$32,000 and expects to have liabilities in the next six months totalling a little less than \$20,000.

[8] In reply, the company submits that it has not made any claim in respect of its costs of document discovery including the e-mails although, it says, the majority of this disclosure was irrelevant to the relatively narrow issue before the Court.

[9] The defendant asserts that it was not only appropriate but necessary to call expert evidence on the question of industry practice and that its witness was someone with sufficient senior industry experience whose expertise was not challenged in cross-examination. In these circumstances, the defendant says that the costs of the expert witness are a justifiable disbursement.

[10] As to Mr Singh's financial circumstances, counsel for the company submits that these do not disclose an inability to pay costs of an amount that would normally be awarded by the Court. Counsel points particularly to the significant balance available between Mr Singh's weekly earnings and his outgoings. The company doubts Mr Singh's claims of impecuniosity and asserts that at a time when relationships were cordial between the two, Mr Singh boasted of having invested a very substantial sum in an overseas spring water drink company.

[11] I do not accept that part of the claim for the period after the hearing and relating to "*consideration of judgment and attendances to costs issue to date*". The defendant was successful, meaning that it is now entitled to continue its proceedings in the District Court but for which costs are not covered by this Court. Next, although the defendant is, of course, entitled to have legal representation of its choice at all stages, many of the issues would not have required the expertise of counsel charging at that level. The case for the defendant was dealt with by a firm of solicitors whose website discloses the usual range of solicitors of levels of seniority and experience (including in employment law). It is safe to infer that although it was no doubt appropriate for a partner of Mr Fairclough's seniority to appear at the hearing, much of the preparatory work could have been undertaken appropriately by a less expensive practitioner. In these circumstances I propose to allow, as a starting point for fair and reasonable legal fees for this case (including GST), a figure of \$15,000. Two-thirds of that sum is \$10,000 which is what I will allow the defendant to recover from the plaintiff for legal fees.

[12] Turning to disbursements, I have concluded, again, that although the defendant is entitled to the legal representation of its choice, there is no justification to require the plaintiff to contribute to the costs of having Christchurch counsel appear in a Wellington case. The proceeding was properly filed in the Court at Wellington. I therefore disallow the claims for air fares, taxi fares and accommodation for counsel and for the company's representative who was also from Christchurch.

[13] Turning then to the costs of the defendant's expert witness who came from Auckland to Wellington for the hearing, these are said to be \$1,250, being 4½ hours (including travelling time) on 4 December 2009 at the rate of \$250 per hour, a consultation fee of \$125 (one-half hour at \$250 per hour), air fares from Auckland to Wellington and return of \$567.12, and taxi fares amounting to an apparently remarkable \$321.20.

[14] Again, it is the defendant's choice to have an expert witness from another city but I am not satisfied that the sort of evidence given by Ms Ballantyne could not have been called from a witness based in Wellington and therefore at a lower cost. I allow \$500 as a disbursement for expert witness fees.

[15] The defendant is entitled to a contribution towards costs of \$10,000 together with a contribution towards disbursements of \$500.

GL Colgan

Chief Judge

Judgment signed at 9 am on Tuesday 23 March 2010