



Employment Court of New Zealand

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Stenhouse v Towman Towing Group Limited [2022] NZEmpC 43 (15 March 2022)

Last Updated: 19 March 2022

IN THE EMPLOYMENT COURT OF NEW ZEALAND CHRISTCHURCH

I TE KŌTI TAKE MAHI O AOTEAROA ŌTAUTAHI

[\[2022\] NZEmpC 43](#)

EMPC 345/2020

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

AND IN THE MATTER OF an application for costs
BETWEEN SHELLEY STENHOUSE
Plaintiff

AND TOWMAN TOWING GROUP
LIMITED
Defendant

EMPC 167/2021

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

BETWEEN TOWMAN TOWING GROUP
LIMITED
Plaintiff

AND SHELLEY STENHOUSE
Defendant

Hearing: On the papers

Appearances: A Halse, advocate for plaintiff P
Cahill, advocate for defendant

Judgment: 15 March 2022

COSTS JUDGMENT OF JUDGE K G SMITH

SHELLEY STENHOUSE v TOWMAN TOWING GROUP LIMITED [\[2022\] NZEmpC 43](#) [15 March 2022]

[1] Judgment was issued in these proceedings on 26 October 2021.¹ It dealt with two challenges arising from a determination of the Employment Relations Authority.² Ms Stenhouse challenged the whole of the determination and added a claim alleging that Towman Towing Group Ltd had breached her right to privacy.³

[2] Towman's challenge was confined to disputing the Authority's conclusion that a personal grievance had arisen because of the circumstances in which Ms Stenhouse worked from home.⁴

[3] The costs arising from these proceedings were reserved. The parties have been unable to reach agreement about them and a further decision is required.

[4] The starting point is cl 19 of sch 3 to the [Employment Relations Act 2000](#) (the Act) which confers on the Court a broad discretion about costs. The Court may order one party to pay another party the costs and expenses considered to be reasonable. The Court's discretion must, however, be exercised judicially and in accordance with well-established principles.⁵ It is assisted by a guideline scale intended to support, so far as possible, the policy objective that determining

costs should be predictable, expeditious and consistent.⁶ The scale is not, however, to replace the discretion.

[5] In addition, the [Employment Court Regulations 2000](#) provide that in exercising this discretion regard may be had to the conduct of the parties tending to increase or contain costs.⁷

[6] Ms Stenhouse sought costs of \$18,023.38 plus GST, as costs of the proceeding and a further \$750 towards the costs of preparing the application for costs.

[7] Towman is opposed to paying costs to Ms Stenhouse and has sought them from her. Towman sought \$28,700 for services provided by Mr Cahill's business, Kendra

1 *Stenhouse v Towman Towing Group Ltd* [2021] NZEmpC 183.

2 *Stenhouse v Towman Towing Group Ltd* [2020] NZERA 426 (Member van Keulen).

3 *Stenhouse*, above n 1, at [12].

4 At [14].

5. See, for example, the decision in *UXK v Talent Propeller Ltd* [2021] NZEmpC 223; *Victoria University of Wellington v Alton-Lee* [2001] NZCA 313; [2001] ERNZ 305 (CA).

6 "Employment Court of New Zealand Practice Directions" <www.employment.govt.nz> at No 16.

7 Regulation 68(1).

Employment Law, \$19,310.53 for payments made to a former lawyer, and \$2,283.90 payable to another former lawyer.

[8] Mr Cahill's submissions proposed two alternatives if the Court was not prepared to award all of the costs it sought. The first alternative was a request for a reasonable contribution to those costs. The second alternative was a request that costs lie where they fall, in a sense replicating the Authority's decision not to award them.

The issues

[9] The following issues arise from the applications for costs:

(a) Should costs be awarded and, if so, to which party?

(b) If costs are awarded, in what amount?

Should costs be awarded?

[10] It is trite that costs follow the event so that usually the successful party is entitled to an award of them to defray the expense incurred in the litigation.

[11] In this case both parties can claim a measure of success. Ms Stenhouse was found to have been unjustifiably dismissed and disadvantaged in her employment. Compensatory awards were made under ss 123(1)(b) and 123(1)(c)(i) of the Act;

\$1,400 was awarded for lost wages and \$14,000 for humiliation, loss of dignity and injury to feelings. The remainder of Ms Stenhouse's claims were unsuccessful.⁸

[12] Towman succeeded in relation to its claim that Ms Stenhouse was not unjustifiably disadvantaged by working from home.⁹

[13] At first blush it might, therefore, be said that there is a reasonable case for costs to lie where they fall. Such a result would not, in my view, properly reflect the nature of the proceeding or lead to a just outcome.

8 *Stenhouse*, above n 1, at [92].

9 At [92](e).

[14] Most of the proceeding was about Ms Stenhouse's claims of unjustified dismissal. While Towman succeeded in the Authority on the unjustified dismissal claim it did not, in reality, present a response to this part of the challenge.

[15] The unjustified disadvantage claim fell into two parts. The first part was a claim that Towman did not act as a fair and

reasonable employer by failing to conduct an impartial investigation into allegations of bullying and/or harassment.¹⁰ The second part was Ms Stenhouse's claim that she was compelled to work from home and that her access to Towman's systems was blocked.

[16] The bullying and/or harassment claim failed.¹¹ The second, about working from home and having access blocked, was partly successful. I found that Ms Stenhouse was prevented from working because Towman blocked her access to its computer systems. The company did not dispute denying her access or explain why it was denied. Instead, the company concentrated on a different and irrelevant matter which was an unfounded allegation that Ms Stenhouse was not entitled to be paid for the hours she claimed while not having access to the company's systems.¹²

[17] Stepping back to look at the litigation overall, Ms Stenhouse was the successful party.

[18] Mr Cahill's submissions relied on Ms Stenhouse's rejection of a settlement offer made without prejudice except as to costs (sometimes called a Calderbank offer). He was referring to a letter from Towman's former lawyer to Ms Stenhouse dated 6 March 2020. That letter described the strengths and weaknesses of the parties' respective cases and made an offer to Ms Stenhouse to settle the dispute for \$15,000 under s 123(1)(c)(i) of the Act payable by instalments.

[19] Mr Halse's submissions did not address Mr Cahill's argument about the Calderbank offer.

10 At [63].

11 At [79].

12 At [84].

[20] A steely approach is taken to Calderbank offers and they can have a significant impact on an award of costs.¹³

[21] I do not accept Mr Cahill's submission. First, the lawyer's letter was tailored to the Authority investigation. It set out the consequences of not accepting the proposal and informed Ms Stenhouse, correctly, that if the offer was rejected Towman would be able to rely on having made it in relation to costs in the Authority.

[22] Mr Cahill did not explain how an offer made in relation to the Authority investigation continued to have value in assessing costs arising from proceedings in the Court. More importantly, the sum awarded to Ms Stenhouse actually exceeded the amount offered.¹⁴

[23] There is nothing in the Calderbank offer or its rejection from which it might be discerned that Ms Stenhouse carried on with litigation unnecessarily or that costs were incurred unreasonably.¹⁵

[24] Ms Stenhouse is entitled to an award of costs. The next issue is how much to award.

What amount?

[25] The claim for costs came to \$18,478.81 plus GST. It comprised a claim for reimbursement of costs incurred with a law firm of \$4,247.08 and CultureSafe NZ Ltd's invoices totalling \$13,481.73, plus GST. A further \$750 plus GST was sought for preparing the application for costs.

[26] I will deal first with the law firm's fees. The law firm issued five bills of costs totalling \$4,247.08 plus GST. For two reasons the claim for them cannot succeed. The first reason is that recovery of them was pursued as part of the claimed compensation dealt with in the judgment. However, no evidence about them was

13. *Bluestar Print Group (NZ) Ltd v Mitchell* [2010] NZCA 385, [2010] ERNZ 446; *Health Waikato v Elmsly* [2004] NZCA 35; [2004] 1 ERNZ 172 (CA).

14 *Stenhouse*, above n 1, at [92].

15 [Employment Court Regulations 2000](#), reg 68(1).

provided during the hearing. The judgment refers to that omission being drawn to Mr Halse's attention. He did not seek leave to call further evidence and the claim failed.¹⁶ Having unsuccessfully pursued recovery of the fees as compensation they cannot be reintroduced under the guise of being part of a costs claim.

[27] The second reason is that the law firm's fees pre-dated the Authority's determination on costs and, if recoverable as costs, might have been sought there.¹⁷ Ms Stenhouse did not seek costs in the Authority and Towman's claim for them failed. The Authority declined to award costs and that decision was not challenged. Mr Halse did not explain how a claim for costs that might have been made in the Authority, and where that subject was disposed of completely by it, could be revived as costs relating to or arising from these proceedings.

[28] The law firm's fees must be deducted from the claimed amount. The balance of the costs claim, excluding the claim for preparing the application, is \$13,481.73 plus GST.

[29] In presenting submissions, Mr Halse and Mr Cahill did not provide any information using the Court's Guideline Scale. That was despite a conference allocating a costs category to the proceeding under that guideline of 2B.

[30] That omission has required an attempt to be made by the Court to assess, for comparative purposes, what the scale might indicate for costs. My calculation of the steps taken in the proceedings using the scale produced a sum greater than is claimed. I consider it is therefore possible to award costs as sought, on the basis of recovering fees paid, but it is first appropriate to check that what is claimed is reasonable.¹⁸

[31] The claimed costs were in two invoices. The primary invoice was dated 18 January 2022 and is invoice 2428. The other invoice is invoice 63, which was included in invoice 2428 as if forming part of a reconciliation or statement.

16 *Stenhouse*, above n 1, at [55].

17 *Stenhouse v Towman Towing Group Ltd* [2021] NZERA 10 (Member van Keulen).

18. The scale amount cannot be awarded if it would result in payment of more than has been spent. See [High Court Rules 2016](#), r 14.2(f) applied via [Employment Court Regulations 2000](#), reg 6.

[32] Invoice 2428 was for \$10,523.73, plus GST. Invoice 2428 covered the period from 4 November 2020 to 17 January 2022, but the hearing concluded on 14 September 2021 and judgment was issued on 26 October 2021. The narration described many of the services charged for as "employment consultancy" without elaboration.

[33] Mr Halse was asked to provide further information about the invoices. That request led to a further exchange of submissions. Invoice 63 was explained as an original invoice raised by CultureSafe NZ Christchurch dated 8 November 2020. It covered services when Ms Stenhouse initially engaged CultureSafe NZ Christchurch before CultureSafe NZ took over the case. The invoice was labelled as a draft explaining why it was included in the narration of services in invoice 2428.

[34] Despite that explanation there are concerns about the invoices as follows:

- (a) Some charges are not justified.
- (b) Some of the items in the two invoices duplicate each other.
- (c) Some charges are not adequately explained.

[35] I will deal first with invoice 2428. This invoice charged for Mr Halse's flights to Christchurch, airport parking, accommodation, meals, transport to and from the airport and included a charge for his time spent travelling. The combined total of those charges is \$1,385.28.

[36] No explanation was provided to justify why the costs of attendances for an out-of-town representative should be awarded. There are lawyers, and other representatives, in Christchurch who could have adequately prepared and presented Ms Stenhouse's case without the need to incur these additional charges. In the absence of an explanation they are not justified and must be deducted from the total claimed.

[37] The invoice includes consultancy services on 30 October 2021, cost letters (the narrative in the invoice is taken to mean dealing with the claim for costs) written on 1 November 2021 and the preparation of submissions over the following days. The

time charged for these consultancy services comes to \$1,380. The difficulty with these aspects of invoice 2428 is that they refer to costs incurred after the hearing and judgment. There is also a duplication. Separately from the attendances in the invoice an application was made as part of Mr Halse's submissions for the costs of preparing the application for costs. I have decided that the appropriate course is to remove from the calculation the invoiced time for preparing costs and to separately consider the claim made in the submissions. That means the adjusted total of the invoice needs to have a further reduction of \$1,380.

[38] Invoice 2428 charged \$5 per minute for considering and replying to 406 emails. The charge came to \$4,059.60. The invoice records them as received and charged for up to and including 17 January 2022. It is not possible to tell from the balance of the invoice when they were sent and received. A reasonable assumption is that many of them are likely to have been sent before and during the hearing but, given the invoice includes services after the hearing, some of them are likely to have been sent subsequently.

[39] I considered disallowing the claim for these attendances on the basis that awarding the whole amount might be unfair to Towman. Its exposure ought to be to costs properly connected with the hearing, not subsequent steps taken on Ms Stenhouse's behalf and which may be unconnected to the judgment or potentially compensated in other ways. However, such a conclusion would be unfair to Ms Stenhouse because she must have communicated with Mr Halse.

[40] Rather than delay this decision by inviting a further round of submissions, I have decided that the appropriate course to adopt is to accept that a significant amount of the correspondence probably took place before and during the hearing and that an apportionment is required to reflect that. On this admittedly rough and ready basis I have decided that three-quarters of the costs should be treated as properly being connected with the hearing. The amount of \$1,000 is to be deducted from the adjusted value of the invoice.

[41] The final adjustment to invoice 2428 is to deal with another duplication between it and invoice 63. Both of them refer to filing a statement of defence to

Towman's challenge but only one was filed. Invoice 2428 contains a narration of \$240 for the time and attendances for this task. Invoice 63 contains a narration for the same thing of \$120. A conservative approach is required by removing the higher amount.

[42] Bringing to account the adjustments to invoice 2428 produces the following summary:

Description	Amount
Invoice 2428	\$10,523.73
Less travel related costs	\$ 1,385.28
Less duplicated costs claim	\$ 1,380.00
Less emails allowance	\$ 1,000.00
Less duplicated statement of defence	\$ 240.00
Total	\$ 6,518.45

[43] No adjustments are required to invoice 63. The total of the two invoices after the adjustments are made is therefore:

Description	Amount
Invoice 2428	\$ 6,518.45
Invoice 63	\$ 2,958.00
Total	\$ 9,476.45

[44] The invoices charged to Ms Stenhouse attracted GST. I assume Ms Stenhouse is not GST registered. I am prepared to uplift costs to recognise that situation. An uplift of \$1,400 is appropriate. The total therefore becomes \$10,876.45, which I would round to \$10,800.

[45] The remaining matter is the application for costs for the time and attendances incurred in preparing the application for costs. The Court was not sufficiently assisted by Mr Halse's submissions to justify a further award for preparing the application for costs. That application is dismissed.

Outcome

[46] Towman is to pay costs to Ms Stenhouse of \$10,800.

K G Smith Judge

Judgment signed at 8.50 am on 15 March 2022