

**IN THE EMPLOYMENT COURT  
AUCKLAND**

**[2015] NZEmpC 153  
EMPC 99/2015**

IN THE MATTER OF      an application for costs

BETWEEN                YASODHARA DA SILVEIRA  
                                 SCARBOROUGH  
                                 Plaintiff

AND                        MICRON SECURITY PRODUCTS  
                                 LIMITED  
                                 Defendant

Hearing:                By memoranda of 14 and 26 August 2015

Appearances:        Y Scarborough, in person  
                                 D France and S Worthy, counsel for defendant

Judgment:            7 September 2015

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**COSTS JUDGMENT OF JUDGE M E PERKINS**

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[1]     In a judgment dated 31 July 2015 Ms Scarborough's application for rehearing was dismissed.<sup>1</sup>

[2]     The defendant had submitted that if the application was dismissed, costs be reserved to enable the defendant to justify seeking indemnity costs against Ms Scarborough in respect of the application. Costs were accordingly reserved. I set timetabling for the filing of memoranda and both parties have now filed their submissions on costs. The defendant seeks costs and that is opposed by Ms Scarborough.

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<sup>1</sup>     *Scarborough v Micron Security Products Limited* [2015] NZEmpC 130.

[3] Earlier, on 18 May 2015, Judge Inglis had issued an interlocutory judgment<sup>2</sup> declining Ms Scarborough's application for a stay of proceedings. Judge Inglis held that the defendant was entitled to costs on that application, the quantum of which was reserved. The defendant now seeks to have such costs quantified.

[4] The defendant seeks an order of indemnity costs in the amount of \$5,420.80 (excluding GST) in its favour in relation to both the application for stay and the application for a rehearing.

[5] As will be ascertained from a reading of the judgments dated 18 May 2015 and 31 July 2015, Ms Scarborough's application for a stay of proceedings and rehearing were unfounded and without merit. The defendant was required, nevertheless, to take both applications seriously as Ms Scarborough was intent on requiring the Court to hear her. In defending both applications the defendant would have incurred substantial legal costs. Indeed the sum now claimed as indemnity costs for both matters would appear, in the circumstances, to be modest and clearly reasonable. In his submissions Mr France, counsel for the defendant, has appropriately categorised the attendances undertaken.

[6] The Court's discretionary power to award costs is contained in cl 19 of Schedule 3 of the Employment Relations Act 2000. In exercising its discretion, by virtue of reg 68(1) of the Employment Court Regulations 2000, the Court may have regard to any conduct of the parties tending to increase or contain costs. As Mr France has submitted, that is particularly apposite in the present case.

[7] The general principles applicable to awards of costs in the Employment Court are now well established.<sup>3</sup> Costs will generally follow the event. The Court then undertakes a two-stage process to determine whether the actual costs incurred by the successful party were reasonably incurred and secondly, the level at which the losing party should contribute to those costs. The starting point is two-thirds of actual and reasonable costs.

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<sup>2</sup> *Scarborough v Micron Security Products Ltd* [2015] NZEmpC 69.

<sup>3</sup> *Victoria University of Wellington v Alton-Lee* [2001] ERNZ 305 (CA); *Binnie v Pacific Health Ltd* [2002] 1 ERNZ 438 (CA); and *Health Waikato Ltd v Elmsly* [2004] 1 ERNZ 172 (CA).

[8] The Court may award indemnity costs. In considering an application for indemnity costs, the Court will have regard to analogous principles contained within the High Court Rules and as applied in decisions of that Court. Rule 14.6(4)(a) of the High Court Rules provides that a Court may order a party to pay indemnity costs if that party has acted vexatiously, frivolously, improperly, or unnecessarily in commencing, continuing, or defending a proceeding or a step in the proceeding. Indemnity costs are defined by r 14.6(1)(b) of the High Court Rules as being the actual costs, disbursements and witnesses expenses reasonably incurred by a party.

[9] Decisions such as *Ben Nevis Forestry Ventures Ltd v Commissioner of Inland Revenue*<sup>4</sup> and *Bradbury v Westpac Banking Corporation*<sup>5</sup> refer to examples of where indemnity costs may be ordered. The making of allegations of fraud knowing them to be false and the making of irrelevant allegations of fraud have been held to be one example. Conduct causing loss of time to the Court and to the other party in commencing or continuing proceedings for some ulterior motive, wilful disregard of known facts or clearly established law applying to the proceedings, making allegations which ought never to have been made or unduly prolonging a case by making groundless contentions are other examples. If the case is truly hopeless the action taken will be presumed to have been commenced for some ulterior motive.

[10] Applying these principles to the present case, I find that Ms Scarborough has indeed made unsubstantiated allegations of fraud against officers of Micron Security Products Limited (Micron). Neither application ever had any reasonable prospect of success and both have caused loss of time to the Court and to Micron. Both applications were truly hopeless and must therefore be presumed to have been commenced for some ulterior motive on Ms Scarborough's part. Being a lay person, she may not have had wilful disregard for clearly established principles of law applying particularly to the application for a rehearing, but she certainly disregarded known facts in the matter. In addition to the allegation of fraud, she has made other scandalous allegations and groundless contentions against officers of Micron. Having regard to all of the circumstances, Ms Scarborough has acted vexatiously,

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<sup>4</sup> *Ben Nevis Forestry Ventures Ltd v Commissioner of Inland Revenue* [2014] NZCA 348, (2014) 22 PRNZ 322.

<sup>5</sup> *Bradbury v Westpac Banking Corporation* [2009] NZCA 234, (2009) 19 PRNZ 385.

frivolously and improperly; and has unreasonably caused the defendant to incur costs on matters which should never have been placed before the Court. Accordingly, this is an appropriate case to award indemnity costs.

[11] Ms Scarborough filed a memorandum of submissions in support of her opposition to the award of costs and an award of indemnity costs against her. Those submissions fail to deal specifically with the issue of costs and instead re-traverse matters raised by her during the course of hearing the applications. They repeat some of the unfounded allegations she has previously made against officers of Micron and continue with her attack on the integrity of legal counsel, Mr France.

[12] Ms Scarborough has made no submission or supplied any information in respect of her financial position. It is known that in respect of a previous award of costs against her in these proceedings she has sought leave to appeal to the Court of Appeal. Such an appeal would require payment of a substantial filing fee. In her most recent submissions, she states that she intends to commence proceedings for a judicial review. Again filing fees would be payable on such proceedings. That would indicate that there is no financial impediment to her paying any further award of costs against her.

[13] Accordingly, there is an award of indemnity costs against Ms Scarborough in the sum of \$5,420.80 in respect of her unsuccessful applications for stay and rehearing.

M E Perkins  
Judge

Judgment signed at 12.15pm on 7 September 2015