

**IN THE EMPLOYMENT COURT
AUCKLAND**

**[2016] NZEmpC 147
EMPC 196/2015**

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

AND IN THE MATTER of an application for costs

BETWEEN ITE
Plaintiff

AND ALA
Defendant

EMPC 272/2015

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 ALA
Plaintiff

AND ITE
Defendant

Hearing: On the papers filed on 18, 24 and 27 May; 9 August; 6, 27, 28
and 20, 28 and 29 September 2016

Appearances: Plaintiff (ITE) in person
M Ward-Johnson, counsel for defendant (ALA)

Judgment: 15 November 2016

COSTS JUDGMENT OF JUDGE CHRISTINA INGLIS

[1] The defendant (ALA) seeks indemnity costs against the plaintiff. The application arises against the backdrop of the plaintiff's unsuccessful challenge to a determination of the Employment Relations Authority.¹

[2] The challenge was dismissed for reasons set out in my judgment dated 15 April 2016.² I ordered the plaintiff to comply with the terms of a settlement agreement and ordered him to pay a penalty of \$6,000. The defendant had cross-challenged against the Authority's costs determination on the basis that it was entitled to indemnity costs under the terms of a settlement agreement. I held that the plaintiff was liable to pay indemnity costs.³ The relevant clause of the agreement provided that:⁴

[the plaintiff] agrees and acknowledges that, if he breaches clauses 11 and/or 12 of this agreement, he will be liable for any of [the defendant's] costs and/or disbursements (including expert fees and/or solicitor/client costs) incurred in addressing, responding to or dealing with the breach.

[3] Evidence was given at hearing in respect of the nature and extent of the costs said to have been incurred by the defendant in addressing, responding to and/or dealing with the plaintiff's established breach of the agreement. I concluded, based on the evidence before the Court, that the defendant was entitled to indemnity costs in respect of the fees incurred in obtaining the services of a psychologist to assist staff in dealing with the fall-out of the plaintiff's breaches on them. I was not satisfied, based on the evidence before the Court, that the fees incurred for IT services fell within the scope of the indemnity provision or that they were reasonable in the circumstances.⁵

[4] It was not possible to fully quantify the total costs incurred by the defendant as at the date of hearing. I directed that if the parties could not agree on this issue, further memoranda (with supporting information) would need to be provided. Agreement did not prove possible and memoranda were subsequently filed.

¹ *P v Q* [2015] NZERA Auckland 181.

² *ITE v ALA* [2016] NZEmpC 42. A subsequent application for leave to appeal was dismissed; *B v ALA* [2016] NZCA 385.

³ At [86]–[87], [105]. The indemnity provision was reflected in identical terms in an undertaking signed by the plaintiff.

⁴ At [86].

⁵ At [91].

[5] Further issues then arose. The defendant had initially sought costs on a GST-inclusive basis. I invited further submissions on this point, drawing the parties' attention to recent Court of Appeal authority on the issue.⁶ The defendant has advised that it no longer seeks GST inclusive costs.

[6] The plaintiff's primary submission is that a proportion of the defendant's claimed costs do not fall within the indemnity provision and/or are unreasonable in amount. He has raised a number of issues with various invoices and information provided to the Court.

[7] Further information relating to various attendances has been filed by the defendant. It accepts that the costs associated with the plaintiff's requests for information under the Local Government Official Information Act 1987 and the Protected Disclosures Act 2000 can be excluded, together with the costs associated with alternative dispute resolution and communications with the Police in relation to a firearms licensing issue. I agree that such exclusions are appropriate in the circumstances.

[8] The plaintiff takes issue with the costs associated with various telephone conversations he had with Mr Ward-Johnson, following an instruction from the defendant that all communication be directed through counsel. The plaintiff says that some of these conversations involved matters that were unrelated to the proceedings. Mr Ward-Johnson accepts that while a limited number of attendances were directed at the plaintiff's information requests, the communications were primarily related to the litigation itself. I accept that this is so. However, I consider that a reduction of \$1,000 to reflect attendances associated with the plaintiff's information requests is appropriate.

[9] I make a further downwards adjustment to reflect attendances referred to in the invoices provided in support of the claim which are not satisfactorily explained and which I am not satisfied, based on the material before the Court, fall within the indemnity provision and/or are reasonable in amount. Such attendances include the

⁶ *New Zealand Venue and Event Management Ltd v Worldwide NZ LLC* [2016] NZCA 282. See too *Ritchies Transport Holdings Ltd v Merennage* [2016] NZEmpC 22 at [30]-[41].

costs associated with work undertaken by Mr Fowler QC; legal attendances relating to unspecified “security” issues; an application advanced by the defendant for leave to file out of time; and legal attendances relating to a “Sunlive” article (which gave rise to an application by the defendant which was dealt with on a consent basis, and which was not finally determined).

[10] The defendant has put before the Court additional material in relation to the costs associated with attendances by a psychologist, Mr McGregor. The plaintiff takes issue with whether such costs fall within the scope of the indemnity costs clause. As I have said, in my substantive judgment I found that the defendant was entitled to indemnity costs in relation to such attendances and that the costs identified by Ms Downey in her evidence were reasonable in quantum. As Ms Downey made clear, those costs were to 31 October 2015.

[11] The additional material relates to the costs associated with the attendances of Mr McGregor in preparing a brief of evidence and attending Court on 11 December 2015 and 17 February 2016. These costs amounted to \$6,127.84. The claimed psychologist costs also relate to a review of material from Hikaka Investigations Ltd and preparation of a “risk assessment” report dated 11 November 2015, totalling \$2,600. While I accept that the costs relating to Mr McGregor’s attendances as a witness fall within the indemnity provision and are objectively reasonable, the same cannot be said for the review of material and the risk assessment report. I exclude them.

[12] The defendant has also put before the Court additional material in relation to the costs associated with the provision of IT services. I dealt with those costs in my substantive judgment. I was not satisfied that the claim had been made out based on the evidence before the Court. That remains the position.

[13] The defendant has confirmed that it incurred costs of less than \$50,000⁷ in responding to the plaintiff’s breaches in the Authority. That means that the earlier order needs to be varied and reduced to reflect the defendant’s actual legal costs, reasonably incurred – namely \$48,859.73.

⁷ Refer [92] substantive judgment.

[14] I am satisfied that legal costs (minus the exclusions and adjustments I have considered appropriate in the circumstances) of \$90,500 were incurred by the defendant in addition to the costs leading up to the Authority's determination (of \$48,859.73). These costs fall within the indemnity provision, being costs incurred in addressing, responding to or dealing with the plaintiff's established breach. I am satisfied on the basis of the information before the Court, and my knowledge of the nature and extent of the issues raised by the proceedings, that such costs are objectively reasonable. I do not accept the plaintiff's broader assertion that the defendant unnecessarily incurred costs or that its conduct ought to reduce or extinguish its entitlement to its legal costs under the indemnity provision.

[15] I allow the defendant's disbursements. These appear to total \$1,429.90, comprising \$871.50 (copying bundles for hearing); \$200.00 (courier charges); and \$358.40 (copying, binding, cases for hearing).

[16] It follows from the foregoing that the plaintiff is ordered to pay the defendant the rounded down sum of \$153,120, comprising \$48,859.73 (legal costs - Authority); \$90,500 (legal costs post-dating Authority's determination); \$12,331.98 (psychologist) and disbursements of \$1,429.90.

Christina Inglis
Judge

Judgment signed at 4.45 pm on 15 November 2016