

**IN THE EMPLOYMENT COURT  
AUCKLAND**

**[2018] NZEmpC 112  
EMPC 121/2018  
EMPC 290/2017  
EMPC 334/2017**

IN THE MATTER OF challenges to determinations of the  
Employment Relations Authority

AND IN THE MATTER OF an application for special leave to remove  
matter to the Employment Court

AND IN THE MATTER OF applications for costs

BETWEEN ELENA KAZEMI  
Plaintiff

AND RIGHTWAY LIMITED  
First Defendant

AND EDWIN FREDERICK SHAND READ  
Second Defendant

AND GREGORY MICHAEL SHEEHAN  
Third Defendant

AND DARRYL DEVENDRA JHINKU  
Fourth Defendant

Hearing: On the papers

Appearances: T Drake, counsel for plaintiff  
B Smith and M McGoldrick, counsel for defendants

Judgment: 27 September 2018

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**COSTS JUDGMENT OF JUDGE J C HOLDEN**

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[1] The proceedings Ms Kazemi filed in the Employment Relations Authority (the Authority) have been removed to the Employment Court (the Court). This judgment

resolves the costs involved in the various proceedings that surrounded that removal.

It covers costs in the Court on:

- (a) Ms Kazemi's challenge to the Authority's costs determination (EMPC 121/2018);
- (b) Ms Kazemi's challenge to the Authority's determination on the application for removal (EMPC 290/2017); and
- (c) Ms Kazemi's application for special leave to remove the matter to the Court (EMPC 334/2017).

[2] It also covers related costs issues that have arisen in the Authority on:

- (d) Ms Kazemi's application for removal in the Authority;
- (e) the Authority's determination of costs for that application; and
- (f) Ms Kazemi's application for a stay of the Authority proceedings.

### **History of the proceedings**

[3] Ms Kazemi filed her statement of problem in the Authority and applied for an order removing it to the Court. That application was opposed and the Authority declined to remove the proceedings.<sup>1</sup>

[4] Ms Kazemi filed a challenge to the Authority's determination.

[5] The defendants sought costs in the Authority. Ms Kazemi sought that costs be put on hold pending the outcome of her challenge. She also sought a stay of the Authority's substantive proceedings pending the outcome of her challenge.

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<sup>1</sup> *Kazemi v Rightway Ltd* [2017] NZERA Auckland 300.

[6] On 20 October 2017, the Authority determined costs and granted the stay of the Authority's proceedings sought by Ms Kazemi.<sup>2</sup> The Authority awarded \$1,500 costs to the defendants.

[7] The defendants filed statements of defence to the challenge in the Employment Court. Prior to the first directions conference, they also filed a memorandum raising the issue of whether Ms Kazemi's adoption of the s 179 challenge process was appropriate or whether she ought to be seeking special leave for an order removing the matter to the Court, pursuant to s 178(3) of the Employment Relations Act 2000 (the Act).

[8] Following the directions conference on 21 November 2017, Ms Kazemi filed an application for special leave to remove the matter to the Court. The defendants opposed her application for special leave.

[9] The parties then filed submissions on the issue of whether the matter should be dealt with as a challenge or as an application for special leave, and dealing substantively with the question of removal. On 11 December 2017, after submissions had been received, the Court issued its judgment in *Johnston v The Fletcher Construction Co Ltd*, which resolved the procedural issue, finding that, where a party disagrees with the Authority's decision not to remove a matter, an application for special leave was the correct route.<sup>3</sup> As a result of that decision being delivered, Ms Kazemi effectively abandoned her challenge, but did not discontinue it.<sup>4</sup> The defendants also filed further submissions, taking account of *Johnston*, at the invitation of Chief Judge Inglis. The Chief Judge proceeded to deal with the matter on the papers and granted the application for special leave.

[10] The substantive removed proceedings remain on foot.

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<sup>2</sup> *Kazemi v Rightway Ltd* [2017] NZERA Auckland 331; *Kazemi v Rightway Ltd* [2017] NZERA Auckland 330.

<sup>3</sup> *Johnston v The Fletcher Construction Co Ltd* [2017] NZEmpC 157 at [43]-[51].

<sup>4</sup> *Kazemi v Rightway Ltd* [2018] NZEmpC 3 at [4].

## **A number of costs issues arise**

[11] The issues to be dealt with in this judgment comprise:

- (a) the amount of costs due to Ms Kazemi for matters in the Authority;
- (b) the categorisation for costs purposes of the application for special leave, and whether Ms Kazemi is entitled to costs for obtaining a judgment without an appearance (the defendants otherwise accepting that the claimed costs are due to Ms Kazemi);
- (c) how costs in respect of the challenge to the Authority's removal determination ought to be factored in; and
- (d) the level of costs to which Ms Kazemi is entitled in relation to her challenge to the Authority's costs determination.

## **Costs in the Authority are due to Ms Kazemi**

[12] The defendants accept that, because of Ms Kazemi's success in the Court on her application for special leave, she is entitled to costs in the Authority.

[13] The Authority dealt with the application for special leave on the papers.

[14] As the originally successful parties, the defendants sought \$1,500 for costs. The Authority agreed that was appropriate, noting that, using that Authority's daily tariff of \$4,500 for the first day of an investigation meeting, the amount sought represented the equivalent of two hours of hearing time.

[15] The defendants say this award simply should be reallocated to Ms Kazemi, so that she is awarded \$1,500 for the Authority proceedings (plus disbursements and GST).

[16] Ms Kazemi disagrees and seeks \$3,015. She points to the work involved in the Authority proceedings, including with respect to her applications that costs be put

on hold pending the outcome of her challenge and for a stay of the Authority proceedings.

[17] Ms Kazemi's application that costs be put on hold was included as part of her submissions on costs. Her application for a stay was dealt with expeditiously by the Authority. The defendants did not oppose the application for a stay; and the Authority's determination was short, essentially recording the position of the parties and the order made. I am not prepared to increase the costs order to include any sum for either application.

[18] Costs in the Authority recognise that it is a low-level body. Accordingly, they are modest. Here, the legal fees were more than the amount awarded by the Authority, on both sides. As the Authority Member notes, costs are discretionary.<sup>5</sup> She said the amount claimed by the defendants was reasonable and appropriate and would do justice to both parties.<sup>6</sup>

[19] There is no reason to depart from the view reached by the Authority. Ms Kazemi is entitled to \$1,500 for costs in the Authority.

[20] The defendants accept that Ms Kazemi is entitled to be reimbursed for the filing fee of \$133.33 paid in the Authority and, because she is an individual not registered for GST, also can recover GST on both the costs and the disbursements.<sup>7</sup>

[21] In total, therefore, the defendants are to pay Ms Kazemi \$1,878.33 (inclusive of GST) for the Authority proceedings.

### **Two issues arise on Ms Kazemi's entitlement to costs on the application for special leave**

[22] The defendants accept that Ms Kazemi is entitled to costs on her successful application for special leave. The two areas where there is dispute are the

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<sup>5</sup> Employment Relations Act, sch 2, cl 15.

<sup>6</sup> *Kazemi v Rightway Ltd* [2017] NZERA Auckland 331 at [8].

<sup>7</sup> *Stormont v Peddle Thorp Aitken Ltd* [2017] NZEmpC 159 at [35]-[37], [44].

categorisation for costs purposes of the application for special leave, and whether Ms Kazemi is entitled to costs for obtaining a judgment without an appearance.

*Categorisation for cost purposes is 2B*

[23] Ms Kazemi submits that the application for special leave should be treated as a Category 2, Band C matter because it required a reconsideration of the development of case law under the equivalent provisions to s 178 of the Act in the Employment Contracts Act 1991.

[24] This issue also was in contention in *Johnston* and counsel for Ms Kazemi appeared for the plaintiff in that case too.<sup>8</sup> In considering costs in *Johnston*, the Chief Judge agreed that the preparation of submissions would have required a comparatively large amount of time, given the nature of the issues involved and the need to undertake a comprehensive review of the relevant authorities. On that basis, she allocated Band C for that step, with the other steps in pursuing the application being left as appropriately Band B.<sup>9</sup> If I were to adopt the same approach here, the costs for the submissions would be increased from \$2,230 (for 1 day), to \$3,345 (for 1.5 days), a difference of \$1,115 (plus GST). However, I do not believe that is appropriate because Ms Kazemi had the benefit of the legal work that had been done for *Johnston*. Accordingly, the costs for the proceeding are categorised as Category 2, Band B.

*Ms Kazemi also has claimed for obtaining judgment without an appearance*

[25] Ms Kazemi includes an amount for work done obtaining judgment without an appearance. The amount for this step on a Category 2B basis would be \$669 (for 0.3 days) plus GST.

[26] The defendants submit that Ms Kazemi, having prepared (and claimed for) written submissions, and with the Court having determined the matter on the papers, there is no basis on which the additional claim for costs in relation to obtaining judgment without an appearance should be granted. In reply, counsel for Ms Kazemi

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<sup>8</sup> *Johnston v The Fletcher Construction Co Ltd* [2018] NZEmpC 18.

<sup>9</sup> At [6].

refers to reviewing the submissions in opposition, carrying out further legal research and preparing a second lot of submissions in reply, arranging for the filing and service of documents, correspondence with the Court registry and other incidental work.

[27] Those matters are encompassed in the claim made for the preparation of written submissions. Although this item is included in the Employment Court's costs guideline, it is of limited application. It is to cover situations where other items are not applicable. In the High Court, the equivalent provision may apply, for example, where a party obtains judgment by default.<sup>10</sup>

[28] No amount is allowed for this item here, bringing the total for costs (exclusive of GST) to \$6,913.

*Ms Kazemi entitled to Court filing fee and GST*

[29] Ms Kazemi is also entitled to recover the Court filing fee inclusive of GST (totalling \$204.44) and to GST on the costs.

[30] Therefore, the amount to which the plaintiff is entitled for the application for special leave is, in total, \$8,154.39.

**The effort the defendants were put to with respect to Ms Kazemi's challenge to the Authority's determination needs to be recognised**

[31] The defendants then claim costs in respect of Ms Kazemi's challenge to the determination of the Authority to decline to remove the matter.

[32] The defendants submit that they are entitled to costs on a Category 2B basis.

[33] Before the application for special leave was filed, the defendants took a number of steps. They were correct about the appropriate procedure from the outset.

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<sup>10</sup> See, for example, *Watts v Leary* [2016] NZHC 1623.

[34] If Ms Kazemi had formally discontinued her challenge, rather than effectively abandoning it, there would have been a presumption that the defendants were entitled to costs.<sup>11</sup> I consider the position is analogous.

[35] I am prepared to accept the claims made by the defendants for costs for the commencement of their defence to the challenge (1.5 days), preparation for the first directions conference (0.4 days), filing their memorandum for the first directions conference (0.4 days), and their appearance at the first directions conference (0.2 days). In relation to the written submissions, 1 day is claimed. The submissions covered both the challenge and the application for special leave on which the plaintiff was successful. I am prepared to allow the defendants 0.5 days for the preparation of their submissions on the matters of procedure. Accordingly, 3 days are allowed at the daily rate of \$2,230, leading to a total of \$6,690.

**Ms Kazemi entitled to costs on her challenge to the costs determination, but at a modest level**

[36] Because of the way these proceedings played out, it was necessary for the plaintiff to file a separate challenge to the Authority's costs determination. With her success in her application for special leave, Ms Kazemi is successful in her challenge to the Authority's costs determination; the costs award recognises that the success on this challenge flows from her success on the application for special leave.

[37] I consider it appropriate to allow costs for the filing of the challenge to the costs determination, but based on Category 1, Band A. The statement of claim did not require anything elaborate; it simply needed to bring the matter before the Court. Accordingly, 1.5 days are allowed at \$1,480 per day, leading to an amount for costs (exclusive of GST) of \$2,220.

[38] Ms Kazemi is also entitled to recover the Court filing fee inclusive of GST (totalling \$204.44) and to GST on the costs, making a total of \$2,757.44.

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<sup>11</sup> *Taranaki Galvanisers Ltd v Udderfield Ltd* [2018] NZCA 297 at [10] and [16]; see also *Kelleher v Wiri Pacific Ltd* [2012] NZEmpC 98, [2012] ERNZ 406 at [10].



## **Overall outcome**

[39] The overall outcome then is:

- (a) Ms Kazemi is entitled to \$1,878.33 from the defendants for costs and disbursements on the Authority proceedings;
- (b) Ms Kazemi is entitled to \$8,154.39 from the defendants for costs and disbursements on the application for special leave (EMPC 334/2017);
- (c) the defendants are entitled to \$6,690 from Ms Kazemi for costs on the challenge to the Authority's determination (EMPC 290/2017); and
- (d) Ms Kazemi is entitled to \$2,757.44 from the defendants for costs and disbursements on the challenge to the costs determination (EMPC 121/2018).

[40] Netting those amounts off means that the defendants must pay Ms Kazemi \$6,100.16.

[41] There is no award of costs with respect to the applications this judgment deals with.

J C Holden  
Judge

Judgment signed at 10.00 am on 27 September 2018