

**IN THE EMPLOYMENT COURT OF NEW ZEALAND  
AUCKLAND**

**I TE KŌTI TAKE MAHI O AOTEAROA  
TĀMAKI MAKĀURAU**

**[2019] NZEmpC 128  
EMPC 258/2018**

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

AND IN THE MATTER of an application for costs

BETWEEN HORIZON CONCEPTS LIMITED  
Plaintiff

AND SHANE HAYWARD  
Defendant

**EMPC 366/2018**

AND IN THE MATTER of proceedings removed from the  
Employment Relations Authority

AND IN THE MATTER of an application for costs

BETWEEN SHANE HAYWARD  
Plaintiff

AND HORIZON CONCEPTS LIMITED  
Defendant

Hearing: On the papers

Appearances: P Swarbrick, counsel for Horizon Concepts Ltd  
S Hayward, in person

Judgment: 16 September 2019

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**COSTS JUDGMENT OF JUDGE K G SMITH**

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[1] Horizon Concepts Ltd successfully challenged an Employment Relations Authority determination about Mr Hayward's status when he worked for the company between June 2016 and July 2017.<sup>1</sup> The substantive judgment held that Mr Hayward was a contractor, not an employee.<sup>2</sup> That decision resolved Horizon Concepts challenge to the Authority determination and the matters removed to the Court.<sup>3</sup>

[2] The parties have been unable to agree on the costs of the proceedings, if any, and Horizon Concepts has applied for an order fixing the amount payable to it. Horizon Concepts is seeking costs for both the proceedings in the Court, and for attendances in the Authority, where costs were reserved but not determined.<sup>4</sup> The total amount sought in the Court and Authority is \$34,213 and disbursements of \$4,177.77. No claim is made for GST, because Horizon Concepts is GST registered.

[3] The proceedings were assigned Category 2 Band B from the Court's Practice Direction Guideline.<sup>5</sup> Horizon Concepts' claim relies on the Guideline Scale for all attendances including commencing the proceeding challenging the determination, preparing for and participating in telephone directions conferences, responding to the proceeding removed to the Court, and for all necessary attendances to prepare for, and attend, the hearing. That sum is \$29,213.

[4] The claim for costs in the Authority is based on seeking an amount that would have been ordered if the Authority's usual tariff applied, which is \$4,500 for the first day of an investigation meeting. That is the amount claimed because the investigation lasted for one day.

[5] A claim of \$500 is made for the costs of preparing the application for costs.

[6] The claimed disbursements sought are made up of Court filing fees of \$204.44, the Authority removal application fee of \$153.33 and \$3,820 for the expense incurred in paying Mr Somerville for his attendances to give evidence.

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<sup>1</sup> *Hayward v Horizon Concepts Ltd* [2018] NZERA Auckland 244.

<sup>2</sup> *Horizon Concepts Ltd v Hayward* [2019] NZEmpC 75.

<sup>3</sup> *Hayward v Horizon Concepts Ltd* [2018] NZERA Auckland 348.

<sup>4</sup> *Hayward v Horizon Concepts Ltd*, above n 1, at [73].

<sup>5</sup> *Horizon Concepts Ltd v Hayward*, above n 2, at [42]; Employment Court Practice Directions, No 16 (<[www.employmentcourt.govt.nz/legislation-and-rules](http://www.employmentcourt.govt.nz/legislation-and-rules)>).

[7] Mr Hayward has opposed an order being made because of his financial circumstances. He submitted that costs should lie where they fall or, alternatively, that only minimal costs should be ordered against him.

[8] Clause 19 of Schedule 3 to the Employment Relations Act 2000 confers a broad discretion on the Court to order costs. That discretion is augmented by reg 68(1) of the Employment Court Regulations 2000 providing that, in exercising the discretion, the Court may have regard to any conduct tending to increase or contain costs.

[9] From the beginning of January 2016 the Court has been assisted in exercising the discretion by the Guideline Scale referred to earlier. The guideline recognises that, in fixing costs, the principles relating to them including increased costs, indemnity costs, the refusal of costs or the reduction of them, and the effect of making settlement offers, are all matters which can be taken into account in exercising the discretion. The Guideline was intended to assist in making decisions on costs predictable, expeditious and consistent but it does not replace the Court's discretion.<sup>6</sup>

[10] Ms Swarbrick's submissions accurately recorded each of the steps taken in these proceedings by reference to the scale. Mr Hayward's submissions did not question any of the steps included in the claim or the accuracy of the calculation. Instead he concentrated on his financial circumstances.

[11] Mr Hayward described a change in his personal circumstances and his difficult financial position as reasons for his inability to pay the amount claimed except, possibly, by instalments. He stated the extent of his indebtedness as approximately \$60,500 involving liabilities to finance companies, ACC, and to repay personal loans from friends. His net income was stated as \$941.86 per week. His weekly outgoings were listed, including some debt repayments, at \$1,081.65 leaving a shortfall of income over outgoings of \$139.79.

[12] Mr Hayward bears the onus of establishing that his financial circumstances should be taken into account and, if they are, to justify why any award that might otherwise be made should not be made, or should be reduced. His financial position

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<sup>6</sup> See, for example, the comments in *Xtreme Dining Ltd v Dewar* [2017] NZEmpC 10 at [25].

was only generally described in his submissions and was not supported in any way, such as by affidavit evidence. Mr Hayward said nothing about his assets and it seems unlikely that he has none. One of the expenses listed by him was for fuel, presumably for a vehicle but that was not mentioned by him. Furthermore, there was some evidence at the hearing about his ownership of vehicles, and an interest in a vehicle towing business. That evidence was not examined at the hearing because it arose only incidentally and was not relevant to the outcome of the case. However, it is relevant when Mr Hayward is seeking an outcome from the Court that, if granted, could see Horizon Concepts bear all of its own costs or a disproportionate amount of them. It was incumbent on Mr Hayward to explain more fully than he has done. He has not discharged the onus on him.

[13] Even if Mr Hayward had been more complete, it is unlikely I would order costs to lie where they fall, or to otherwise reduce them.<sup>7</sup> In *Scarborough v Micron Security Products Ltd* the Court observed that there may be a number of reasons why a successful party would wish to have a costs judgment despite the opposing party not being in a position to satisfy the order immediately.<sup>8</sup> I agree. It is difficult to see why Mr Hayward's present situation should lead to a reduction in what Horizon Concepts would otherwise be entitled to. The recoverability of any amount he is ordered to pay is a separate issue.

[14] Horizon Concepts is entitled to an order for costs and there is no reason to depart from the Court's Guideline Scale and the Authority's tariff. It is also entitled to costs for preparing its application for costs.

[15] The last issue to address is the claim for disbursements. I am satisfied that Horizon Concepts is entitled to be reimbursed for its filing fees and the costs incurred for the removal application. Mr Somerville's fees are not recoverable as a disbursement. He was a witness of fact and was in no different position from any other witness, even though he is a chartered accountant performing professional services for the parties. The claim for his fees to be reimbursed as a disbursement is declined.

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<sup>7</sup> See the discussion in *Tomo v Checkmate Precision Cutting Tools Ltd* [2015] NZEmpC 2.

<sup>8</sup> *Scarborough v Micron Security Products Ltd* [2015] NZEmpC 105, [2015] ERNZ 812.

## **Outcome**

[16] Mr Hayward is ordered to pay Horizon Concepts:

- (a) Costs in this Court of \$29,213.
- (b) Costs for the proceeding in the Authority of a further \$4,500.
- (c) Disbursements of \$357.77.
- (d) Costs for preparing the application for costs of \$500.

K G Smith  
Judge

Judgment signed at 12.00 pm on 16 September 2019