

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

**I TE KŌTI TAKE MAHI O AOTEAROA
TE WHANGANUI-A-TARA**

**[2021] NZEmpC 110
EMPC 449/2019**

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

AND IN THE MATTER OF an application for costs

BETWEEN CASSANDRA REID
 Plaintiff

AND NGĀTI RANGI TRUST
 Defendant

Hearing: On the papers

Appearances: A Halse, advocate for plaintiff
 G Ballara and S Radcliffe, counsel for defendant

Judgment: 19 July 2021

COSTS JUDGMENT (NO 2) OF JUDGE J C HOLDEN

[1] The Court awarded the defendant, Ngāti Rangi Trust (the Trust), costs on its application to dismiss the proceedings,¹ calculated on a Category 2B basis.²

[2] It now seeks costs in respect of the Employment Relations Authority proceedings and for the balance of the Employment Court proceedings. It seeks:

(a) \$20,000 as against actual costs in the Authority of \$23,695;

¹ *Reid v Ngāti Rangi Trust* [2021] NZEmpC 18.

² *Reid v Ngāti Rangi Trust* [2021] NZEmpC 56.

- (b) \$17,143 as its actual costs as against scale costs in the Court for the dismissed proceedings of \$16,252; and
- (c) Costs for the application for costs of \$750.

[3] It does not seek GST as it is registered for GST purposes.

The Trust points to a Calderbank offer made before the Authority investigation meeting

[4] The Authority dismissed Ms Reid's application on 1 November 2019, on the preliminary issue of status, with costs being reserved.³ Ms Reid filed her challenge before the issue of costs in the Authority was resolved, which the Trust therefore now asks the Court to do.

[5] As the investigation meeting occupied one day, based on the Authority's usual practice, costs of \$4,500 would be ordered. However, the Trust points to a letter sent in April 2018, well before the Authority's investigation meeting, that included an offer to settle the proceedings made on a "without prejudice save as to costs", or Calderbank, basis. It says that the rejection of that Calderbank offer means that Ms Reid ought to be liable for costs on a solicitor/client basis from the time the Calderbank offer was made. That leads to the figure of \$23,695 and the claim for \$20,000. The costs identified include \$1,463.42 for the costs associated with mediation.

Uplift sought on Court costs also

[6] The Trust has calculated scale costs in the Court based on the Category 2B allocation.⁴ That comes to \$16,252.

³ *Reid v Ngāti Rangi Trust* [2019] NZERA 626 at [40] (Member Ryan).

⁴ "Employment Court of New Zealand Practice Directions" <www.employment.govt.nz> at No 16.

[7] The actual solicitor/client costs incurred by the Trust for the court proceedings, excluding GST and excluding costs incurred in relation to the interlocutory application to dismiss, were \$17,143.

[8] The Trust seeks full costs in the Court on three bases:

- (a) Ms Reid's "flouting" of the Court's "unless order";
- (b) Ms Reid's conduct which caused the Court to vacate multiple fixtures and make numerous amendments to timetabling orders and schedules;
- (c) The Calderbank offer already referred to.

[9] The Trust notes that Mr Halse, the advocate for Ms Reid, has taken responsibility for much of the default in respect of the proceedings but says that does not cure Ms Reid's liability.

[10] Notwithstanding the level of costs award sought, the Trust confirms that it would accept \$10 per week from Ms Reid in payment of the costs awards.

Ms Reid did not file any evidence

[11] Although Mr Halse belatedly filed a memorandum on costs, no affidavit or other evidence was filed by Ms Reid.

[12] This means that there is no evidential foundation from Ms Reid upon which the Court can rely.

[13] As noted by the Trust, Mr Halse has founded CultureSafe New Zealand Ltd, a business in which he is the sole shareholder and director, based on representing employees in the employment institutions. He has represented clients on many occasions in the Authority and the Court and should therefore be expected to know the importance of providing evidence. The lack of any affidavit evidence from Ms Reid is regrettable.

Costs are discretionary

[14] The Court has a broad jurisdiction to award such costs and expenses as the Court thinks reasonable.⁵ A parallel jurisdiction applies to the Authority.⁶ In exercising its discretion under the Act, the Court may have regard to any conduct of the parties tending to increase or contain costs, and that includes considering any Calderbank offer made a reasonable time before the hearing.⁷

[15] In considering costs in the Authority, a Calderbank offer can be taken into account, but costs in the Authority should nevertheless remain modest.⁸ Although an uplift from the standard tariff may be warranted where, as here, there has been a Calderbank offer made and not accepted, an award of \$20,000 for a one day investigation meeting would not be consistent with modesty.

[16] I accept, however, that the Trust's Calderbank offer would continue to have relevance when considering costs in the Court. In making the offer, the Trust expressly referred to it in being full and final settlement of the claim in the Authority "or any subsequent related proceedings (including any subsequent challenge to the Employment Court)". The point is repeated several times in the letter of offer. It also is consistent with the Court of Appeal's judgment in *Bluestar Print Group (NZ) Ltd v Mitchell* in which the Court of Appeal held it was necessary to take into account the Calderbank offer made before the Authority's investigation meeting because it was for more than was ultimately achieved in the Court.⁹

[17] I agree too that there were elements of the conduct of Ms Reid and Mr Halse in the Court proceedings that increased the costs of the Trust.¹⁰

[18] There is, however, another matter that I consider to be relevant and take into account. As noted, the Trust is prepared to accept \$10 per week from Ms Reid in payment of her costs. It already has an award of costs of \$4,150 on the application to

⁵ Employment Relations Act 2000, sch 3 cl 19(1).

⁶ Employment Relations Authority 2000, sch 2 cl 15(1).

⁷ Employment Court Regulations 2000, reg 68.

⁸ *Stevens v Hapag-Lloyd (NZ) Ltd* [2015] NZEmpC 28, [2015] ERNZ 224 at [88]-[99].

⁹ *Bluestar Print Group (NZ) Ltd v Mitchell* [2010] NZCA 385, [2010] ERNZ 446 at [24].

¹⁰ See *Reid*, above n 1, at [4].

dismiss, which Ms Reid is paying at \$10 per week. This will take almost 8 years for Ms Reid to pay off. If the amount now claimed was added to the earlier costs, it would take Ms Reid over 80 years to pay it. There can be no expectation on the part of the Trust that this would happen. While there may be a number of reasons why a successful party would wish to have a costs judgment in their favour, despite the opposing party not immediately being in a position to satisfy such an award, here there is no reason given for the Trust wanting a costs award that could never be fully recovered, and it has committed to the \$10 per week payment arrangement.¹¹

[19] It seems to me that there must be a point at which Ms Reid should be free from the obligation to pay costs. The issue the Court is concerned about is how long it is reasonable to expect Ms Reid to continue paying costs to the Trust.

[20] Although the Trust elected to claim costs on the application to dismiss separately from the remainder of its costs, I consider all costs in the round.

[21] In view of the agreed payment regime in place, I order that Ms Reid pay the Trust, in total, \$6,240, including the earlier order of \$4,150, which, at the rate of \$10 per week, would see Ms Reid making payment to the Trust for a total of 12 years.

[22] There is no costs award on the application for costs.

J C Holden
Judge

Judgment signed at 11 am on 19 July 2021

¹¹ Contrast *Scarborough v Micron Security Products Ltd* [2015] NZEmpC 105, [2015] ERNZ 812 at [38].