IN THE EMPLOYMENT COURT OF NEW ZEALAND
AUCKLAND

I TE KŌTI TAKE MAHI O AOTEAROA
TĀMAKI MAKAURAU

[2022] NZEmpC 239
EMPC 317/2020

IN THE MATTER OF	an application to reopen EMPC 396/2019
AND IN THE MATTER OF	an application for costs
BETWEEN	SUSHILA DEVI BUTT First Plaintiff
AND	ARTHUR ROYD WILSON BUTT Second Plaintiff
AND	THE ATTORNEY-GENERAL SUED ON BEHALF OF THE MINISTRY OF HEALTH First Defendant
AND	THE ATTORNEY-GENERAL SUED ON BEHALF OF THE MINISTER OF HEALTH Second Defendant

Hearing:	On the papers
Appearances:	A Till and J Perrott, counsel for plaintiffs W Aldred and O Wilkinson, counsel for defendants
Judgment:	23 December 2022

COSTS JUDGMENT OF JUDGE KATHRYN BECK

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[1] Mr and Mrs Butt have applied for costs following their success on the preliminary issue of whether they were induced to enter into a record of settlement by a misrepresentation.[1]

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[1] *Butt v Attorney-General sued on behalf of the Ministry of Health* [2022] NZEmpC 183.

[2] They are seeking full indemnity costs or, in the alternative, increased costs or costs on a Category 3C basis in respect of most steps in the proceedings to date (not already dealt with in the previous costs decision).[2] Indemnity costs amount to $108,102.88. Costs on a Category 3 basis, calculated in accordance with the High Court Rules 2016, amount to $65,742.67. They seek GST on top of each of these awards on the basis that they are not registered for GST purposes.

[3] The defendants' primary submission is that the appropriate approach for the Court, in respect of the preliminary issue of misrepresentation, is to reserve costs pending the outcome of the proceedings. Alternatively, they submit that the appropriate approach is for the Court to award scale costs on a 2B basis. They say that the threshold for indemnity costs is not met and the hearing of the preliminary point was not sufficiently complex to justify Category 3. Finally, they note that the plaintiffs are claiming for all steps taken by them in these proceedings to date, including the commencement of proceedings and subsequent telephone conferences. They submit that if costs are to be awarded at this stage, they should only be in respect of the single preliminary issue and therefore confined to the steps necessary to determine that issue.

[4] Under cl 19 of sch 3 to the Employment Relations Act 2000, the Court has a broad discretion to order any party to pay any other party such costs and expenses as the Court thinks reasonable. The principles are well established.[3]

[5] The primary principle is that costs follow the event. As to quantification, the principle is one of reasonable contribution to costs actually and reasonably incurred.

[6] The Court scale is not intended to replace the Court's ultimate discretion under the statute as to whether to make an award. It is a factor in the exercise of the Court's discretion.

What is the scope of any costs award?

[7] I agree with the defendants that any costs award in this instance must only be in respect of the single preliminary issue and therefore confined to the steps necessary

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2 *Butt v Attorney-General on behalf of the Ministry of Health* [2022] NZEmpC 49.
3 *Victoria University of Wellington v Alton-Lee* [2001] ERNZ 305 (CA) at [48].

to determine that issue. It is not appropriate to go back to the initiation of the proceedings and steps taken from the outset. The award of those costs (if any) is reserved until the end of the proceedings when the outcome and success, or otherwise, of the parties is known.

Is it appropriate to reserve costs?

[8] The defendants' primary submission is that the appropriate approach is to reserve costs in relation to the preliminary issue pending the outcome of the proceedings. I do not agree. The trial of the preliminary matter was a discrete threshold issue. It is not a matter that will be revisited as part of the proceedings as a whole. It is appropriate that costs follow the event and that I fix costs at this point, similar to the previous interlocutory applications.

Increased or indemnity costs

[9] The plaintiffs note that the Court has a broad discretion to award costs and that it also has a discretion to award indemnity costs. They submit that this is a case for the exercise of that discretion on the basis that the application was unnecessary and that the Crown did not need to take the approach it did. Further, they say that the Crown has substantial resources compared to them and that this is part of a larger vein of litigation being brought by the recipients of disability funding at the current time.

[10] The defendants say that the high threshold for indemnity costs is not met. The Court did not criticise either the defendants or their counsel's conduct in the proceedings. They say that the plaintiffs' submissions, in relation to the Crown being better resourced, do not provide a basis for an uplift. I agree. Indemnity costs may be awarded in circumstances where a party has acted vexatiously, frivolously, improperly or unnecessarily in commencing, continuing or defending a proceeding.[4] Such circumstances are exceptional and require exceptionally bad behaviour.[5]

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4 High Court Rules 2016, r 14.6(4)(a); applied via the Employment Court Regulations 2000, reg 6(2)(a)(ii).

5 *Bradbury v Westpac Banking Corp* [2009] NZCA 2234, [2009] 3 NZLR 400 at [28].

[11] I appreciate that the plaintiffs are not suggesting that the defendants acted vexatiously, frivolously or improperly in this instance. Their submission is that it was unnecessary for the Crown to take the approach that it did.

[12] Essentially, the plaintiffs say that the decision to contest the preliminary issue was unnecessary. However, to justify indemnity costs the defence would need to have lacked merit.

[13] The genuineness of Mr and Mrs Butts' understanding was apparent from the outset;[6] and the basis for the misunderstanding was apparent from the face of the document.[7] However, particularly in the absence of the file note from Ms Wilson which was not produced until during the hearing itself, the decision to defend the allegation of misrepresentation, based on Ms McKechnie's recollection of the contents of the telephone conversation and other legal argument, could not be said to be lacking merit.

[14] While the defendants were entirely unsuccessful in relation to the preliminary issue, I do not consider that contesting the proceedings, or the way in which they were conducted, met the criteria for awarding costs on an indemnity basis.

[15] While it is frustrating for the plaintiffs that they are unable to recover their full costs, as noted at the outset and in previous costs decisions, the normal principle applying in these circumstances is one of reasonable contribution to costs, not indemnity. That principle is only displaced in exceptional circumstances; there are no such circumstances here.

Scale costs

[16] If they are unable to obtain full indemnity on their costs, the plaintiffs argue that scale costs should apply on a Category 3C basis. They say this was a complex matter that required expertise on matters that are rarely considered in the Employment

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6 As evidenced by the record of the advice given by Ms Wilson in her email to them dated 4 September 2020 which they attached to their correspondence to the defendants.

7 The comment on the draft – "Paula – Access tells us that additional funding isn't required for training."

Court, being the setting aside of a record of settlement based on misrepresentation and cancellation under the Contract and Commercial Law Act 2017.

[17] The defendants submit that there was nothing about the proceedings or the applications that would require a representative to have special skill or experience in the Employment Court. They say that Category 3 is reserved for the highest complexity proceedings. They may be classified as such because of the length of the proceedings or the complexity of the law involved. They say neither applies in this instance. There were no special features which took it outside the realm of normal litigation complexity, especially when compared to matters that have previously been classified as Category 3. They argue that Category 2B is appropriate in the circumstances and provided a breakdown of how such a scale would apply in this instance.

[18] I agree that this hearing in relation to the preliminary issue, while delicate, was of average complexity requiring a normal amount of time. That said, the plaintiffs are entitled to a contribution to their actual and reasonable costs, I consider such a contribution to be $25,000 in the circumstances.

Costs on costs

[19] The plaintiffs have sought costs on the costs application. As I commented previously, such an award is relatively rare and more appropriate for complex applications. This is not such an application. I do not consider that this is an occasion where an award is appropriate. No costs on the costs application are awarded.

GST

[20] The plaintiffs have also sought that GST be payable on top of any costs award given that the plaintiffs are individuals and not in a position to claim it back. The defendants submit that this is not a correct approach as it proceeds on the basis that the High Court Rules were developed on the assumption that litigants would be GST registered and there is no basis for that assumption.

[21] I accept that, as Mr and Mrs Butt are not registered for GST and as such the real value of a costs award is reduced. In the circumstances I consider it appropriate to uplift the costs awarded, as has been done in this Court previously,[8] to $29,000.

Conclusion

[22] The defendants are accordingly ordered to pay the plaintiffs the sum of $29,000 within 14 days of the date of this judgment.

Kathryn Beck
Judge

Judgment signed at 12.30 pm on 23 December 2022

[8] *Judea Tavern Ltd v Jesson* [2017] NZEmpC 120, [2017] ERNZ 726; and *Stormont v Peddle Thorp Aitken Ltd* [2017] NZEmpC 159 at [35]–[37].