

**IN THE EMPLOYMENT COURT
WELLINGTON**

**[2016] NZEmpC 46
EMPC 14/2014**

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

BETWEEN IRITANA HOROWAI NGAWHARAU
 Plaintiff

AND THE PORIRUA WHANAU CENTRE
 TRUST
 Defendant

Hearing: (on the papers by submissions filed on 1 July and 14 December
 2015)

Appearances: B Paradza, advocate for the plaintiff
 A Knowsley, counsel for the defendant

Judgment: 2 May 2016

COSTS JUDGMENT OF JUDGE A D FORD

[1] The Court regrets the delay in dealing with this matter. Mr Iritana Ngawharau challenged a determination of the Employment Relations Authority (the Authority) of 15 April 2014 which had rejected his claim of unjustifiable dismissal.¹ The Authority concluded that he had abandoned his employment. The case was heard in Wellington on 24 February and 8 May 2015. In its judgment delivered on 12 June 2015, the Court upheld Mr Ngawharau's challenge and concluded that he had indeed been unjustifiably dismissed.²

[2] Mr Ngawharau recovered the sum of \$7,680 for lost remuneration and \$4,000 as compensation for hurt and humiliation. No reduction was made on account of contribution. The plaintiff was also awarded costs. The parties were unable to reach

¹ *Ngawharau v The Porirua Whanau Centre Trust* [2014] NZERA Wellington 34.

² *Ngawharau v The Porirua Whanau Centre Trust* [2015] NZEmpC 89.

agreement on this issue and the plaintiff now seeks a formal award of costs in respect of both the Authority investigation and the hearing in this Court.

[3] After the judgment had been delivered, the defendant sought leave to appeal to the Court of Appeal. In a judgment delivered on 1 December 2015, the Court of Appeal declined leave to appeal.³ As Mr Paradza had appeared as a lay advocate for Mr Ngawharau, the Court of Appeal held that he was not entitled to costs in connection with the application for leave. That is not the position in this jurisdiction.

[4] There was no dispute as to the principles applicable to awards of costs. In the Authority they are usually based on a notional daily rate which, at the present time, stands at \$3,500. In this Court, prior to the introduction of the new Scale of Costs which applies to proceedings commenced after 1 January 2016 (which is not the situation in the present case), awards have been based on the principles enunciated by the Court of Appeal in the well known triumvirate of cases - *Victoria University of Wellington v Alton-Lee*;⁴ *Binnie v Pacific Health Limited*;⁵ *Health Waikato Limited v Elmsly*.⁶

[5] In relation to costs, the Court has a broad discretion which must always be exercised in the interests of justice and according to established principles. The approach which is generally followed is that the Court looks to determine what would be reasonable costs for the successful party in conducting the particular litigation in question and then decides what, in all the circumstances, would be a reasonable contribution for the unsuccessful party to make towards those costs. Normally, 66 per cent of the reasonable costs so determined is regarded as an appropriate contribution but that figure may need to be adjusted upwards or downwards depending upon the circumstances.

[6] In the present case, the plaintiff seeks a contribution towards his costs and disbursements in the Authority of \$3,571.56, based on the notional daily rate. Counsel for the defendant, Mr Knowsley, submitted that no costs should be awarded

³ *Porirua Whanau Centre Trust v Ngawharau* [2015] NZCA 585.

⁴ *Victoria University of Wellington v Alton-Lee* [2001] ERNZ 305 (CA) at [48].

⁵ *Binnie v Pacific Health Ltd* [2002] 1 ERNZ, 438 (CA) at [14].

⁶ *Health Waikato Ltd v Elmsly* [2004] 1 ERNZ 172 (CA).

in respect of the Authority investigation because there was no evidence that any costs, apart from the filing fee, had been incurred by the plaintiff.

[7] In his submissions on this aspect of the claim, Mr Paradza stated:

... In the ERA [the] plaintiff was represented by Mr Chris Moses who was his advocate. In the absence of invoices from Mr Moses the notional daily rate used in the Authority applies. ...

[8] I agree with Mr Knowsley that, notwithstanding the notional daily rate, in the absence of an invoice or other evidence that the plaintiff had in fact incurred costs in respect of the Authority investigation, it is not appropriate for the defendant to be ordered to make a "contribution" towards costs on this count. Although there is no evidence that Mr Moses made any charge for his services, there is an invoice from Gault Bevan Law for \$400 on account of attendances and filing of the personal grievance proceedings in the Authority. Therefore, I allow this sum together with the filing fee of \$72 (rounded off).

[9] Mr Paradza has produced invoices totalling \$12,955.90 which he submits is the figure representing the plaintiff's reasonable costs in respect of the challenge. He seeks full indemnity costs on the grounds that the Court found "no contribution whatsoever" on his part and on other grounds relating to the impact on the plaintiff of his unjustifiable dismissal.

[10] Mr Knowsley submitted that none of the grounds relied on justify an award of indemnity costs and, in this regard, he stressed that the defendant had been "100% successful in the ERA." I agree and accept that submission.

[11] Mr Knowsley further submitted that a reduction in the amount claimed was warranted on account of the fact that the plaintiff originally filed a defective statement of claim which needed to be corrected by Mr Paradza. While that statement is correct, the original statement of claim had been filed by Mr Moses and, in the absence of an invoice from Mr Moses, there is no evidence of any duplication on that count.

[12] Mr Knowsley was also critical of other charges: in particular, a claim of \$150 for office overheads; certain "post judgment" costs and a claim of \$700 for what appears to be attendances on account of the costs application itself, including

submissions. I disallow the claim for office overheads, but that does not require any deduction from the amount claimed because it does not appear in any of the invoices. I allow the claim in respect of the "post judgment" costs which appears to be reasonable. For costs on the application itself, I am prepared to allow \$400. I also allow, as disbursements, the \$200 filing fee and \$50 claimed in relation to the agreed bundle of documents.

[13] In respect of Court costs, therefore, after making the adjustment referred to in the previous paragraph, the total sum claimed amounts to \$12,650 (rounded off). I accept that that figure is a reasonable amount in respect of the conduct of litigation. The challenge was not without its difficulties and Mr Ngawharau was well represented by Mr Paradza. Turning to the appropriate contribution, I do not see any reason to depart from the usual 66 per cent figure, leaving a net award of \$8,350.

[14] In summary, Mr Ngawharau is awarded costs and disbursements totalling \$9,072 made up as follows:

The Authority

Costs:	\$400.00
Disbursements:	
Filing fee:	\$72.00

The Challenge

Costs:	\$8,350.00
Disbursements:	
Filing fee	\$200.00
Agreed bundle	\$50.00
Total:	\$9,072.00

A D Ford
Judge

Judgment signed on 2 May 2016 at 12.30 pm