

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

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

**[2024] NZEmpC 149  
EMPC 251/2022**

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

AND IN THE MATTER OF an application for costs

BETWEEN DAVID OSBORNE  
Plaintiff

AND CALLAGHAN INNOVATION  
Defendant

Hearing: On the papers

Appearances: Plaintiff in person  
P Chemis and E von Veh, counsel for defendant

Judgment: 9 August 2024

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**COSTS JUDGMENT OF JUDGE K G SMITH**

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[1] David Osborne worked for Callaghan Innovation from September 2014 until 10 August 2018. He was dismissed for redundancy and raised a personal grievance with his former employer alleging an unjustified dismissal.

[2] The Employment Relations Authority dealt with a preliminary matter arising from Mr Osborne's allegation that Callaghan Innovation breached the Protected Disclosures Act 2000 and its own disclosure policy.<sup>1</sup> The Authority concluded that it had no jurisdiction to consider Mr Osborne's claims on this subject.

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<sup>1</sup> *Osborne v Callaghan Innovation* [2022] NZERA 323 (Member O'Sullivan).

[3] Mr Osborne's challenge to the preliminary decision was unsuccessful. Consequently, Callaghan Innovation is entitled to costs.<sup>2</sup>

[4] The parties have not been able to agree about costs, and Callaghan Innovation has applied for them to be fixed. It seeks costs of \$24,330.20 on a Category 2 Band B basis in accordance with the Court's Practice Directions Guideline Scale.<sup>3</sup>

[5] Mr Osborne opposed Callaghan Innovation's application and requested that any amount awarded against him be reduced from what was claimed. He did not indicate how much the claim should be reduced by or otherwise state what could be considered a just sum to award.

[6] In addition to submissions Mr Osborne provided copies of correspondence between his former counsel and Callaghan Innovation's lawyers containing an offer made without prejudice save as to costs and the response to it.

## **Analysis**

[7] The starting point for costs is sch 3 cl 19(1) of the Employment Relations Act 2000 (the Act). That clause empowers the Court to order any party to a proceeding to pay to any other party such costs and expenses as are considered reasonable. That power is supplemented by reg 68 of the Employment Court Regulations 2000, which provides that in fixing costs regard may be had to any conduct of the parties tending to increase or contain costs.

[8] A costs award is discretionary. However, that discretion must be exercised on a principled basis. The primary principle to apply in exercising the discretion is that costs follow the event. Ordinarily that means the unsuccessful party should be ordered to make a reasonable contribution to the costs incurred by the successful party.<sup>4</sup>

[9] The guideline assists the Court in exercising the discretion. It is intended to support the policy, so far as is possible, that determining costs should be predictable,

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<sup>2</sup> *Osborne v Callaghan Innovation* [2024] NZEmpC 116.

<sup>3</sup> Employment Court of New Zealand Practice Directions" <[www.employmentcourt.govt.nz](http://www.employmentcourt.govt.nz)> at No 18.

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

expeditious and consistent. That said, the guideline is an aid to exercising the discretion and is not intended to replace it.

[10] At a directions conference this proceeding was provisionally allocated to 2B for the purposes of the guideline. Each of the steps claimed by Callaghan Innovation in its application for costs applied that category and band.

[11] Mr Osborne made four submissions:

- (a) the costs claim is excessive;
- (b) the defendant's behaviour during mediation and in the Court process is relevant;
- (c) the principles of fairness and reasonableness should influence the Court's discretion; and
- (d) his current financial situation should be taken into account.

[12] Some of Mr Osborne's submissions were difficult to follow. As to the submission that the amount claimed was excessive, he did not point to any step claimed by Callaghan Innovation that should be disallowed, or to any adjustment that might be needed to better reflect what was done.

[13] The second submission, about the defendant's behaviour, was supported by nine very brief paragraphs which did not explain the point being made. Some of those paragraphs seemed to be criticisms of what happened in the Authority and therefore can have no bearing on costs arising from this challenge. Other paragraphs criticised Callaghan Innovation for raising "interlocutory processes" adding to the time taken, which appears to be a reference to the successful application to strike out several of Mr Osborne's causes of action.<sup>5</sup> If that is the case, no reason was given for putting aside that success. Other parts of this submission, which touched on the timeliness of

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<sup>5</sup> *Osborne v Callaghan Innovation* [2023] NZEmpC 209.

steps taken by Callaghan Innovation, lacked specificity and cannot be taken any further.

[14] Finally in relation to the second submission, while a party's conduct may be taken into account under reg 68, it would not be appropriate to reduce the costs claimed because of anything that may have happened during mediation. There were two problems which the submission did not overcome. The first was that no particulars of the alleged conduct were provided, so the claim could not be assessed. The second problem was that there is an impediment to considering what happened during mediation, which is created by s 148(3) of the Act.

[15] As to the third submission, I accept that in the exercise of fixing costs the result needs to be fair and reasonable. Mr Osborne's submissions did not, however, explain how the claim now made departed from being fair and reasonable given that the amount sought was derived entirely from the guideline and counsel confirmed that what is claimed is less than the actual costs incurred. Given the policy objective referred to earlier the submission is unsustainable.

[16] Mr Osborne's fourth submission was an invitation to take account of his financial situation. He did not disclose his income, assets or liabilities. In the absence of that sort of information it is not possible to give any weight to Mr Osborne's submission, which, presumably, was an invitation to reduce the amount otherwise payable to Callaghan Innovation. In any event, even if that sort of information had been provided, the costs to be awarded are unlikely to have been either refused or reduced in amount.<sup>6</sup>

[17] Although not part of Mr Osborne's submissions, he did provide to the Court a copy of a settlement offer made on his behalf to Callaghan Innovation. The offer invited Callaghan Innovation to make a payment to Mr Osborne. Callaghan Innovation declined to settle and was successful in defending the challenge, rendering the offer irrelevant to the amount of the costs now claimed.

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<sup>6</sup> *Tomo v Checkmate Precision Cutting Tools Ltd* [2015] NZEmpC 2, [2015] ERNZ 196.

## **Outcome**

[18] I am satisfied costs should be awarded to Callaghan Innovation on a 2B basis. Mr Osborne is ordered to pay Callaghan Innovation costs of this proceeding in the sum of \$24,330.20.

K G Smith  
Judge

Judgment signed at 3.15 pm on 9 August 2024