



Employment Court of New Zealand

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Allison v Ceres New Zealand LLC [2021] NZEmpC 230 (22 December 2021)

Last Updated: 7 January 2022

IN THE EMPLOYMENT COURT OF NEW ZEALAND CHRISTCHURCH

I TE KŌTI TAKE MAHI O AOTEAROA ŌTAUTAHI

[\[2021\] NZEmpC 230](#)

EMPC 218/2020

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 ALLISON Plaintiff
AND	CERES NEW ZEALAND LLC Defendant

Hearing: On the papers

Appearances: A Oberndorfer, advocate for plaintiff
S Townsend and H Rossie, counsel for
defendant

Judgment: 22 December 2021

COSTS JUDGMENT OF JUDGE K G SMITH

[1] Ceres New Zealand LLC has applied for costs against David Allison, following his unsuccessful challenge of a determination of the Employment Relations Authority.¹

[2] The starting point in considering Ceres' application is cl 19 of sch 3 to the [Employment Relations Act 2000](#). That clause confers a broad discretion on the Court to award costs. That discretion has to be exercised on a principled basis. It is assisted by a Guideline Scale intended to support, so far as possible, the policy objective that

1 *Allison v Ceres New Zealand LLC* [\[2021\] NZEmpC 177](#).

DAVID ALLISON v CERES NEW ZEALAND LLC [\[2021\] NZEmpC 230](#) [22 December 2021]

determining costs should be predictable, expeditious and consistent.² That scale does not, however, replace the Court's discretion.

[3] Ceres has applied for costs on a Category 2B basis. I am satisfied that category is appropriate.

[4] The amount claimed in costs using the Guideline Scale was \$26,768. Ms Townsend, Ceres' counsel, confirmed that the amount sought is substantially less than the actual costs incurred by the company.

[5] In Ms Townsend's submissions she referred to and provided a copy of a *Calderbank* letter to Mr Allison's representatives in February 2021; just over two months before the hearing of this proceeding.³ The settlement offer made in that letter proposed foregoing costs awarded against Mr Allison in the Authority, discontinuing proceedings in the Authority seeking compliance, and not seeking costs associated with steps taken in this proceeding to that point in time. There was no response to that offer.

[6] Mr Allison does not oppose an order but has requested it be for a lesser amount than Ceres claimed. Ms Oberndorfer, Mr Allison's advocate, accepted that the calculation provided by Ceres complied with the Court's Guideline Scale. A deduction was sought, however, because it included a step for filing an interlocutory application for the defendant's witness, David McIntyre, to give evidence by AVL. The reason for requesting that reduction was because AVL was necessitated for reasons beyond the control of both parties. Mr McIntyre lives in the USA and travel restrictions created by concerns over the COVID pandemic led to the application.

2. "Employment Court of New Zealand Practice Directions" www.employmentcourt.govt.nz at No 16.
3. [Employment Court Regulations 2000](#), reg 68(2)(a). See *Calderbank v Calderbank* [1975] 3 All ER 333 (EWCA).

[7] Ms Oberndorfer submitted that the inevitability of that evidence being given by AVL was accepted at a directions conference, so that it would be unreasonable for the costs of the subsequent application to authorise it to be reflected in an order.

[8] The balance of Ms Oberndorfer's submissions sought a further reduction because of Mr Allison's current personal and financial position. The information supporting the request to further reduce costs also has its origins in the pandemic. Ms Oberndorfer's memorandum stated that Mr Allison is not able to safely receive the COVID vaccination. Consequently, he is unable to remain in his present full-time employment which will end at Christmas 2021. Thereafter he will only be able to work on an on-call basis, provided the work he is able to do is consistent with his unvaccinated status.

[9] Ms Oberndorfer also advised that Mr Allison has limited financial resources to draw on, so that he will need to pay off any costs award over time. In that situation she submitted it would be unconscionable to order him to pay an amount that the Court knows he cannot reasonably meet.⁴ The request was to confine costs to \$12,500.

[10] Those submissions were not supported by an affidavit from Mr Allison. I do not propose to delay this judgment until that evidence is available and will assume that Mr Allison's position is as Ms Oberndorfer has described it.

[11] The first issue is to consider whether an adjustment should be made to the amount claimed by Ceres for the AVL application. I do not think one is appropriate. A formal application was necessary. The resulting order dealt with steps required to ensure that the evidence was able to be given in a satisfactory way. I am satisfied it is appropriate for costs to include the application.

[12] I do not accept that Mr Allison's current personal and financial circumstances warrant a reduction in the amount that might be awarded in costs. There are two

4. Relying on *Shepherd v Scan Audio New Zealand Ltd* [1999] NZEmpC 205; [1999] 2 ERNZ 374 (EmpC) at 379–380; and *IHC New Zealand Inc v Fitzgerald EmpC* Wellington WC7/07, 28 February 2007 at [11].

reasons for that conclusion. First, in *Tomo v Checkmate Precision Cutting Tools*, the Court cautioned against substantially reducing or eliminating costs liability at the stage at which costs are determined, on the basis of the unsuccessful party's financial position at that point in time.⁵ The reason for that approach was because it would deny the successful party the ability to make decisions about whether, and when, to seek to enforce an award to which it is otherwise entitled.

[13] In *Scarborough v Micron Security Products Ltd*, the Court accepted that the financial position of the unsuccessful party may be relevant in determining what to order but that is not a decisive factor.⁶ It has to be weighed against other relevant factors including the interests of the other party and the broader public interest.⁷

[14] I agree with the conclusions in *Tomo* and *Scarborough*. These considerations favour making the order as sought. The limited information provided in Ms Oberndorfer's memorandum does not persuade me that it would be just to reduce the amount to award.

[15] The second reason for declining to make an adjustment in this case is the existence of a *Calderbank* offer. A "steely" approach is taken to those offers.⁸ The offer was, in the circumstances, reasonable. When the offer was rejected Ceres was committed to substantial expense in defending the claim. It is entitled to defray some of that expense with a costs order.

[16] I am satisfied that an order ought to be made.

Conclusion

[17] Mr Allison is ordered to pay to Ceres New Zealand LLC costs of \$26,768.

⁵ *Tomo v Checkmate Precision Cutting Tools Ltd* [2015] NZEmpC 2, [2015] ERNZ 196.

⁶ *Scarborough v Micron Security Products Ltd* [2015] NZEmpC 105, [2015] ERNZ 812.

⁷ At [36].

8. *Bluestar Print Group (NZ) Ltd v Mitchell* [2010] NZCA 385, [2010] ERNZ 446 at [20]; and *Health Waikato v Elmsly* [2004] NZCA 35; [2004] 1 ERNZ 172 (CA) at [53].

[18] There is no order for any additional costs incurred in preparing the application for costs.

K G Smith Judge

Judgment signed at 11 am on 22 December 2021

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