



# Employment Court of New Zealand

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## Butterfield v Alliance Group Limited [2018] NZEmpC 108 (19 September 2018)

Last Updated: 25 September 2018

IN THE EMPLOYMENT COURT  
CHRISTCHURCH

[\[2018\] NZEmpC 108](#)  
EMPC 198/2017

IN THE MATTER OF a challenge to a determination  
of the Employment Relations  
Authority  
AND IN THE MATTER OF an application for costs  
BETWEEN WILLIAM BUTTERFIELD  
Plaintiff  
AND ALLIANCE GROUP LIMITED  
Defendant

### EMPC 201/2017

IN THE MATTER OF a challenge to a determination of the  
Employment Relations Authority  
AND IN THE MATTER OF an application for costs  
BETWEEN ALLIANCE GROUP LIMITED  
Plaintiff  
AND WILLIAM BUTTERFIELD  
Defendant

Hearing: On the papers filed on 22 June, 24 July, 13, 29 and 30  
August  
2018

Appearances: M-J Thomas, counsel for Mr Butterfield  
P Chemis and S Brookes, counsel for Alliance Group Ltd

Judgment: 19 September 2018

### COSTS JUDGMENT OF JUDGE J C HOLDEN

WILLIAM BUTTERFIELD v ALLIANCE GROUP LIMITED NZEmpC CHRISTCHURCH [2018] NZEmpC

108 [19 September 2018]

[1] Alliance Group Ltd (Alliance) succeeded in its challenge to the Employment Relations Authority's (the Authority) finding of unjustifiable dismissal; Mr Butterfield failed in his challenge in respect of Alliance's decision not to re-engage him.<sup>1</sup>

[2] Alliance now applies for costs for the Authority investigation, for costs for the Employment Court proceedings up until advice was received that Mr Butterfield was legally aided, and for an order from the Court pursuant to [s45\(5\)](#) of the [Legal Services Act 2011](#) specifying what order for costs would have been made against Mr Butterfield with respect to the remainder of the proceedings, if his grant of legal aid had not affected his liability.

[3] Ms Thomas, who has acted for Mr Butterfield throughout, initially had difficulty in making contact with Mr Butterfield

about the application. Once contact was made, Mr Butterfield applied for an extension of time to file submissions and to allow time for an affidavit and evidence of Mr Butterfield's financial position to be provided.

[4] I granted an extension to allow Mr Butterfield to file and serve any submissions regarding costs and to provide any evidence by way of affidavit in support of his submissions.

[5] Within the time allowed, submissions for Mr Butterfield were filed. No affidavit was provided.

### Events leading up to the Court hearing

[6] Mr Butterfield lodged his statement of problem in the Authority on 21 August 2015. In its determination dated 4 July 2017, the Authority upheld Mr Butterfield's claim of unjustifiable disadvantage in relation to his not being engaged by Alliance in July 2014 but dismissed his claim for unjustifiable dismissal in relation to Alliance's failure to re-engage Mr Butterfield in December 2014.<sup>2</sup>

1 *Butterfield v Alliance Group Ltd* [2018] NZEmpC 61.

2 *Butterfield v Alliance Group Ltd* [2017] NZERA Christchurch 114.

[7] Both Mr Butterfield and Alliance filed challenges to the Authority's determination.

[8] Mr Butterfield applied for legal aid. That application was received by the Legal Services Commissioner on 1 November 2017 and on 9 November 2017 Mr Butterfield was advised that legal aid had been granted. Ms Thomas advised the solicitors for Alliance of the grant of legal aid the same day.

[9] By letter dated 20 February 2018, being six days before the hearing commenced in the Court, Alliance made a Calderbank offer to Mr Butterfield to settle the proceedings.

[10] The offer was that Alliance would pay Mr Butterfield a total of \$15,000, comprising \$7,000 (less tax) for loss of wages and a further \$8,000 pursuant to s 123(1)(c)(i) of the [Employment Relations Act 2000](#) (the Act). That offer was open for acceptance until 5pm on 22 February 2018. It was not accepted by Mr Butterfield.

### Costs in the Authority are calculated with reference to a tariff

[11] Clause 15 of Schedule 2 of the Act gives the Authority a broad discretion to award costs as it thinks reasonable.

[12] The Authority adopts a daily tariff in relation to costs, as it is entitled to do.<sup>3</sup>

[13] At the time Mr Butterfield lodged his statement of problem, the Authority's daily tariff was \$3,500 per day. The investigation meeting took a day and a half.<sup>4</sup> Accordingly, the daily tariff leads to an amount of \$5,250 for costs.

### Alliance succeeded in the Employment Court

[14] Clause 19 of Schedule 3 of the Act likewise gives the Court a broad discretion to award costs as the Court thinks reasonable.

3 *PBO Ltd (formerly Rush Security Ltd) v Da Cruz* [2005] NZEmpC 144; [2005] ERNZ 808 at [46].

4 *Butterfield*, above n 2, at [83].

[15] Since 1 January 2016 the Court has used a Guideline Scale to assist it in exercising its discretion.<sup>5</sup> For costs purposes, this proceeding was allocated to Category 2, Band B.

[16] [Section 45\(2\)](#) of the [Legal Services Act](#) prevents an award of costs being made against a legally aided person in a civil proceeding, unless there are exceptional circumstances. However, that immunity does not apply to periods for which there is no grant of legal aid.<sup>6</sup>

[17] Alliance seeks \$4,683 for costs in the Employment Court prior to legal aid being granted. That sum is made up as follows:

Step	Band B allocation (Days)	Rate (2)	Recoverable amount

Commencement of defence to challenge by plaintiff	1.5	\$2,230	\$3,345
Preparation for first directions conference	0.4	\$2,230	\$892
Appearance at first or subsequent directions conference	0.2	\$2,230	\$446

[18] The amounts sought are reasonable. No separate amount has been claimed for Alliance's commencement of its challenge. No claim has been made for second counsel.

### Mr Butterfield makes submissions on his ability to pay

[19] Absent other considerations, Alliance would be entitled to \$5,250 from Mr Butterfield for costs in the Authority, and \$4,683 for costs in the Court.

5 Costs Guideline Scale <[www.employmentcourt.govt.nz](http://www.employmentcourt.govt.nz)>.

6. *AA v LA* [2017] NZHC 646 at [15]; *Carter v Western Viaduct Marine Ltd* (2003) 16 PRNZ 1034 (HC) at [23]-[25].

[20] Mr Butterfield submits that his ability to pay an award of costs is significantly restrained by the financial hardship he is in. The issue is whether, and to what extent, that level of costs should be reduced (or eliminated) because of Mr Butterfield's financial position.

[21] I had expected Mr Butterfield to file an affidavit in support of his submissions on costs and I take no account of statements made in the submissions that are unsupported by evidence. But I am prepared to have regard to the documents from Work and Income and from the Inland Revenue Department that have been supplied. Those show that Mr Butterfield is presently on jobseeker support, and has been on a very low income for some time. Further, there is no dispute that Mr Butterfield applied for civil legal aid, which was granted on 9 November 2017. That demonstrates a level of impecuniosity in the period immediately preceding the application.

[22] The Court has a wide jurisdiction on the matter of costs, and one matter that is relevant, although not decisive, is whether a proposed award would cause the losing party excessive or disproportionate hardship.<sup>7</sup>

[23] I accept that an award of costs at the level referred to in [19] would cause Mr Butterfield excessive hardship in the circumstances. I consider that an appropriate level of costs in total is \$5,000.

### Alliance is entitled to an order confirming what it would have been entitled to had Mr Butterfield not been legally aided

[24] Alliance seeks an order pursuant to [s 45\(5\)](#) of the [Legal Services Act](#) specifying what order for costs would have been made against Mr Butterfield with respect to the remainder of the proceedings if [s 45](#) had not affected his liability.

[25] The main reason a party who succeeds against a party on legal aid seeks an order under [s 45\(5\)](#) is to enable them to apply to the Legal Services Commissioner for

*7 Scarborough v Micron Security Products Ltd* [2015] NZEmpC 105, [2015] ERNZ 812 at [36];

*Leota v Chief Executive of the Ministry of Social Development* [2017] NZEmpC 18 at [6].

payment under [s 46](#) of the [Legal Services Act](#). Where a party seeks an order under [s 45\(5\)](#), in general, a Court will make one.<sup>8</sup>

[26] The purpose of sections such as [s 46](#) was considered by the Court of Appeal in *Laverty v Para Franchising Ltd*: they are to compensate, to the extent appropriate, part or all of the countervailing disadvantage caused to unaided parties of not being able to recover their costs from a legally aided opponent.<sup>9</sup>

[27] If a party makes application under [s 46](#), a decision is made by the Legal Services Commissioner, having regard to the matters in [s 46\(3\)](#). The possibility of such an application is irrelevant in the exercise of the Court's discretion under [s 45\(5\)](#). The Court is asked merely to specify what an award of costs would have been in ordinary circumstances.<sup>10</sup> The appropriate comparator is a standard costs award for the litigation, not an award that may have been reduced to avoid excessive or disproportionate hardship to the unsuccessful party.

[28] The amount sought to be specified is \$16,725, made up as follows:

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Step	Band B allocation (Days)	Rate (2)	Recoverable amount
Defendant's preparation of briefs	2	\$2,230	\$4,460
Defendant's preparation of authorities and common bundle	1	\$2,230	\$2,230
Preparation for hearing	2	\$2,230	\$4,460
Appearance at hearing	2.5	\$2,230	\$5,575

[29] Alliance says Calderbank offers are relevant to a Court's determination as to whether costs should be ordered against a legally aided party under [s 45\(2\)](#), because its conduct in rejecting the offer caused the other party to incur unnecessary cost, being

8 *EGW v The Attorney-General* HC Wellington, CIV-1999-485-85, 25 September 2008 at [9], citing

*Laverty v Para Franchising Ltd* [2005] NZCA 436; [2006] 1 NZLR 650 (CA) at [32].

9 *Laverty v Para Franchising Ltd* at [22].

10 *EGW*, above n 8, at [11].

the cost of preparing for, and attending the Court hearing.<sup>11</sup> However, Alliance does not seek an uplift in the order made under [s 45\(5\)](#), nor an order for costs against Mr Butterfield under [s 45\(2\)](#). In any event, I do not consider the Calderbank offer was effective here. This is because Mr Butterfield had only a short time within which to consider the offer.<sup>12</sup> I would not have taken it into account in fixing costs in ordinary circumstances. Nor would I have considered Mr Butterfield's failure to accept it warranted an order under [s 45\(2\)](#), if an application for such an order had been made.

[30] A costs order of \$16,725 would have been made in ordinary circumstances. Accordingly, I make the order sought under [s 45\(5\)](#) of the [Legal Services Act](#).

#### Disbursements are sought

[31] The defendant seeks disbursements covering Authority fees, Court fees, and flights and accommodation for both hearings, with Mr Butterfield being ordered to pay those incurred prior to the grant of civil legal aid, and the remainder included in the order made pursuant to [s 45\(5\)](#) of the [Legal Services Act](#).

[32] The amount specified in its memorandum for "Authority fees" is \$204.44 but that would seem to be a mistake; I take it Alliance is referring to the fee payable for filing its challenge in the Employment Court. This filing fee of \$204.44 is inclusive of GST, which Alliance would be able to recover as a business expense in the usual way, so is not recoverable from Mr Butterfield. I allow the Court filing fee exclusive of GST of \$177.77, but no order is made in respect of fees in the Authority.

[33] Alliance then seeks \$125.22 for "Court fees" to be included in the order under [s 45\(5\)](#) of the [Legal Services Act](#). This figure represents Alliance's contribution of half the hearing fee of \$250.44 (inclusive of GST). It is appropriate to include that fee in the [s 45\(5\)](#) order, but again less GST, so \$108.89.

[34] It is not standard for the cost of flights and accommodation for counsel to be

<sup>11</sup> [Legal Services Act 2011, s 45\(3\)\(a\)](#).

<sup>12</sup> *Ogilvy & Mather (New Zealand) Ltd v Darroch* [1993] NZEmpC 172; [1993] 2 ERNZ 943 at 953.

allowed. Particular reasons for out-of-town counsel would be needed.<sup>13</sup> None have been advanced here. Mr Butterfield was represented by counsel from Invercargill and, while there is no criticism of Alliance for instructing Wellington counsel, the travel costs of it doing so are not to be (or, in the absence of legal aid being granted, would not have been) borne by Mr Butterfield.

#### Orders made

[35] Mr Butterfield is ordered to pay Alliance:

(a) \$5,000 for costs in the Employment Relations Authority and Employment Court up until civil legal aid was

granted; and  
(b) \$177.77 for Court filing fees.

[36] In addition, I make an order pursuant to [s 45\(5\)](#) of the [Legal Services Act](#) that Mr Butterfield would have been ordered to pay Alliance costs of \$16,725 and disbursements of \$108.89 with respect to the remainder of the Court proceedings if [s 45](#) had not affected his liability.

[37] There is no order made with respect to the time and effort taken to prepare the application for costs.

J C Holden Judge

Judgment signed at 3 pm on 19 September 2018

13. See, for example, *Gini v Literacy Training Ltd* [\[2013\] NZEmpC 25](#) at [\[35\]](#); *The National Bank of New Zealand Ltd v Paterson* CC24A/01, 25 October 2001 (EmpC) at [3].

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