



Employment Court of New Zealand

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Craig v Bolstad [2014] NZEmpC 107 (25 June 2014)

Last Updated: 1 July 2014

IN THE EMPLOYMENT COURT AUCKLAND REGISTRY

[\[2014\] NZEmpC 107](#)

ARC 104/13

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

AND IN THE MATTER of an application for costs

BETWEEN MICHAEL PETER CRAIG Plaintiff

AND GRANT AND MARGARET BOLSTAD
 Defendants

Hearing: On the papers filed by the parties on 13 and 23 June
 2014

Appearances: T de Latour, advocate for plaintiff
 N Bolstad, advocate for defendant

Judgment: 25 June 2014

COSTS JUDGMENT OF JUDGE M E PERKINS

[1] This matter involves a challenge to a determination of the Employment Relations Authority dated 27 November 2013.¹ Mr Craig had been dismissed from employment as a farm assistant with the defendant. The determination held that Mr Craig had been employed for a valid trial period pursuant to [s 67A](#) of the [Employment Relations Act 2000](#) (the Act). He was therefore prevented from bringing a personal grievance for an unjustified dismissal.

[2] Costs were reserved in the determination. In a subsequent determination dated 17 February 2014,² Mr Craig was ordered to make a contribution towards the

defendants' costs of \$1,636.50.

¹ *Craig v Bolstad* [2013] NZERA Auckland 543.

² [2014] NZERA Auckland 54.

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[3] Following the filing of the statement of claim and statement of defence in the challenge, Mr Craig gave notice to the Court of a change of representation and on the same date filed a notice of discontinuance. That notice indicated that costs remained an issue but submitted that costs should lie where they fall.

[4] On the same day that the notice of discontinuance was filed, Ms Bolstad, advocate for the defendants, made an application for costs on the discontinuance. Indemnity costs are claimed. The application refers to a previous offer on costs made by the defendants to the plaintiff prior to the Authority's determination on costs. This would appear to be an attempt to bring the matter within reg 68 of the [Employment Court Regulations 2000](#) (the Regulations). Under that regulation the Court in exercising its discretion on costs is entitled to have regard to any offer made by either party to the other. As indemnity costs are claimed by the defendant, it is presumed that the

reference to the offer would provide a basis for the Court to exercise its discretion to award indemnity costs.

[5] A copy of a tax invoice directed to the defendants from their advocate Ms Bolstad, was attached to the application for costs. No breakdown of attendances was provided and the fees charged appeared to be excessive, having regard to the stage the proceedings had reached when the discontinuance was filed. Accordingly, Ms Bolstad was directed to provide more information. A breakdown of costs was provided by her which seemed to confirm that the fees charged to the defendants are excessive and unreasonable.

[6] The breakdown of the attendances alleged that there were three, one hour long, telephone calls. Two of these were with the plaintiff's former advocate and one with Grant Bolstad. There was a further attendance with him lasting 30 minutes. Eight hours was claimed as the time taken to prepare and file the statement of defence following what can only have been a brief discussion again with the first named defendant.

[7] The statement of defence consists of a header page and less than two pages of pleadings. A further two hours is included for various communications with the Court and the first named defendant "updating Statement of Claim progress".

[8] I gave Ms Bolstad a further opportunity to justify the fees charged to her clients. She has now filed a further memorandum. That deals with the offer of settlement relied upon. It also deals with the two telephone attendances with the plaintiff's then advocate. It gives no explanation for the inordinate amount of time taken to prepare the statement of defence.

[9] Mr de Latour, advocate for the plaintiff, has filed a reply to the application for costs. That sets out a sequence of events and the background to the filing of the notice of discontinuance. It delves into substantive issues, which in view of the discontinuance are not really relevant to costs.

[10] The submissions, however, also refer to the matters to be considered by the Court in exercising its discretion on costs. It refers to the plaintiff's precarious financial position resulting from his dismissal and his present impecuniosity. The submissions refer to the circumstances surrounding the plaintiff's termination of employment under the 90-day trial period. Insofar as the offer of settlement referred to in the application for costs is concerned, Mr de Latour, in his submissions, points out that the defendants did specify a sum they would accept in settlement of costs involved in the Authority proceedings, but before the costs determination of the Authority was issued. Mr de Latour points out that the costs awarded by the Authority were, in fact, less than the sum which the defendants had specified they would accept in settlement. This is confirmed in Ms Bolstad's further memorandum and that should have been revealed by her in the application she filed on the defendants' behalf, which clearly relies upon the offer to justify an award of indemnity costs. The determination of the Authority on costs is substantially less than the sum the defendants indicated they would accept. That offer cannot be relied upon by them to found a claim for indemnity costs.

[11] I note that Ms Bolstad is also claiming disbursements relating to postage and courier charges. These are items which she should normally be expected to absorb into her overhead costs and therefore would be included in her hourly rate charge.

[12] The Court has a wide discretion on costs.³ It may take into account matters such as the impecuniosity of the party against whom the costs are sought. This is a case also where based on realistic assessments as to the costs of continuing with the challenge and in view of the likely financial outcomes even if successful, the plaintiff has withdrawn the proceedings. In conjunction with his advocate he has acted in a responsible manner in that regard.

[13] In exercising the discretion the Court must have regard to whether the fees charged are indeed actual and reasonable charges.⁴ I have serious doubts as to whether Ms Bolstad expended the time she has claimed in preparing the statement of defence. Even if she did, that would be indicative of her lack of experience in such matters as the fees she has charged for preparing a statement of defence of one and half pages, even with the ancillary attendances, is so grossly excessive as to be completely unreasonable.

[14] I have taken account of Mr de Latour's submissions. Apart from the brief statements in the application for costs no other submissions have been made by the defendants' advocate beyond the explanatory memoranda directed to be filed.

[15] In all the circumstances this is not an appropriate case for an award of costs on a discontinuance. In the normal course of events, costs are usually awarded where a notice of discontinuance is filed.⁵ Certainly, in the light of the circumstances of the alleged offer in comparison with the eventual award of costs by the Authority in this case, this would never have been an appropriate case for indemnity costs as now claimed by the defendants.

[16] Accordingly, the application for costs is dismissed. I accept Mr de Latour's submission that costs should lie where they fall.

Judgment signed at 3.30 pm on 25 June 2014

M E Perkins
Judge

³ [Employment Relations Act 2000](#), sch 3, cl 19.

⁴ *Binnie v Pacific Health Ltd* [2003] NZCA 69; [2002] 1 ERNZ 438 (CA).

⁵ *Kelleher v Wiri Pacific Ltd* [2012] NZEmpC 98.

