



# Employment Court of New Zealand

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## Gamble v Agresearch Limited CC6A/09 [2009] NZEmpC 81 (10 September 2009)

Last Updated: 19 November 2009

### IN THE EMPLOYMENT COURT

#### CHRISTCHURCHCC 6A/09CRC 30/08

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

AND

IN THE MATTER OF an application for costs

BETWEEN JENNIE GAMBLE

Plaintiff

AND AGRESEARCH LIMITED

Defendant

Hearing: Memoranda received 14 July and 13 August 2009

Judgment: 10 September 2009

### COSTS JUDGMENT OF JUDGE A A COUCH

[1] I gave my substantive judgment in this matter on 29 June 2009 (CC 6/09). I concluded by observing that the defendant was entitled to costs and directing that memoranda be filed if the parties could not agree on the quantum. Memoranda have now been filed.

[2] For the defendant, Mr Skelton's submissions are straightforward and conventional. The memorandum filed by Mr Wall, however, very largely fails to address the relevant issues. It consists of 11 close typed pages divided into 38 paragraphs, 37 of which are devoted to a misguided attempt to relitigate the substantive matters I have decided. As Mr Wall is well aware, I am *functus officio* with respect to those matters and cannot change my decision. If the plaintiff was dissatisfied with my decision, it was open to her to seek leave to appeal it. She has not done so.

[3] Mr Skelton begins by referring to the essential principles governing the exercise of the Court's discretion set out in the Court of Appeal decisions in *Victoria University of Wellington v Alton-Lee* [2001] NZCA 313; [2001] ERNZ 305, *Binnie v Pacific Health Ltd* [2003] NZCA 69; [2002] 1 ERNZ 438 and *Health Waikato Ltd v Elmsly* [2004] NZCA 35; [2004] 1 ERNZ 172. He then adopts the summary of those principles I gave in *Merchant v Chief Executive of the Department of Corrections* AC 26/09, 25 June 2009 at para [3]:

*A useful starting point is two-thirds of the costs actually and reasonably incurred by that party but that proportion may be adjusted up or down according to the circumstances of the case and the manner in which it was conducted. Ability to pay is also a factor to be taken into account.*

[4] The costs incurred by the defendant are said to total \$12,125 + GST. This was verified by copies of the invoices rendered by Mr Skelton and I am satisfied that this amount of costs was actually incurred.

[5] That raises the issue of the extent to which that expense was reasonably incurred. It is explained as being for 24.5 hours of Mr Skelton's professional time at a rate of \$495 + GST per hour. A list of the work done was provided. Mr Skelton then submitted that the manner in which the plaintiff's case was pleaded and argued substantially added to the time that would otherwise have been required had the plaintiff's case been limited to the relatively straightforward preliminary issue involved.

[6] In his memorandum, Mr Wall does not directly address most of these issues. Rather, he suggests somewhat facetiously that Mr Skelton should have been “enriched” by the submissions Mr Wall made.

[7] There is a great deal of substance in Mr Skelton’s submissions. The manner in which the plaintiff’s case was presented to the Court greatly extended the time required for counsel to prepare and present the defendant’s response to it. In particular, I note:

The original statement of claim totally failed to comply with regulation 11 of the [Employment Court Regulations 2000](#). Rather than being a series of succinct statements of facts alleged and remedies sought, it was a rambling and discursive document running to 18 closely typed pages in which the facts relied on were buried in extended expositions of legal theory. The amended statement of claim was much more concise but still included a “footnote” containing gratuitous and offensive personal observations by Mr Wall. Responding to these documents undoubtedly required very much more time than would have been required had the claim been pleaded in accordance with the traditional principles embodied in the regulations.

The summary of argument provided by Mr Wall was equally discursive and contained much material which was unnecessary. A striking example was his reliance on directives of the Council of the European Union and regulations from the United Kingdom which could be of no possible relevance in this country and which Mr Wall eventually conceded he had misrepresented. Equally irrelevant was a section discussing the concept of lockout and, in light of the plaintiff having expressly abandoned any claim in tort, so were discussions of the relationship between the historic concepts of contract and tort and of vicarious liability in tort. Mr Wall’s submissions delved into Roman law, an examination of the origins of the modern law of contract and an historical perspective on employment dispute resolution procedures in New Zealand. While small parts of those submissions were of some relevance, it was only on page 34 of his 37-page synopsis that Mr Wall began to address the essential issue in the case. To properly understand, assess and respond to those submissions undoubtedly would have taken Mr Skelton a great deal of time.

The plaintiff persisted in maintaining the claim for penalty when there was no foundation for it in the pleadings or in the evidence. This prolonged the hearing and required additional work by Mr Skelton to respond to it.

[8] Overall, I find that the time spent by Mr Skelton in preparing and presenting the defendant’s response to the plaintiff’s claims as they were actually made was reasonable. I do not, however, find it reasonable that the plaintiff should contribute to the 2 hours’ travelling time charged. I return to the issue of travel costs in my discussion of disbursements.

[9] I turn then to the rate at which the defendant was charged for the work done by Mr Skelton. He is undoubtedly a skilled and experienced advocate and it may well be that \$495 + GST per hour reflects a market assessment of the value of his skills. I am unable to accept, however, that this is a reasonable rate for litigation of this nature.

[10] In the *Merchant* costs decision, I used the daily recovery rates specified in the High Court Rules as a guide to what is reasonable in this Court. As I noted there, those rates were fixed when the current High Court Rules came into effect on 1 February 2009 and are subject to annual review by the Rules Committee in consultation with the New Zealand Law Society, the New Zealand Bar Association and the Legal Services Agency.

[11] Had this matter been pleaded and argued in a straightforward manner, I would have regarded category 2 as appropriate, that is proceedings of average complexity requiring counsel of skill and experience considered average in the Court. Given the complexity of the case actually presented for the plaintiff and the obscure nature of many of the legal arguments advanced, I accept that the proceedings should be regarded as being in category 3, that is proceedings that because of their complexity require counsel to have special skill and experience in the Court.

[12] The appropriate daily recovery rate for category 3 proceedings is \$2,370 per day inclusive of GST. That is based on two-thirds of actual and reasonable costs. Allowing for there being 8 chargeable hours in a day, that equates to a reasonable rate of \$395 + GST per hour.

[13] On this basis, I find that the costs actually and reasonably incurred by the defendant amounted to \$9,677.50 + GST. Excluding GST, two-thirds of that sum is a little over \$6,450 and I take that as a starting point.

[14] The next issue to which I have regard is the extent to which the manner in which the proceedings were conducted requires any adjustment from that starting point. I have already made allowance for the extra time Mr Skelton was required to spend on this matter because of the manner in which it was pleaded and argued and I must be careful to ensure that the defendant is not doubly compensated. In this aspect of the assessment, however, I should have regard to the extent to which the defendant was put to unnecessary cost. In my view, at least one-third of the time spent on the matter by Mr Skelton was required to deal with irrelevant and hopeless aspects of the claim. I also find that these inappropriate aspects of the matter added at least an hour to the hearing. The defendant is entitled to be recompensed at a greater rate for those aspects of the costs it has incurred.

[15] Mr Skelton attached to his memorandum a copy of a *Calderbank* letter sent to Mr Wall on behalf of the plaintiff in December 2008. Offers made in such correspondence only have significance when the plaintiff is successful. The plaintiff in this case was not and I therefore do not take the letter into account.

[16] The final consideration must be the ability of the plaintiff to pay. The accepted principles are that a party will be presumed to be able to pay an award of costs unless the Court is satisfied on proper evidence that to do so would cause undue hardship. In relation to this issue, Mr Wall said in his memorandum only that the plaintiff has been unable to find alternative employment in the 2 years since she was dismissed. I accept that statement but, in the absence of any evidence of the plaintiff's means, it falls well short of establishing undue hardship. I therefore must proceed on the presumption that the plaintiff is able to pay.

[17] I note at this point that, in the course of the telephone conference with the representatives on 16 March 2009, I specifically asked Mr Wall whether he had explained to the plaintiff the Court's usual practice in relation to costs, that is costs normally follow the event and the amount of any award is related to the actual and reasonable costs incurred by the successful party. Mr Wall confirmed that he had informed the plaintiff of this.

[18] Taking all aspects of the matter into account, I find that a just award of costs in favour of the defendant is \$7,000.

[19] The disbursements claimed comprise an airfare for Mr Skelton of \$410, an airfare for Ms Dunster of \$770 and taxi fares of \$68.70 for travel between Christchurch airport and the Court.

[20] The airfare for Mr Skelton was incurred because he is based in Auckland. In his memorandum, Mr Skelton properly observes that there are no doubt competent counsel in Christchurch who could have represented the defendant in this matter. He then mounts an argument that there was good reason for the defendant to have engaged him rather than local counsel. In particular, he says that he regularly does work for the defendant and was already familiar with the background to this matter.

[21] The principle governing this issue is that, while a party is entitled to engage counsel of its choice, another unsuccessful party ought not to be required to contribute to any additional or unnecessary costs incurred as a result of that choice. In this case, I accept that the savings made by engaging counsel familiar with the defendant and with the matter in question equalled or outweighed the cost of travel. I therefore allow the disbursements for Mr Skelton's airfare and the taxi fares.

[22] I do not allow the airfare for Ms Dunster. At the telephone conference with the representatives on 16 March 2009, I directed that the evidence of the witnesses be given in affidavit form so that they need not attend the hearing unless required for cross-examination. Ms Dunster was not required for cross-examination and her attendance at the hearing was therefore unnecessary.

[23] In summary, the plaintiff is ordered to pay the defendant \$7,478.70, being \$7,000 for costs and \$478.70 for disbursements.

A A Couch

Judge

Signed at 8.00am on 10 September 2009.

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