Employment Court of New Zealand

Halse v Employment Relations Authority [2023] NZEmpC 151 (11 September 2023)

Last Updated: 15 September 2023

IN THE EMPLOYMENT COURT OF NEW ZEALAND AUCKLAND

I TE KŌTI TAKE MAHI O AOTEAROA TĀMAKI MAKAURAU

[2023] NZEmpC 151
EMPC 406/2021

IN THE MATTER OF	an application for judicial review
AND IN THE MATTER OF	an application for costs
AND IN THE MATTER OF	an application for stay of proceedings
AND IN THE MATTER OF	an application for recusal
BETWEEN	ALLAN HALSE Applicant
AND	EMPLOYMENT RELATIONS AUTHORITY First Respondent
AND	TURUKI HEALTHCARE CHARITABLE TRUST Second Respondent
AND	CULTURESAFE NEW ZEALAND LTD (IN LIQUIDATION) Third Respondent
AND	TRACEY SIMPSON Fourth Respondent

Hearing:	On the papers
Appearances:	A Halse, applicant in person Appearance excused for first respondent A F Drake, counsel for second respondent No appearance for third and fourth respondents
Judgment:	11 September 2023

JUDGMENT OF JUDGE J C HOLDEN

ALLAN HALSE v EMPLOYMENT RELATIONS AUTHORITY [2023] NZEmpC 151 [11 September 2023]

[1] In these proceedings there are three outstanding matters to be dealt with:

(a) Mr Halse's request that I recuse myself;
(b) Mr Halse's application for a stay of proceedings; and
(c) Turuki Healthcare Services Charitable Trust's application for costs.

[2] Because of my findings on the first two applications, this judgment is able to deal with all three applications, which should bring these proceedings to an end, at least as far as this Court is concerned.

[3] In short, for the reasons explained in this judgment:

(a) I decline to recuse myself;
(b) Mr Halse's application for a stay is declined;
(c) Mr Halse is ordered to pay costs to Turuki totalling $30,800, with payment to be made within 28 days of the date of this judgment.

Mr Halse claims apparent bias

[4] This is the second time in the course of these proceedings that Mr Halse has applied for me to recuse myself.1 Mr Halse also applied for me to recuse myself in another, unrelated proceeding. That application was declined by Chief Judge Inglis.2

[5] The basis for the application before me now is not that I have any external relationship with a party or representative, or any personal interest in the outcome of either the application for a stay or the application for costs. Rather, it is because Mr Halse is unhappy with the outcome of previous matters he has had before me. He says this demonstrates "apparent bias" such that a fair-minded, objective and fully informed

1 *Halse v Employment Relations Authority* [2022] NZEmpC 82, [2022] ERNZ 329.

2 *Halse v Hamilton City Council* [2023] NZEmpC 118.

observer might reach the view that there is a real possibility that I might not be impartial in reaching a decision on the matters still before me in these proceedings, principally Turuki's application for costs.

[6] Specifically, Mr Halse submits that of 21 occasions where I had issued rulings, 17 of those went against him. He also points to instances in previous judgments where he says I have made adverse public statements about him. The application he made in the case that was dealt with by Chief Judge Inglis was on the same basis.

There is no basis for recusal

[7] The guiding principle is that a judge should recuse themselves if, in the circumstances, a fair-minded, objective and fully informed observer would have a reasonable apprehension that the judge might not be impartial in reaching a decision on the case. The standard for recusal is one of "real and not remote" possibility, rather than probability.3

[8] Recusal is not available simply because a party believes that by seeking the disqualification of a judge, they will have their case tried by someone thought to be more likely to decide the case in their favour.4

[9] An application for recusal on the ground that a judge has made prior rulings against a party, on the law or evidence, would succeed only in the rarest of circumstances. The fair minded and informed observer does not assume that because a judge has taken an adverse view on a previous application or applications, that they will have prejudged, or will not deal fairly with, all future applications by the same litigant.5 That suggestion ignores the force and significance of the judicial oath and, without more, could not possibly meet the test for recusal.6

3. *Saxmere Company Ltd v Wool Board Disestablishment Company Ltd* [2009] NZSC 72, [2010] 1 NZLR 35 at [3]–[4].

4 *Saxmere*, above n 3, at [8]; citing *Re JRL, ex parte CJL* [1986] HCA 39; (1986) 161 CLR 342 (HCA) at 352.

5 *Zuma's Choice Pet Products Ltd v Azumi Ltd* [2017] EWCA Civ 2133 at [29].

6 *Stiassny v Siemer* [2013] NZHC 154 at [12].

[10] The Chief Judge traversed most the various rulings and judgments referred to by Mr Halse.7 As the Chief Judge found, those rulings and judgments do not reach the threshold for apparent bias.8 There is no basis in these proceedings either for a reasonable and objective person to consider that I won't determine the matters now before me other than fairly and without bias.

[11] There is, accordingly, no basis on which I should recuse myself and I decline to do so.

Mr Halse seeks a stay

[12] Mr Halse has previously applied for a stay of these proceedings, with that application dealt with in the substantive judgment.9 In summary, the bases for Mr Halse's current application for a stay are:

(a) he has filed an application for judicial review in the Court of Appeal in relation to a similar matter where the

alleged errors are also applicable to these proceedings;10
(b) he has a right to a judicial review, with the Authority providing a defence; and
(c) the strike out was a miscarriage of justice.

[13] Mr Halse relies on s 10 of the Judicial Review Procedure Act 2016, s 27 of the New Zealand Bill of Rights Act 1990 and *Taito v R*.11

[14] The Authority took no position on the current application for a stay. In regard to Mr Halse's previous application for stay, the Authority noted that it was named in the judicial review under s 9(3) of the Judicial Review Procedure Act, as the decision maker. Its filing of a statement of defence was therefore said to be governed by s 10(2)

7 See generally *Halse v Hamilton City Council*, above n 2, at [14] and [18]–[23]

8 At [26].

9 *Halse v Employment Relations Authority* [2023] NZEmpC 69 [*Substantive judgment*] at [10]–[18].

10. Being an application for a judicial review of *Halse v Employment Relations Authority* [2022] NZEmpC 167, [2022] ERNZ 808.

11 *Taito v R* [2002] UKPC 15, [2003] 3 NZLR 577.

rather than s 10(1) of the Judicial Review Procedure Act, which provides a discretion, not an obligation, to file a statement of defence.

[15] Turuki opposes the application for a stay. It notes that it is not a party to the Court of Appeal proceedings. It also notes that Mr Halse is the subject of an extended restraining order issued by the High Court under s 166(4) of the Senior Courts Act 2016, and submits that will likely lead to the Court of Appeal proceedings being struck out.12

[16] The application to strike out Mr Halse's judicial review application has already been heard and Turuki says it is not in the interests of justice to delay a decision on Turuki's application for costs.

[17] Turuki says that Mr Halse's application for a stay is another unmeritorious and vexatious application by Mr Halse and that it is entitled to an expedient award of costs to defray at least some of the legal expenses it has incurred in respect of this matter.

The application for a stay is declined

[18] Mr Halse's argument that the Authority is required to file a statement of defence in a judicial review proceeding has been well-traversed in previous decisions of this Court.13

[19] As previously submitted by the Authority, it is s 10(2) of the Judicial Review Procedure Act that applies to a decision-maker in judicial review proceedings, such as the Authority. That sub-section provides a discretion, not an obligation, to file a statement of defence. It would be only in rare situations that a statement of defence by a decision-maker should be filed. Here, it was appropriate for the Authority to abide the Court's decision and not enter the fray. Its determinations must speak for themselves.

12 *Halse v Rangiura Trust Board* [2023] NZHC 1519.

13 *Substantive judgment*, above n 9, at [26]; *Halse v Employment Relations Authority* [2023] NZEmpC 96 at [53]; and *Halse v Employment Relations Authority (No 2)* [2023] NZEmpC 54 at [16].

[20] As noted in the substantive judgment, the Court is able to strike out judicial review proceedings.14 Section 27 of the New Zealand Bill of Rights Act does not act to exclude that.15

[21] Mr Halse's reliance on *Taito v R* is misguided. That case was a successful challenge to the way the Court of Appeal conducted criminal appeals. It has no application to the present proceedings.

[22] The proceedings to which Mr Halse refers that have been filed in the Court of Appeal do not involve Turuki. Even if similar issues are being raised in that case, and it is not struck out by the Court of Appeal, that does not form a basis for staying the determination of costs in the present case.

[23] Turuki is entitled to have its application for costs dealt with. The application for a stay is declined.

Turuki is entitled to costs

[24] Having been successful in its application to strike out Mr Halse's application for judicial review, Turuki sought costs of $40,869. However, its application for costs was filed on 19 May 2023, before Mr Halse filed his second applications for recusal and for a stay.16

[25] Turuki submits that the proceeding merits a costs categorisation under the Employment Court Costs Guideline of 2B.17 It also submits that increased costs should be awarded on the basis that the applications were unnecessary, based on an argument without merit which was bound to fail and served only to needlessly prolong the proceeding. Turuki seeks an uplift of 50 per cent on band 2B.

14 *Substantive judgment*, above n 9, at [22].

15 *Reid v Masterton District Court* [2014] NZCA 147 at [20]; and see generally *Peterson v Lucas*

[2015] NZCA 627 at [36].

16. The second application for a stay was filed on 22 May 2023; the second application for recusal was filed on 16 June 2023.
17. "Employment Court of New Zealand Practice Directions" <www.employmentcourt.govt.nz> at No 18.

[26] Its calculation of costs up until 19 May 2023 is:

Guideline Step	**Proceedings**	**Band B time allocation**	**Amount**
2	Statement of defence to application for judicial review	1.5	$3,585
28	Filing interlocutory application to strike out judicial review application	0.6	$1,434
11	Preparation for first directions conference	0.4	$ 956
29	Filing opposition to first interlocutory application for recusal of judge	0.6	$1,434
30	Preparation of written submissions opposing application for recusal	1	$2,390
32	Appearance at hearing of defended application for recusal	0.5	$1,195
28	Filing interlocutory application for security for costs	0.6	$1,434
49	Preparation of affidavit in support of security for costs application	2	$4,780
52	Preparation of written submissions for the hearing of application for strike out and security for costs	1	$2,390
54	Appearance at hearing on interlocutory application for strike out and security for costs	0.5	$1,195
50	Filing opposition to first interlocutory application for stay	0.6	$1,434
52	Preparation of written submissions for hearing of stay application	1	$2,390
54	Appearance at hearing of defended application for stay of proceedings	0.5	$1,195
28	Preparation of memorandum on costs	0.6	$1,434
	Total	**11.4**	**$27,246**
	50 per cent uplift		**$40,869**

[27] In addition, Turuki seeks costs on the second application for recusal on a Category 2B basis and has incurred costs on the second application for a stay.

[28] The Court requested confirmation (or otherwise) from Mr Drake, counsel for Turuki, that Turuki's legal costs equal or exceed the amount now being sought. This is because costs may not exceed the amount incurred.

[29] Mr Drake confirmed that Turuki's legal costs exceed the sum claimed.

[30] Mr Halse opposes costs. This is, first, because of the Court of Appeal proceedings already referred to, and his applications for recusal and for stay.

[31] Second, Mr Halse queries whether Turuki's costs indeed exceed the $40,869 claimed. He submits that sworn affidavits and evidence should be provided by Turuki to support its claim for an uplift in costs, with the ability to cross examine witnesses. He referred to the process leading to the Court's decision in *Ashby v NIWA Vessel Management Ltd*,18 whereby Ms Ashby was required to provide evidence of the costs she had incurred.

[32] As already found, as a successful party, Turuki is entitled to costs. In considering costs the Court has a discretion, but that discretion must be exercised on a principled basis. The Court is guided by the Guideline Scale, which has been implemented to assist the Court and parties so that costs are predictable, expeditious and consistent. It is not bound by the Guideline Scale. In particular, in exercising its discretion, the Court may have regard to any conduct of the parties tending to increase or contain costs.19 Increased costs may be awarded where a party has failed to act reasonably.20 It is for the party seeking increased costs to show that the award is justified.21

[33] I accept that these proceedings are properly categorised as falling within Category 2B. Mr Halse does not suggest otherwise.

18 *Ashby v NIWA Vessel Management Ltd* [2022] NZEmpC 213.

19 Employment Court Regulations 2000, reg 68.

20 *Bradbury v Westpac Banking Corporation* [2009] NZCA 234, [2009] 3 NZLR 400 at [27].

21 *Strachan v Denbigh Property Ltd* HC Palmerston North CIV 2010-454-232, 3 June 2011 at [27].

[34] One of the points of the Guideline Scale is to avoid time-consuming close analysis of reasonable time taken per step in a proceeding. The Court will usually accept a representative's advice of what costs have been incurred. However, the Court retains the power to seek more information if it considers that to be necessary to assess the application. The *Ashby* case to which Mr Halse referred is in that category. It had complications arising out of a change of representation that meant further clarity was required. It is distinguishable from the present case.

[35] The scale calculation provided by Turuki is accepted as accurate except on three points. First, there was no hearing for the application for recusal. Second, the affidavit filed in support of the application for security for costs was very brief; I do not allow any claim in respect to it. Third, the hearing of the first interlocutory application for a stay is more correctly recorded as a quarter day. The application for costs also includes an amount for costs on the application for costs, which are not routinely given, but can be awarded where it is appropriate to do so.22 Turuki endeavoured to agree costs with Mr Halse, but its efforts were rebuffed. Costs are appropriate. Adjusting the calculation to account for the three points identified, I accept the figure of $20,673.50 as a starting point in the calculation of costs up until 19 May 2023. I add a further $5,000 for the second application for recusal and the second application for a stay. This is less than scale costs for two opposed interlocutory applications, reflecting that there is an overlap between those applications and the earlier applications. The starting point therefore becomes

$25,673.50.

[36] Here, Mr Halse's application for judicial review was found to be misconceived, vexatious and an abuse of process. Those are legal findings and, by themselves, do not warrant an uplift on costs. I accept, however, that these proceedings have been drawn out, with Mr Halse attempting to relitigate matters already decided.

[37] I also accept that Mr Halse's pursuit of his previous application for a stay, in circumstances where he was invited to file further submissions on the application to strike out but declined to do so, meant that Turuki was put to the unnecessary cost of

22. *Nisha LSG Sky Chefs New Zealand Ltd (No 2)* [2018] NZEmpC 33, [2018] ERNZ 108 at [17]– [18].

defending that application for a stay, which could have been avoided. His submissions then filed on the application for a stay went beyond that application and revisited and amplified submissions made on the application to strike out.23

[38] On balance, I consider that the way in which Mr Halse has conducted these proceedings merits a modest increase on scale costs. Costs of $30,800 are payable by Mr Halse to Turuki. That sum is to be paid within 28 days of the date of this judgment.

J C Holden Judge

Judgment signed at 10.30 am on 11 September 2023

23 *Substantive judgment*, above n 9, at [18].