



Employment Court of New Zealand

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Hines v Eastland Port Limited [2018] NZEmpC 111 (25 September 2018)

Last Updated: 30 September 2018

IN THE EMPLOYMENT COURT AUCKLAND

[\[2018\] NZEmpC 111](#) EMPC 14/2018
EMPC 47/2018

IN THE MATTER OF challenges to determinations of
the Employment Relations
Authority
AND IN THE MATTER OF an application for costs
BETWEEN PAUL HINES
Plaintiff
AND EASTLAND PORT LIMITED
Defendant

Hearing: On the papers
Appearances: P McBride, counsel for plaintiff
E J Brown, counsel for
defendant
Judgment: 25 September 2018

COSTS JUDGMENT OF JUDGE J C HOLDEN

[1] Eastland Port Ltd (EPL) was successful in the substantive proceedings brought by Captain Hines and now applies for costs.¹ Captain Hines fully recognises that, given the Court's findings, an award of costs will be made.

[2] Captain Hines does not dispute significant portions of EPL's application:

- (a) there is no issue as to the costs sought in the Employment Relations Authority (the Authority);
- (b) there are three specific points Captain Hines disputes in relation to the application for costs in the Court;
- (c) he raises issues about claimed disbursements; and

¹ *Hines v Eastland Port Ltd* [\[2018\] NZEmpC 79](#).

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(d) he disagrees with the "consequential" claims advanced (being for interest sought on the costs judgment sum, and costs associated with the costs application).

Costs payable in relation to the Authority

[3] Clause 15 of sch 2 of the [Employment Relations Act 2000](#) (the Act), gives the Authority a broad discretion to award costs as it thinks reasonable. The Authority adopts a daily tariff in relation to costs, as it is entitled to do.²

[4] The applicable daily tariff for the Authority investigation is \$4,500 for the first day of the investigation meeting and \$3,500 for each subsequent day. The Authority investigation spanned six days and EPL therefore seeks \$22,000. This is less than its actual costs and, as noted, Captain Hines raises no issue with respect to the amount claimed.

[5] Captain Hines is to pay \$22,000 to EPL for costs in the Authority.

EPL is entitled to costs in the Employment Court

[6] Clause 19 of sch 3 of the Act gives the Court a broad discretion to award costs as it thinks reasonable.

[7] Since 1 January 2016 the Court has used a guideline scale to assist it in exercising its discretion.³ For costs purposes, this proceeding was allocated to Category 2, Band B.

[8] The Court is entitled to take into account any other matters it considers relevant, including those set out in reg 68 of the [Employment Court Regulations 2000](#).

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

3 Costs Guideline Scale <www.employmentcourt.justice.govt.nz/legislation-and-rules/>.

[9] EPL seeks \$39,582.50. That is less than its actual costs and is made up as follows:

Item	Step	Band B allocation (Days)	Recoverable amount Using Rate 2 (\$2,230)
2	Commencement of defence to challenge by defendant	1.5	\$3,345
3	Opposition to plaintiff's application for urgency	2	\$4,460
6	Attendances to plaintiff's application for special leave to remove matter	1	\$2,230
11	Preparation for first directions conference	0.4	\$892
12	Filing Memorandum for first directions conference	0.4	\$892
13	Appearance at first directions conference	0.2	\$446
36	Defendant's preparation of briefs and affidavits	2	\$4,460
384	Defendant's attendances to common bundle	1	\$2,230
39	Preparation for hearing	2	\$4,460
40	Appearance at hearing for sole representative on 23 March (3/4 day), 4 April (1/2 day), 9-13 April and 24 April 2018	7.25	\$16,167.50
			\$39,582.50

[10] Captain Hines disputes the claims made for items 3, 6 and 38.

4 Mistakenly recorded as Item 37 in EPL's application.

EPL claims for urgency

[11] Under item 3, EPL has claimed for two days to cover its opposition to Captain Hines' application for urgency.

[12] At the time Captain Hines filed his challenge in the Employment Court, he also applied for urgency. The application was referred to Chief Judge Inglis and she directed that a telephone directions conference be convened, which it was, a few days later.

[13] On the morning of the directions conference, EPL filed a memorandum which, while being described as "in opposition to the application for urgency", dealt not only with that matter but with other matters to be dealt with in the

directions conference.

[14] Captain Hines says there is duplication between the time claimed for the opposition to the plaintiff's application for urgency and that claimed for items 11 to

13. I accept that the application for urgency required additional work, as reflected in EPL's memorandum, but I prefer to deal with that by removing the separate claim at item 3 and adjusting the time allocated for item 12 so that it is on the basis of Band C rather than Band B. That would increase the time allocation for item 12 from 0.4 to

0.5 days with a consequent increase in the total amount recoverable from \$892 to

\$1,115. Accordingly, the amount claimed for item 3 is not allowed but the amount allowed for item 12 is increased to \$1,115.

No application for special leave

[15] The next objection raised by Captain Hines is for the claim for one day, for attendances to an application for special leave to remove the matter. Item 6 in the guideline scale refers to "Filing opposition to application for special leave to remove matter". There was no application to the Court for special leave to remove a matter from the Authority so no opposition was filed.

[16] The day claimed at item 6 is not allowed.

Attendances regarding the common bundle

[17] Captain Hines objects to the claim for one day's costs under item 38 for "Defendant's preparation of list of issues, agreed facts, authorities and common bundle." The objection is that EPL did not prepare a list of issues, agreed facts or authorities, and that the common bundle was prepared by Captain Hines. On that basis, Captain Hines says the amount claimed is excessive and suggests that a reasonable allowance would be 0.25 days at most. In view of the circumstances, I consider that the allocated time for this item should be calculated in accordance with Band A, being 0.5 day. Accordingly, the amount claimed for that item is reduced from

\$2,230 to \$1,115.

[18] In total then, the amount allowed for costs in the Court is \$32,000.50.

EPL raised other matters

[19] Although EPL based its claim for costs on the guidelines, it submitted there was a potential argument for an uplift both to reflect "new and extended evidence and claims brought by the Plaintiff in the Employment Court, that were not heard before the Authority" and because an offer had been made to settle the proceedings early on.

[20] I see no reason for an uplift in relation to the evidence. On a de novo hearing a party is entitled to call more extensive evidence than was called in the Authority. In any event, the additional evidence would increase the length of the hearing, which is reflected in the costs award.

[21] Captain Hines says that the settlement offer was specifically without prejudice; it was not a Calderbank offer.

[22] The position with respect to such offers is that they attract a privilege that only can be waived with the consent of both parties. If that consent is not forthcoming, then the without prejudice offer will be inadmissible.⁵

5. [Evidence Act 2006, ss 57\(1\)](#) and (2), [65\(5\)](#); *Idea Services Ltd (in stat man) v Barker* [\[2012\] NZEmpC 112](#); [\[2012\] ERNZ 454](#) at [\[29\]-\[30\]](#).

[23] The offer of settlement is not admissible in the context of this application, ought not to have been referred to and is not taken into account.

Disbursements are sought

[24] EPL seeks disbursements of \$2,062.55 (plus GST) for the Authority and

\$26,520.27 (plus GST) for the Court. The bulk of the amount claimed is for expert witness fees and disbursements. Other

disbursements are travel costs: flights, hotels, meals, rental vehicles and petrol, plus there is an amount claimed for “legal research”.

Particular reasons needed for travel expenses for counsel

[25] It is not standard for the costs of travel and accommodation for counsel to be allowed. There is no criticism of EPL for engaging out-of-town counsel, as Captain Hines did also, but it does not follow that the cost of doing so ought to be met by Captain Hines. Particular reasons for out-of-town counsel are needed.⁶ None have been advanced here to justify the claim. The only amounts I consider are recoverable are those for the hearing of closing submissions in Auckland as this travel would have been required of local counsel too. Therefore, I allow the cost of the flights identified in the invoice dated 16 July 2018 of \$399.13, together with the taxi fares to and from Auckland Airport totalling \$144.70. The accommodation noted in that invoice covers the hearing in Gisborne also and so covers six nights in total. I therefore allow one-sixth of the costs identified, or \$141.31, for accommodation, which brings the total for travel-related disbursements to \$685.14.

Legal research not a disbursement

[26] Legal research is not a disbursement but part of the legal work for which costs are claimed and awarded. No separate allowance is made for it.

6. *Gini v Literacy Training Ltd* [2013] NZEmpC 25 at [35]; *The National Bank of New Zealand Ltd v Patterson*, CC24/01, 25 October 2001 (EmpC) at 3.

Claim with respect to expert witness

[27] Captain Hines objects to paying Mr Burton’s fees. He says Mr Burton’s views were not reasonably necessary for the conduct of the proceeding. He also says Captain Hines ought not have to pay for initially wrong views, or for their later correction. Another concern raised is that Mr Burton went beyond his expert role and prepared advice on an evidential matter, noted in the second invoice.

[28] Mr Burton was called as an expert witness by EPL to give evidence on matters of maritime law, which did feature in the case. It was reasonable of EPL to engage him in the circumstances. To the extent Mr Burton included time in his invoice for work done receiving information and correcting views earlier held, that too is allowed.

[29] Accordingly, I allow the fee recorded in the invoice dated 31 March 2018 of \$12,652.

[30] I agree that the second invoice includes time on non-expert advice. I have taken an approach that is generous to Captain Hines, and have reduced the figure for fees by a third, which would more than take account of the non-expert work included in it. This means that the fees payable by Captain Hines for the invoice dated 30 April 2018 are \$6,400, bringing the total allowed for Mr Burton’s fees to \$19,052.

[31] Captain Hines has also questioned Mr Burton’s disbursements. I allow Mr Burton’s travel expenses of \$550.65 (excluding GST) but I accept that the standard office service charges are not sufficiently identified to be recoverable.

GST not recoverable

[32] EPL has sought GST with respect to the disbursements claimed. The position is that GST can be relevant for the exercise of the Court’s discretion if the successful party advises the Court that it has paid GST but, because it is not GST-registered, is

not able to recover it.⁷ That is not the case here and therefore it is not recoverable from Captain Hines.

Interest not awarded

[33] EPL claims interest on the costs judgment sum for the period 16 July 2018 to the date of payment, pursuant to the [Interest on Money Claims Act 2016](#).

[34] The [Interest on Money Claims Act](#) does not apply directly to proceedings in the Employment Court. Rather, cl 14 of sch 3 of the [Employment Relations Act](#) provides that, in any proceedings for the recovery of any money, the Court may, if it thinks fit, order that the amount awarded include interest, calculated in accordance with sch 2 of the [Interest on Money Claims Act](#), on the whole or part of the money for the whole or part of the period between the date when the cause of action arose and the date of payment in accordance with the judgment.

[35] Here, although the substantive judgment identified that EPL was entitled to costs, no award was made.⁸ The judgment referred to Category 2B but did not provide sufficient certainty as to calculation for Captain Hines to know what costs and disbursements were due. Until this judgment is issued, there is no debt.⁹ With the release of this judgment, I expect the parties will be able to agree to a suitable payment arrangement.

[36] No award for interest is made.

No costs for application

[37] EPL also seeks costs of \$1,500 for its application for costs. Captain Hines says that, in fact, he ought to get an allowance of that amount for costs. He says that, by email dated 13 August 2018, he invited EPL to identify the costs being sought but

7. *New Zealand Venue and Event Management Ltd v Worldwide NZ LLC* [2016] NZCA 282, (2016) 23 PRNZ 260 at [11]- [12].

⁸ *Hines*, above n 1, at [164].

9. *Chesterfields Preschools Ltd v Commissioner of Inland Revenue* [2013] NZCA 44, [2013] 2 NZLR 499 at [20].

there was no response to that request other than the filing of the memorandum seeking costs later that day.

[38] The Court's approach to costs on applications for costs was discussed recently in *Nisha v LSG Sky Chefs NZ Ltd (No 2)*.¹⁰ Applications for costs on costs are relatively rare but, when made, can be awarded as part of the Court's broad discretion. *Nisha* is an example of an application being made in circumstances where the issue of costs was complex and time-consuming. Those features are not present here.

[39] In the substantive judgment, I noted that EPL could apply to the Court within 28 days if costs were sought and could not be agreed. The expectation of the Court is that parties will endeavour to agree on costs. Costs in the Authority are usually easily resolved, and that was the case here. Costs in the Court can also generally be resolved in a straightforward manner by reference to the costs categorisation given to the proceeding and to the guideline scale. Agreement on costs ought to have been attempted prior to an application being made in the Court.

[40] Costs on the costs application will lie where they fall.

Conclusion

[41] In conclusion, Captain Hines is to pay EPL \$74,288.29 comprising:

- (a) \$22,000 for costs in the Authority;
- (b) \$32,000.50 for costs in the Court;
- (c) \$685.14 for disbursements incurred in attending at the Employment Court in Auckland for closing submissions;
- and
- (d) \$19,602.65 for Mr Burton's fees and disbursements.

Judgment signed at 9.30 am on 25 September 2018

J C Holden Judge

¹⁰ *Nisha v LSG Sky Chefs NZ Ltd (No 2)* [2018] NZEmpC 33 at [11]- [18].