# Employment Court of New Zealand



## Ikundabose v McWatt Group Limited [2020] NZEmpC 114 (31 July 2020)

Last Updated: 5 August 2020

**IN THE EMPLOYMENT COURT OF NEW ZEALAND AUCKLAND**

**I TE KŌTI TAKE MAHI O AOTEAROA TĀMAKI MAKAURAU**

[2020] NZEmpC 114
**EMPC 50/2019**

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| IN THE MATTER OF | a challenge to determinations of the Employment Relations Authority |
| AND IN THE MATTER OF | an application for costs |
| | **EMPC 53/2020** |
| AND IN THE MATTER OF | an application for rehearing |
| AND IN THE MATTER OF | an application for security for costs |
| BETWEEN | ELIYA IKUNDABOSE<br>Plaintiff |
| AND | MCWATT GROUP LIMITED<br>Defendant |

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| Hearing: | On the papers |
| Appearances: | Plaintiff in person<br>P M Howard-Smith, counsel for defendant |
| Judgment: | 31 July 2020 |

**JUDGMENT OF JUDGE M E PERKINS**

**(Costs, application for rehearing, application for security for costs)**

### Introduction

[1] In a judgment issued on 18 December 2019,1 challenges which the plaintiff, Eliya Ikundabose, had filed against three separate determinations of the Employment

1 *Ikundabose v McWatt Group Ltd* [2019] NZEmpC 193.



Relations Authority (the Authority) were dismissed.2 Costs were reserved on the basis that costs would follow the event and Mr Ikundabose would be liable to the defendant, McWatt Group Ltd (McWatt Group), for costs. The parties were unable to reach agreement on the quantum of costs. Memoranda were then received from the parties containing their respective submissions on costs.

[2] The issue of a judgment on costs should have then been straightforward. However, Mr Ikundabose sought to re-litigate matters by filing an application for a rehearing. The application for rehearing was filed outside the time limit for Mr Ikundabose to do so. He is a lay litigant representing himself. The application and accompanying documents explain his reasons for delay in submitting the application.

[3] McWatt Group filed a notice of opposition to the application for a rehearing. The first ground of opposition relates to the application being filed out of time and should not be considered for that reason. Further grounds for opposition are that proper reasons for a rehearing are not made out. If Mr Ikundabose is granted a rehearing so that a further hearing is necessary, the defendant has applied for an order for security for costs.

[4] This judgment deals with the application for a rehearing and will then revert to dealing with the issue of quantum of costs arising from the substantive judgment of 18 December 2019. Evidence by way of affidavits and submissions from the parties on these matters have been received. These have all been considered even though Mr Ikundabose has been extended some leniency by further memoranda and emails being accepted from him which he was not entitled to file.

**The application for rehearing – reasons for delay**

[5] In respect of the application for a rehearing, two issues arise. The first is whether the application for a rehearing could have been made sooner for the purposes

2. *Ikundabose v McWatt Group Ltd* [2019] NZERA 85 (Member Arthur); *Ikundabose v McWatt Group Ltd (No 2)* [2019] NZERA 96 (Member Arthur); *Ikundabose v McWatt Group Ltd* [2019] NZERA 118 (costs) (Member Arthur).

of sch 3 cl 5(2) of the Employment Relations Act 2000 (the Act); secondly, whether a rehearing ought to be granted.

[6] Schedule 3 cl 5 of the Act, which deals with the Court's power to grant a rehearing, provides that:

> (1) The court has in every proceeding, on the application of an original party to the proceeding, the power to order a rehearing to be had upon such terms as it thinks reasonable, and in the meantime to stay proceedings.
> (2) Despite subclause (1), a rehearing may not be granted on an application made more than 28 days after the decision or order, unless the court is satisfied that the application could not reasonably have been made sooner.

...

[7] Clause 5(2) is couched in mandatory terms. An application may not be granted if it is made to the Court outside the 28-day period after the judgment or order unless the Court is satisfied that it could not reasonably have been made sooner than it was. This threshold needs to be reached before consideration can be given as to whether the grounds for ordering a rehearing are made out. The full Court in *Empress Abalone v Langdon* held that an applicant must move "with all possible dispatch" at all times, following the 28-day period.3 Immediate steps to remedy the situation, and prompt filing, will lend weight to an argument that the application could not reasonably have been made sooner for the purposes of sch 3 cl 5(2).

[8] In the present case, the 28-day period after the judgment was delivered would have expired on 28 January 2020.4 Mr Ikundabose filed his application for a rehearing on 26 February 2020, although he filed an amended application after that. Using 26 February 2020 as the earliest date, the total number of days which expired following the 28-day period was 29 days. The overall total time which elapsed from the delivery of judgment was 70 days.

3 *Empress Abalone v Langdon* [2001] NZEmpC 133; [2001] ERNZ 441 (EmpC) at [55].

4 Taking account of the Christmas period covered by reg 74B, Employment Court Regulations 2000.

[9] In the amended application for rehearing dated 11 March 2020, in his grounds for applying for a rehearing, Mr Ikundabose sets out the reasons for the delay in filing as follows:

1. I delayed to submit the application for rehearing because:
2. I took time to see that the court judgement was out. The judgement had exceeded the anticipated period of three months, and wasn't sure about when I will receive it because it was going towards holidays, I thought I was going to take more time. When the judgement email was sent to me, it went in my email [junk] folder and couldn't see it in time.
3. I later on saw the judgement and informed the court about my intent to submit a rehearing application.
4. I then delayed submitting my rehearing application because I didn't have application fee. I had to borrow money from CashConverters. Please see **Exhibit "E"**.
5. I also wanted to seek some legal advice.

[10] The Exhibit E to which he refers is attached to his first affidavit in support of the application, which was sworn on 26 February 2020 and filed on that date. The exhibit is a personal loan agreement, dated 24 February 2020, evidencing a cash loan made to him of $1,200. The filing fee for an application for rehearing is $306.67.

[11] In the notice of opposition filed on behalf of McWatt Group, the grounds for opposing the application being granted are that there is no supporting evidence provided by Mr Ikundabose as to the difficulties associated with his computer in receiving the judgment, or exactly when he sought legal advice. The ground is also raised that there is no evidence as to when Mr Ikundabose received money from the finance company Cash Converters. In fact, that evidence is available by Exhibit E which Mr Ikundabose refers to in his application.

[12] It is accepted that some unrepresented litigants face challenges with court processes and procedures. In the present case, however, there is no evidence that Mr Ikundabose, despite the difficulties, endeavoured with due diligence to file his application for a rehearing on time. The time which elapsed is substantial. In the context of the consideration of the costs application made by McWatt Group, the inference to be drawn is that Mr Ikundabose saw an application for a rehearing as a

possible method of staving off an inevitable order for costs against him. His own submissions on costs were filed with the Court on 13 February 2020 and nearly two weeks followed before he filed his application for a rehearing.

[13] Mr Ikundabose must have known of the Court's judgment of 18 December 2019 by 30 January 2020 at the latest, if not before. He was served with the defendant's submissions on costs on 30 January 2020. Those submissions referred to the judgment. Mr Ikundabose also clearly knew by that time of the timetabling, which was set out in the judgment requiring his own submissions to be filed, because he filed them within the 14-day period required.

[14] Applying the tests expressed in *Empress Abalone*, I am not satisfied that the ground in cl 5(2) has been made out and decline the application on this basis. However, in case I am wrong in rejecting the application on that basis, I have considered the matters raised by Mr Ikundabose in support of his application for a rehearing. I have concluded that even if cl 5(2) did not represent a stumbling block to the application, I would not have granted it in any event.

**Approach to rehearing applications**

[15] Judge Inglis (as she then was) considered the approach to be taken at some length in her judgment in *Marx v Southern Cross Campus Board of Trustees* and I adopt her judgment in the present case.5 The court has a general power to grant a rehearing. This is confirmed by sch 3 cl 5(1) of the Act, set out earlier in this judgment. While the discretion is a broad one it is to be exercised judicially and in accordance with principle. The usual approach, as adopted in this case, is for the trial judge to hear and determine any application for rehearing.6

[16] A range of factors would be relevant to a consideration as to whether a rehearing is appropriate, including weighing both the parties' interests and the broader public interest in the finality of litigation. The overriding consideration is to avoid a

5 *Marx v Southern Cross Campus Board of Trustees* [2017] NZEmpC 4, [2017] ERNZ 1.

6 See *Yong (t/a Yong & Co Chartered Accountants) v Chin* [2008] ERNZ 1 (EmpC) at [3].

miscarriage of justice.7 The applicable principles were discussed by the Court of Appeal in *Ports of Auckland v NZ Waterfront Workers Union*.8 As the Court of Appeal confirmed, the mere possibility of a miscarriage of justice is not a sufficient ground for granting a rehearing.9 What is required is an actual miscarriage of justice, or at least a real or substantial possibility or substantial risk of a miscarriage of justice.

[17] The rehearing is not available simply to allow parties to reformulate their claim, revise their arguments or otherwise allow a further hearing of the matter based on the same evidence. Nor is there free rein to decide from several possible options what will be pursued if a party is dissatisfied with a judgment. Matters which are appropriately dealt with by an application for leave to appeal are not appropriate as grounds for granting a rehearing. These factors all tell against Mr Ikundabose's application.

[18] In *Davis v Commissioner of Police*, Judge Ford observed that:10

[12] The authorities show that some special circumstance must be found to exist to warrant the ordering of a rehearing. It would be an impossible burden on this Court if a rehearing under cl 5 could be obtained merely by request and there is a strong countervailing public interest consideration in having finality to litigation.

[19] In the same decision Judge Ford discussed the sort of cases in which applications for a rehearing have generally succeeded. He stated as follows:

[13] Traditionally, rehearings have been ordered when the integrity of a judgment has been placed in issue by some special and unusual circumstance. Examples include the discovery of fresh or new evidence, that could not with reasonable diligence have been discovered prior to the hearing, which is of such a character as to appear to be conclusive: *Hardie v Round.* A similar situation, albeit less common, may arise where a significant and relevant statutory provision or authoritative decision has been inadvertently overlooked or misapprehended: *Ports of Auckland Ltd v New Zealand Waterfront Workers Union* and *Yong t/a Yong and Co Chartered Accountants v Chin.* Other special and unusual circumstances will no doubt arise and each will fall to be considered on a case-by-case basis. The threshold test to be applied is whether the applicant can establish a real or substantial risk of a miscarriage of justice if the judgment is allowed to stand.

7. *Cavalier Carpets NZ Ltd v NZ (except Taranaki etc) Woollen Mills etc IUOW* [1989] 2 NZILR 378 (LC) at 381.

8 *Ports of Auckland v New Zealand Waterfront Workers Union* [1995] NZCA 390; [1995] 2 ERNZ 85 (CA).

9 *Ports of Auckland v New Zealand Waterfront Workers Union,* above n 5, at [88].

10 *Davis v Commissioner of Police* [2015] NZEmpC 38, [2015] ERNZ 27 (footnotes omitted).

**Grounds for the application for rehearing**

[20] In the present case, Mr Ikundabose is endeavouring to redirect his challenge away from the redundancy issue upon which the hearing and judgment was based. The claims he made in respect of his redundancy were clearly the emphasis in his pleadings and at the hearing. He now alleges that an issue surrounding an alleged settlement over final pay was the chief cornerstone of the case when clearly that was not so. He now alleges there was a settlement agreement at the time of termination of his employment which was not addressed. In his affidavit in support of his application for rehearing, he also raises issues relating to sick leave and holiday pay entitlements, which he claims were not addressed.

[21] Final pay, sick leave and holiday pay issues were raised in the hearing. The question of the alleged settlement was also covered. There was in fact no settlement and the evidence clearly proved that. If there had been a settlement as Mr Ikundabose now alleges, then that would have precluded him from raising the grievance relating to his redundancy. His only remedy would then have been to sue on the alleged settlement which he now claims was breached.

[22] Insofar as sick leave and holiday pay are concerned, the evidence confirms that Mr Ikundabose received his full entitlement upon termination of employment. In addition, at [21] of his second amended statement of claim, dated and filed on 8 April 2019, Mr Ikundabose confirms that he received full payment of the sick leave entitlement.

[23] In addition to endeavouring to raise these matters by way of rehearing, Mr Ikundabose also appears to be seeking a stay of enforcement on the costs awarded against him in the Authority and an interim order prohibiting publication of the determination and judgment pending the rehearing. This is a repetition of matters which have already been dealt with and rejected in the substantive judgment of 18 December 2019. He also claims that there are documents which were not presented at the hearing. The documents he refers to were either presented at the hearing or, if not, were certainly available and within his possession and control at the time the hearing took place.

[24] Based on all these matters Mr Ikundabose appears to be seeking further consideration of his compensation claim for $100,000 and other monetary claims which were dismissed in the judgment of 18 December 2019.

[25] Having regard to the principles applying to applications for a rehearing as previously discussed, Mr Ikundabose's grounds do not support his application. No miscarriage of justice or a real or substantial possibility or substantial risk of a miscarriage of justice has occurred. As indicated earlier, if the Court had considered grounds existed for him to bring the application for rehearing out of time, the application would nevertheless have been dismissed. If he claims there are outstanding wages, sick leave pay and holiday pay (which the evidence does not appear to support), his proper remedy is to apply to the Authority. The Court does not have originating jurisdiction to consider such matters beyond those which were raised in the challenge.

[26] Because the application for rehearing is dismissed, there is no need to consider the defendant's application for security for costs.

**Quantum of the defendant's costs following judgment of 18 December 2019**

[27] The defendant now seeks confirmation of the costs award in the Authority. The challenge Mr Ikundabose made to that determination has been dismissed. It is appropriate for the Court to now confirm the Authority's costs award in this judgment. Mr Ikundabose is, accordingly, ordered to pay $4,500 to the defendant for those costs.

[28] So far as the costs on the challenge are concerned, several factors are raised by the defendant. The proceedings were

allocated Category 2 Band B under the Court's Costs Guideline Scale of costs at a directions conference.11 Mr Howard-Smith, counsel for the defendant, has helpfully provided in his submissions a table showing calculation of costs based on the Scale. The total sum calculated amounts to $31,787. I have carefully considered the times allocated in the table and am of the view that the times are reasonable. Indeed, I regard the claims as probably somewhat conservative

11 "Employment Court of New Zealand Practice Directions" <www.employment.govt.nz> at No 16.

and, therefore, on the generous side towards Mr Ikundabose. Mr Howard-Smith has also provided some explanatory notes which I accept as valid.

[29] The defendant seeks indemnity costs or an uplift from the costs calculated using the Guideline Scale. Indemnity costs incurred by the defendant because of these proceedings amount to $50,000 exclusive of GST. When the Authority's costs of

$4,500 are added, the total claim for indemnity costs amounts to $54,500. I agree with the submissions made on behalf of the defendant that Mr Ikundabose made this a difficult case for the defendant. Allegations of perjury were made by him against witnesses, he alleged there was a conspiracy to get rid of him rather than his dismissal being based on a genuine redundancy and there were other matters which he raised which required attendances and evidence unnecessarily. While I accept that Mr Ikundabose had no prior experience in such matters, the proceedings and the hearing itself were prolonged by him failing to reasonably co-operate with procedures prior to the hearing and, in particular, inspection of documents and the production of a common bundle of documents which was directed. Additional witnesses were necessary to answer allegations raised by Mr Ikundabose. He indulged in prolonged questioning of witnesses at the hearing, pursuing matters of little or no relevance. Some of the allegations he made were quite immoderate and not to his credit.

[30] In addition, the defendant submits that an offer of settlement was made early in the proceedings which should be considered. The offer, if accepted, would have allowed Mr Ikundabose to discontinue the proceedings without liability for further costs. While this could not be truly characterised as a Calderbank offer, it, nevertheless, presented an opportunity for Mr Ikundabose to make a realistic re-assessment on his prospects of succeeding in the proceedings. Unfortunately, without the benefit of legal advice, Mr Ikundabose was not able on his own to make that assessment.

[31] In his submissions in answer, Mr Ikundabose has primarily endeavoured to re- traverse the alleged merits of his claim. It also contains matters which were subsequently raised in the re-hearing application. Those parts of his submissions, which might be regarded as relevant to the application for costs are, nevertheless, somewhat unfocussed. He asks the Court to not award any costs against him. He

raises his impecuniosity and, in subsequent correspondence with the Court, has re- emphasised his inability to meet an award of costs.

[32] Schedule 3 cl 19(1) of the Act confers on the Court a broad discretion to make orders as to costs. Regulation 68 of the Employment Court Regulations 2000 sets out matters which may be considered by the Court when exercising that discretion. It reads:

**68 Discretion as to costs**

(1) In exercising the court's discretion under the Act to make orders as to costs, the court may have regard to any conduct of the parties tending to increase or contain costs, including any offer made by either party to the other, a reasonable time before the hearing, to settle all or some of the matters at issue between the parties.

(2) Under subclause (1), the court—

(a) may have regard to an offer despite that offer being expressed to be without prejudice except as to costs; but
(b) may not have regard to anything that was done in the course of the provision of mediation services.

[33] The discretion must be exercised judicially and in accordance with principle. Principles applicable to the exercise of the discretion have been set out in numerous decisions, including the Court of Appeal in *Victoria University of Wellington v Alton-*

*Lee*, *Binnie v Pacific Health Ltd* and *Health Waikato Ltd v Elmsly*.12

[34] The fundamental purpose of an award of costs is to recompense the party who has been successful in litigation for the

costs of being represented by counsel or an advocate. Prior to the introduction of the Court's Guideline Scale, the norm for a starting point was two thirds of actual and reasonable costs, but that might be varied up or down according to the circumstances of the case and the way it was conducted. Ability to pay was also a factor to be considered and that remains as an applicable principle.

12 *Victoria University of Wellington v Alton-Lee* [2001] NZCA 313; [2001] ERNZ 305 (CA); *Binnie v Pacific Health Ltd* [2003] NZCA 69; [2002] 1 ERNZ 438 (CA); and *Health Waikato Ltd v Elmsly* [2004] NZCA 35; [2004] 1 ERNZ 172 (CA).

[35] The Guideline Scale is of course, based on the recovery rates prescribed in the High Court Rules, insofar as the monetary allowances are concerned, and those rates also have an inbuilt discounting factor.

[36] In the present case, Mr Ikundabose presented and conducted his case in an inefficient manner which added to the costs incurred by the defendant in having to respond to it. This is not unusual in a case where there is a self-represented litigant. Mr Ikundabose's unfamiliarity with legal concepts and Court procedures prolonged the matter. Nevertheless, a factor which must be considered in the overall exercise of the discretion to award costs is the ability of Mr Ikundabose to pay. In *Gates v Air New Zealand Ltd*, Judge Couch stated when considering this issue:13

The established principle is that a party ought not to be ordered to pay costs to the extent that doing so would cause undue hardship. What this principle allows for is that payment of any substantial sum will cause a measure of hardship to some litigants, particularly individuals. That is to be expected and is considered to be an acceptable consequence of unsuccessfully engaging in litigation. It also recognises that the primary focus of an award of costs should be on compensation of the successful party. It is only when payment of an award which achieves the purpose of justly compensating the successful party would cause a degree of hardship which is excessive or disproportionate that the interests of the unsuccessful party must be recognised by reducing the award which would otherwise be appropriate.

[37] While Mr Ikundabose has presented to the Court details of his financial position in a somewhat haphazard fashion, there can be no doubt that a substantial award of costs will cause hardship. The discretion therefore needs to be exercised in a balanced way. Mr Ikundabose has pursued the defendant in these proceedings in a persistent way. In taking the proceedings first to the Authority he then had the benefit of a well-reasoned determination but chose to pursue the matter further by way of a challenge to the Court and then, not accepting the decision of the Court, endeavoured to reopen the matter by way of a rehearing. While there might, under normal circumstances, be a basis for awarding indemnity costs or certainly an uplift, the reality of the matter is that, whatever award of costs is made, it would be a considerable time before recovery could be expected.

13 *Gates v Air New Zealand Ltd* [2010] NZEmpC 26 at [21].

[38] In all the circumstances, I consider that the appropriate award of costs for the substantive proceedings should be the costs calculated by Mr Howard-Smith in his table and amounting to $31,787. While there may be grounds for an uplift in this case, I must consider Mr Ikundabose's financial position. The Guideline Scale costs provide a proper balance and go some way to providing recompense for the defendant. Costs for that amount are, accordingly, awarded in favour of McWatt Group against Mr Ikundabose. With the costs in the Authority added to that sum, the total award against Mr Ikundabose for those costs is $36,287.

[39] There is a need to also consider the costs which the defendant is entitled to in respect of the unsuccessful application for a rehearing. Again, this is a matter involving the exercise of a discretion. Rather than seeking further submissions from the parties I have decided to set costs now having regard to the matters already discussed and the need now to bring these proceedings to a conclusion. I will allow the rate for one day under the Guideline Scale even though the attendances of counsel for the defendant would have likely well exceeded that time. The further sum to be paid by Mr Ikundabose as costs on the rehearing application is therefore $2,390.

**Disposition**

[40] In conclusion, the effect of this judgment is that Mr Ikundabose's application for a rehearing is dismissed. There is no need for the Court to consider the defendant's application for security for costs. In respect of the substantive proceedings and the proceedings before the Authority, Mr Ikundabose is ordered to pay to McWatt Group for costs, the sum of $36,287. In respect of the application for rehearing, costs are fixed in the sum of $2,390. The total sum Mr Ikundabose is ordered to pay for costs is $38,677.

M E Perkins Judge

Judgment signed at 12.30 pm on 31 July 2020