



Employment Court of New Zealand

You are here: [NZLII](#) >> [Databases](#) >> [Employment Court of New Zealand](#) >> [2016](#) >> [\[2016\] NZEmpC 29](#)

[Database Search](#) | [Name Search](#) | [Recent Decisions](#) | [Noteup](#) | [LawCite](#) | [Download](#) | [Help](#)

Kilpatrick v Air New Zealand [2016] NZEmpC 29 (23 March 2016)

Last Updated: 6 April 2016

IN THE EMPLOYMENT COURT AUCKLAND

[\[2016\] NZEmpC 29](#)

ARC 46/13

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

AND IN THE MATTER of an application for costs

BETWEEN JENNIFER KILPATRICK Plaintiff

AND AIR NEW ZEALAND LIMITED
 Defendant

Hearing: By memoranda as to costs dated on 29 January and 12
 February
 2016

Appearances: Plaintiff in person
 D France and S van der Wel, counsel for defendant

Judgment: 23 March 2016

COSTS JUDGMENT OF JUDGE M E PERKINS

[1] In my substantive judgment dated 13 January 2016 I dismissed Ms Kilpatrick's challenge in its entirety.¹ Costs were reserved to enable the parties to file submissions on costs. Memoranda containing the submissions of the parties have now been filed.

[2] In the determination of the Employment Relations Authority dated 31 May

2013 costs were reserved.² In a subsequent determination dated 4 July 2013 Ms

Kilpatrick was ordered to pay a contribution of \$8,750 towards the costs of Air New

Zealand Ltd (Air NZ).³ While Ms Kilpatrick filed a challenge in the Court to the

¹ *Kilpatrick v Air New Zealand Ltd* [2016] NZEmpC 1.

² *Kilpatrick v Air New Zealand Ltd* [2013] NZERA Auckland 221.

³ *Kilpatrick v Air New Zealand Ltd* [2013] NZERA Auckland 280.

JENNIFER KILPATRICK v AIR NEW ZEALAND LIMITED NZEmpC AUCKLAND [\[2016\] NZEmpC 29](#) [23 March 2016]

substantive determination of the Authority, she did not challenge the subsequent costs determination.

[3] Ms Kilpatrick's challenge was filed in this Court on 20 June 2013. For reasons that are set out in my substantive judgment, delays occurred which led to the matter being brought to a concluded hearing on 31 August 2015. These delays were not of the Court's

making. In addition, once the hearing commenced in July 2015, an inaccurate estimate of time meant it needed to be adjourned part-heard.

[4] In submissions on costs on behalf of Air NZ, Mr France has indicated that the total legal costs incurred by Air NZ in this matter (excluding GST) amount to

\$111,019. Copies of invoices rendered to Air NZ are attached to his submissions. He refers to the steps taken in the proceedings including the interlocutory applications which needed to be attended to. These included Ms Kilpatrick's application for judgment by default on the basis that Air NZ had filed its statement of defence out of time. Belatedly, this misguided application was withdrawn by Ms Kilpatrick. In addition, the statement of claim originally filed when she was representing herself included causes of action which could never have been within the jurisdiction of this Court to consider. Once she obtained legal advice, an amended statement of claim was filed on Ms Kilpatrick's behalf to which a response was required. Mr France also submits that throughout the proceedings, including the hearing itself, the proceedings were prolonged by Ms Kilpatrick's actions; he submits that there should be uplift in the award of costs as a result.

[5] During the course of the proceedings, Air NZ applied for an order for security for costs against Ms Kilpatrick. Such an order was made against her requiring her to pay into Court the sum of \$20,000 to be held in an interest-bearing account by the Registrar. This sum was eventually paid into Court after some delay. Ms Kilpatrick had been granted some indulgence in the payment of the security to enable her to complete the sale of a property she owned in Wellington. There is now some doubt as to whether she in fact used the sale of this property to pay the security ordered against her because in the submissions, which she has now filed, she states that she was able to pay the security into Court as a result of the generosity of family and friends.

[6] In her submissions on costs, Ms Kilpatrick has endeavoured to re-traverse matters raised in the substantive proceedings and which have no relevance at this stage to the issue of costs. Such is the tone of her submissions that she has clearly seen them as an opportunity to make inappropriate comments against Mr France and employees of Air NZ. She also raises previous grievance cases involving Air NZ which bear no relationship whatsoever to her case or to the issue which must now be determined. To the extent that she does deal with the issue of costs in the present proceedings, her submissions deal with her present impecuniosity which she attributes to the litigation. While she does not say so, the inference to be taken is that any costs award against her should on this ground be substantially reduced, if not waived. Insofar as the money paid into Court by way of security is concerned she submits as follows:

Ms Kilpatrick now seeks to have money held in trust by the Court to be paid to the Court for costs she was unaware of and the remainder to be returned to her so she can repay her mother who is elderly, distressed and now also insolvent.

[7] In his submissions Mr France requested that the sum paid by way of security, together with any accumulated interest, now be paid to Air NZ in reduction of the award of costs it seeks against Ms Kilpatrick.

[8] The principles relating to awards of costs in this Court are now well established. Presently the Court has introduced a guideline scale of costs by way of a pilot programme. However, as Ms Kilpatrick's challenge was commenced well before the introduction of the guideline, the application for costs in these proceedings needs to be dealt with on the basis of established principles contained in

the Court of Appeal judgments of *Victoria University of Wellington v Alton-Lee*,⁴

*Binnie v Pacific Health Ltd*⁵ and *Health Waikato Ltd v Elmsly*.⁶

[9] The consideration of costs involves a two-stage process on the basis that costs will generally follow the event. First, the Court considers whether the actual

costs that were incurred by the successful party were reasonable. Secondly, in

⁴ *Victoria University of Wellington v Alton-Lee* [2001] NZCA 313; [2001] ERNZ 305 (CA).

⁵ *Binnie v Pacific Health Ltd* [2003] NZCA 69; [2002] 1 ERNZ 438 (CA).

⁶ *Health Waikato Ltd v Elmsly* [2004] NZCA 35; [2004] 1 ERNZ 172 (CA).

assessing any award the Court will adopt a starting point of 66 percent of actual and reasonable costs.

[10] The Court retains an ultimate discretion on costs. In exercising the discretion the Court will take into account all relevant matters, including the way that the parties conducted the litigation, the manner in which the parties endeavoured to settle or reacted to attempts at settlement, and the unsuccessful party's financial circumstances. These considerations will be relevant in deciding whether to increase or decrease any costs award from the established starting point.

[11] The manner in which Ms Kilpatrick's alleged financial position will be taken into account by the Court was expressed by Judge Couch in *Gates v Air New Zealand Ltd* in the following way:⁷

A factor which must be considered in the overall exercise of my discretion to award costs is the ability of the plaintiff to pay. 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.

[12] Unfortunately, while Ms Kilpatrick appears to rely upon her financial circumstances as a basis for substantially reducing or waiving costs, she has not provided sufficient detail to corroborate her statement that she “still has no job, career, house, income [and] carries a financial debt in excess of \$80,000 to her family and friends”. Nevertheless, from the information I was able to gather about Ms Kilpatrick from the interlocutory proceedings and during the course of the substantive hearing itself, I am prepared to accept that Ms Kilpatrick is likely to now be in straitened financial circumstances. However, I anticipate that when these

proceedings are finally behind her, Ms Kilpatrick will take on employment.

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

[13] The question as to what extent her financial position will now be worsened by the award of costs against her prompts the comment that the consequences of these proceedings have arisen mainly as a result of her own actions in the matter. Coincidentally, similar considerations arose in *Gates* as evidenced by the following comment from Judge Couch in that decision, which in many ways applies equally to

Ms Kilpatrick:8

There can be no doubt that the manner in which the plaintiff's case was presented and conducted was inefficient and added significantly to the costs incurred by the defendant in responding to it. That was very largely the result of the plaintiff's decision to appear in person. Her unfamiliarity with legal concepts and Court procedures prolonged many of the interlocutory procedures. While that was understandable and largely acceptable, the plaintiff also prolonged the proceedings at times by her unwillingness to accept what she was told by the Court or what was obvious as a matter of logic.

[14] There is no need to repeat the comments I made in the substantive judgment about the dogmatic and obstinate way Ms Kilpatrick refused to acknowledge the evidence against her in addition to the breach of her obligations of good faith towards Air NZ in refusing to cooperate, engage and communicate with it in the disciplinary process. While making the comments that I have about my perception of Ms Kilpatrick's present financial position, she has not been exactly forthcoming about her present asset and income position.

[15] Ms Kilpatrick pursued her challenge against Air NZ in the face of a well reasoned determination by a very experienced member of the Authority. The clear findings of fact in that determination would have alerted Ms Kilpatrick to the futility of her challenge. Obviously she was entitled to bring a challenge to the Court but would have been aware of the inevitable consequence of a costs award against her in the event she did not succeed.

[16] Having regard to all of the circumstances to be taken into account in exercising the Court's discretion in this matter, I have decided that there is no reason to depart from usual principles and I adopt a starting point of 66 per cent of the actual costs to Air NZ which I regard as reasonable. Certainly it would be contrary

to principle to accept Ms Kilpatrick's submission that costs against her should be

8 At [13].

completely waived or reduced to such an extent that she would receive change from the money which she has already paid into Court as security for costs.

[17] There are two areas where I consider that Ms Kilpatrick's actions have resulted in completely unnecessary costs being incurred by Air NZ and for which uplift should be considered. These relate to her misguided application for judgment by default based on her incorrect belief that Air NZ was out of time with filing its statement of defence, and her similarly misguided initial pleadings which necessitated substantial amendment and then the necessity for Air NZ to re-plead.

[18] As Mr France has indicated in the summary to his submissions, 66 percent of actual and reasonable costs in this case would amount to \$73,000. Having regard to those factors where I consider a modest uplift should apply I have decided to increase the total costs award against Ms Kilpatrick to \$80,000. This is an uplift of

\$7,000 to take account of those matters I have mentioned. There will be an award against Ms Kilpatrick accordingly and in addition she is also ordered to pay Air NZ the sum of \$795.50 to reimburse it for the modest disbursements it has incurred.

[19] As indicated, Ms Kilpatrick did not challenge the costs award by the Authority. That award will stand requiring Ms Kilpatrick to pay to Air NZ the sum of \$8,750. It is also appropriate that the funds held by the Registrar as security for costs should now be paid to Air NZ together with accumulated interest. There is an order accordingly. These funds are to be credited against the total costs award contained in this judgment.

M E Perkins

Judge

Judgment signed at 4.15 pm on 23 March 2016