



Employment Court of New Zealand

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McKinlay v Wellington Cosmetic Clinic Limited [2021] NZEmpC 211 (29 November 2021)

Last Updated: 8 December 2021

IN THE EMPLOYMENT COURT OF NEW ZEALAND WELLINGTON

I TE KŌTI TAKE MAHI O AOTEAROA TE WHANGANUI-A-TARA

[\[2021\] NZEmpC 211](#)

EMPC 388/2020

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
AND IN THE MATTER	of an application for costs
BETWEEN	JOANNE MCKINLAY Plaintiff
AND	WELLINGTON COSMETIC CLINIC LIMITED Defendant

Hearing: (on the papers)

Appearances: P McKenzie-Bridle, counsel for the plaintiff
Dr R Jones, agent for the defendant

Judgment: 29 November 2021

COSTS JUDGMENT OF JUDGE B A CORKILL

[1] In a judgment of 9 August 2021,¹ I allowed a challenge to an order of non-publication, made by the Employment Relations Authority.² I was satisfied there was no proper reason for such an order to stand.

[2] As Ms Joanne McKinlay was the successful party, I indicated that costs should follow the event.

¹ *McKinlay v Wellington Cosmetic Clinic Ltd* [\[2021\] NZEmpC 125](#).

² *OST v EPB Ltd* [\[2019\] NZERA 133 \(Member Loftus\)](#).

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[3] Subsequently, Ms McKinlay's counsel, Mr McKenzie-Bridle, filed a submission in support of an application for costs, which confirmed that Ms McKinlay was legally aided for the purposes of the proceeding.

[4] Mr McKenzie-Bridle referred to *Curtis v Commonwealth of Australia*, where the Court of Appeal considered whether a successful party funded by legal aid could recover scale costs or some lesser amount.³

[5] In that particular context, the Court of Appeal said:⁴

The quantum [of costs] should be according to the Court of Appeal scale. Costs should be scale costs or the amount paid out by the [Legal Services] Commissioner for the appeal, whichever is the lesser figure. Thus costs should not exceed scale, or (if they are less), the amount paid for legal services.

[6] Mr McKenzie-Bridle invited the Court to follow this approach. He submitted that a correct assessment of costs under the Court's Guideline Scale as to Costs was

\$24,617. However, the amount paid out by the Commissioner for Ms McKinlay's costs to date was \$13,471.24, including GST, which did not include likely costs for the preparation of the memorandum of costs which had been prepared.

[7] Because these figures were less than the scale assessment, Mr McKenzie-Bridle argued that the Court should make an order with reference to the sums actually invoiced to the Commissioner.

[8] Dr Jones, a director of Wellington Cosmetic Clinic Ltd (WCCL), opposed the application. He stated that WCCL had incurred legal costs which had affected its liquidity. He also said he had sought an opportunity to negotiate, both as to the quantum of costs, and as to a timetable for payment. He said, however, that the timeframe within which an offer was then made on behalf of Ms McKinlay for acceptance did not allow him a proper opportunity to consider it. This was because an application for costs was then filed, on which he had to focus.

3 *Curtis v Commonwealth of Australia* [2019] NZCA 126.

4 At [22].

[9] I issued a minute indicating that if WCCL wished the Court to take into account its financial circumstances, then reliable information would need to be filed.⁵ No such material was filed within the timeframe which I stipulated, or indeed since. In the absence of any reliable details about WCCL's circumstances, I place the issue as to its ability to pay to one side.

[10] The starting point for the assessment of costs is cl 19 of sch 3 of the [Employment Relations Act 2000](#). It confers a broad discretion.

[11] The discretion to award costs must be exercised judicially, and in accordance with that and other well-established principles.⁶

[12] Finally, the Court's Guideline Scale as to Costs may be a factor in the exercise of the Court's discretion.⁷

[13] For the purposes of exercising the discretion in a principled way, I asked for, and received, copies of Ms McKinlay's legal aid invoices. There are ten invoices. In my view, three of them should not be considered, for these reasons:

(a) The invoice of 30 April 2019 relates to the initial response filed on behalf of Ms McKinlay, when WCCL instituted a challenge. That challenge was, however, discontinued, and in a judgment of 4 December 2020, Judge Perkins dealt with the issue of costs flowing from the discontinuance.⁸ Accordingly, I place the invoice of 30 April 2019 to one side as the costs to which it relates have already been dealt with.

5 Minute of 4 November 2021.

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

7 "Employment Court of New Zealand Practice Directions"

<<https://www.employmentcourt.govt.nz/assets/Documents/Publications/Employment-Court-Practice-Directions.pdf>> at No 16.

8 *EPB Ltd v OST* [2020] NZEmpC 218 at [23]–[30].

(b) The invoices of 31 October 2019 and 31 January 2020 relate to a hearing which was conducted in the Family Court, as referred to in my judgment.⁹ This Court does not have a jurisdiction to deal with costs incurred in another Court. Accordingly, I place those particular invoices to one side also.

[14] The total of the remaining legal aid invoices which have been paid is

\$9,664.71, including GST.

[15] Mr McKenzie-Bridle's assessment as to scale costs totalled \$24,617, on a Category 2B basis.

[16] Following the dicta of the Court of Appeal in *Curtis*, I consider it fair and reasonable that WCCL pay an amount equivalent to the relevant legal aid invoices, which are substantially less than the scale assessment.¹⁰

[17] It is clear the legal aid invoices were rendered on a GST basis, and that the Commissioner paid GST. Under the Court's broad discretion as to costs, I therefore allow for this liability, since it appears to be contemplated by the dicta in *Curtis* when the Court of Appeal referred to "the amount paid for legal services" as being recoverable.¹¹

[18] Mr McKenzie-Bridle said he will be rendering a final invoice to the Commissioner for the work involved in preparing a

costs submission, likely to be

\$442.20 plus GST. The costs application had some complexities which required research as to the legal aid position. In the somewhat unusual circumstances, I allow

\$300 for this aspect of Mr McKenzie-Bridle's claim.¹²

9 *McKinlay v Wellington Cosmetic Clinic Ltd*, above n 1, at [21].

10 *Curtis v Commonwealth of Australia*, above n 3, at [22].

11 At [22].

12 Costs on costs may be awarded as an aspect of the Court's discretion as to costs: *Booth v Big Kahuna Holdings Ltd* [2015] NZEmpC 134 at [44]–[47]; and *Nisha v LSG Sky Chefs New Zealand Ltd* [2018] NZEmpC 33, [2018] ERNZ 108, at [11]–[18].

[19] In the result, WCCL is ordered to pay Ms McKinlay the sum of \$9,964.71.

B A Corkill Judge

Judgment signed at 1.20 pm on 29 November 2021

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