



Employment Court of New Zealand

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Mercer v McIntyre [2016] NZEmpC 102 (18 August 2016)

Last Updated: 22 August 2016

IN THE EMPLOYMENT COURT WELLINGTON

[\[2016\] NZEmpC 102](#)

EMPC 113/2015

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

AND IN THE MATTER of an application for costs

BETWEEN SHANE ANDREW MERCER
 Plaintiff

AND ROBERT LESTER MCINTYRE
 Defendant

Hearing: By submissions filed on 20 June and 11 July
 2016

Appearances: S Mercer, plaintiff in person
 J Reardon, counsel for the defendant

Judgment: 18 August 2016

COSTS JUDGMENT OF JUDGE CHRISTINA INGLIS

[1] The defendant has applied for costs following an earlier substantive judgment delivered by Judge Ford¹ dismissing Mr Mercer's challenge to a determination of the Employment Relations Authority.² The defendant seeks a contribution to costs of

\$10,704.

[2] Mr Mercer accepts that he ought to make a contribution towards costs. He submits that a reasonable contribution would be \$3,996, although he asks that consideration be given to a 50 per cent reduction having regard to allegedly

aggravating features of the defendant's conduct.

¹ *Mercer v McIntyre* [2016] NZEmpC 49.

² *McIntyre v Core Technology Ltd* [2015] NZERA Wellington 34.

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[3] The starting point is cl 19(1) of sch 3 of the [Employment Relations Act 2000](#). It confers a broad discretion as to costs, providing that:

(1) The court in any proceedings may order any party to pay to any other party such costs and expenses ... as the court thinks reasonable.

[4] Regulation 68(1) of the [Employment Court Regulations 2000](#) also deals with costs. It provides that, 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.

[5] The discretion to award costs, while broad, is to be exercised judicially and in accordance with principle. The primary principle is that costs follow the event. The usual starting point in ordinary cases in this Court is 66 per cent of actual and reasonable costs. From that starting point, factors that justify either an increase or decrease are assessed.

[6] It is evident that the challenge involved a number of attendances, including drafting a statement of defence, preparation for and attendance at case management conferences, written submissions and a half day of hearing time. Counsel for the defendant submits that a contribution to reasonable costs might best be assessed by applying the scale for costs contained within the High Court Rules, based on category 2B. A contribution of \$10,704 is sought. Actual costs are said to be around

\$20,000.

[7] The plaintiff does not take issue with an application of the High Court scale for an assessment of costs but submits that the case falls within category 1A because the issues for the Court were narrow, focussing on the interpretation of a single clause in the employment agreement, and the level of skill involved was at the “light end of the scale”. Applying category 1A to the steps which were reasonably taken in responding to the challenge (without further deduction for conduct allegedly unnecessarily increasing costs) would lead to an award of \$3,996.

[8] The proceeding can appropriately be described as one of average complexity. While, as the plaintiff points out, some costs would have already been incurred in

terms of preparation in the Employment Relations Authority, further costs were inevitable once the matter came before the Court on the plaintiff’s challenge. Although the High Court costs scale is not directly applicable in this jurisdiction, it can usefully be applied by way of analogy. I accept that a reasonable contribution to costs in all of the circumstances would be around \$10,700.

[9] I have considered whether a reduction would be appropriate having regard to the matters referred to in the plaintiff’s submissions. These essentially relate to the defendant’s alleged refusal to provide documentation prior to the challenge being filed. Such matters are not relevant to an assessment of costs and I put them to one side. Nor am I otherwise persuaded that a reduction is appropriate.

[10] The plaintiff is ordered to pay the defendant a contribution towards his costs of \$10,700.

[11] Disbursements are not sought and none are ordered.

Christina Inglis
Judge

Judgment signed at 12.30 pm on 18 August 2016

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