



Employment Court of New Zealand

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O'Boyle v McCue [2021] NZEmpC 23 (9 March 2021)

Last Updated: 14 March 2021

IN THE EMPLOYMENT COURT OF NEW ZEALAND AUCKLAND

I TE KŌTI TAKE MAHI O AOTEAROA TĀMAKI MAKĀURAU

[\[2021\] NZEmpC 23](#)

EMPC 464/2019

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
AND IN THE MATTER	of an application for costs
BETWEEN	LYNETTE SALLY O'BOYLE First Plaintiff
AND	O'BOYLE LAW LIMITED Second Plaintiff
AND	JANIS MARY MCCUE Defendant

Hearing: On the papers
Appearances: C W Stewart and D Church, counsel for the plaintiffs D Grindle, counsel for the defendant
Judgment: 9 March 2021

COSTS JUDGMENT OF JUDGE B A CORKILL

[1] This judgment resolves costs issues flowing from the Court's substantive decision where I said Ms McCue was entitled to costs on a 2B basis.¹ I indicated counsel should discuss quantum and any associated issues directly in the first instance, with the right being given to return to Court if need be.

[2] The parties have not resolved all issues, but they have agreed that under the Court's Guideline Scale as to Costs, the correct starting point of an order for costs in

1 *O'Boyle v McCue* [\[2020\] NZEmpC 175](#).

LYNETTE SALLY O'BOYLE v JANIS MARY MCCUE [\[2021\] NZEmpC 23](#) [9 March 2021]

Ms McCue's favour is \$34,324.25. This figure includes legal costs with regard to an interlocutory judgment, legal costs at the substantive hearing, and disbursements.

[3] The sole issue is whether there should be an uplift. Invoices were produced indicating that Ms McCue had incurred actual legal fees of \$54,877, including GST.

[4] In the costs submissions which were originally filed by Ms McCue's counsel, Mr Grindle, it was submitted that the first factor justifying an uplift related to a Calderbank letter he sent to the representative acting for Ms O'Boyle at the time, on 12 June 2019; this was shortly after the investigation meeting in the Employment Relations Authority (the Authority).

[5] This ground of uplift was resisted for Ms O'Boyle, on the basis that the offer was advanced solely for the purposes of the Authority hearing and made no reference to the possibility of a challenge in this Court. Ms Stewart, counsel for Ms O'Boyle

argued that if a Calderbank offer is made at the Authority stage, and not renewed, it is ineffectual for costs purposes in this Court.²

[6] In his reply submissions, Mr Grindle said that this Court should follow the earlier authorities; thus, Ms McCue would no longer rely on the Calderbank letter. In my view, that was a proper concession in the particular circumstances of this case, since the content of the offer was plainly directed to resolving Ms McCue's claim at that stage. This was evident from the fact that the costs liability which would be compromised related to costs in the Authority only. Second, the offer had to be accepted by 17 June 2019; I infer it was intended to lapse at that time. The offer was not renewed subsequently.

[7] Although Ms O'Boyle also proposed resolution via a Calderbank offer on 11 May 2020, shortly before the commencement of the substantive hearing in the Court, the offer fell well short of the findings made by this Court; nor was it relied on by Ms O'Boyle.

2. *Kaipara v Carter Holt Harvey Ltd* [2012] NZEmpC 92, [2012] ERNZ 395; *O'Connor v Auckland University Students' Association Inc* [2014] NZEmpC 185 at [19(d)]; there is controversy as to the application of this principle: *Rodkiss v Carter Holt Harvey* [2015] NZEmpC 147; [2015] ERNZ 333 at [29]–[33].

[8] There are, however, two remaining issues with which the Court must deal. The first relates to conduct, noting that under reg 68(1) of the [Employment Court Regulations 2000](#), the Court may have regard to the conduct of the parties tending to increase or contain costs. Further, the Court's Guideline Scale is not intended to replace the Court's discretion to fix a reasonable sum for costs.³

[9] The first issue raised concerns a request made for Ms McCue's medical records; this issue became the subject of an interlocutory judgment.⁴ The parties have agreed that in respect of that judgment, there should be a contribution to costs under the Guideline Scale in the sum of \$4,222.33. I do not consider that the circumstances relating to the request for disclosure justify an uplift from this figure.

[10] The second issue raised, however, is more significant. It relates to issues concerning payments for unpaid wages and other entitlements which were due to Ms McCue by Ms O'Boyle, as discussed in my substantive judgment. Mr Grindle submitted that the way in which this issue was dealt with during the course of the challenge escalated legal costs.

[11] He referred to the fact that various payments were made after the Authority hearing, on a sequential basis. I described these in the substantive judgment.⁵

[12] Mr Grindle emphasised that it was necessary for the Court to direct the parties to prepare a Scott Schedule because of controversy relating to outstanding amounts; he said that Ms McCue's position, as described in that schedule, was largely upheld.⁶

[13] In response, Ms Stewart said that payments made by Ms O'Boyle were made as soon as counsel advised her to do so, that costs should not be used to punish a losing party; and that conduct by parties prior to the commencement of a proceeding is not misconduct in a proceeding and is therefore irrelevant to costs. She submitted that what is relevant is the way in which the litigation itself is progressed.

³ [Employment Relations Act 2000](#), sch 3, cl 19.

⁴ *O'Boyle v McCue* [2020] NZEmpC 51, [2020] ERNZ 111.

⁵ *O'Boyle*, above n 1, at [81]–[84].

⁶ At [85]–[104].

[14] I agree that for costs purposes, the focus should be on attendances that were required during the course of the proceeding in the Court. I also accept that an award for costs should not be made so as to punish.

[15] However, I am satisfied that significant attendances were required to deal with the issues of unpaid entitlements. This included the preparation of the Scott Schedule which the Court found reliable when dealing with many of Ms McCue's claims; there is no discrete factor in the scale of costs which covers those attendances.

[16] The relevant invoice rendered to Ms McCue with regard to ongoing attendances during the proceeding, does not delineate the amount charged to her for this work.

[17] I am satisfied that an uplift of \$4,000 is justified as a contribution to the likely costs involved in the work which arose from dealing with the ongoing issue of unpaid entitlements, particularly with regard to the preparation of the Scott Schedule.

[18] In the result, Ms O'Boyle is to pay Ms McCue the total sum of \$38,324.25.

[19] I make no order as to costs with regard to the application for costs.

B A Corkill Judge

Judgment signed at 3.10 pm on 9 March 2021

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