



# Employment Court of New Zealand

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## Pretorius v Marra Construction (2004) Limited [2016] NZEmpC 152 (18 November 2016)

Last Updated: 23 November 2016

IN THE EMPLOYMENT COURT AUCKLAND

[\[2016\] NZEmpC 152](#)

EMPC 323/2015

IN THE MATTER OF a challenge to a determination of the

Employment Relations Authority

BETWEEN FREDRICK PRETORIUS Plaintiff

AND MARRA CONSTRUCTION (2004) LIMITED

Defendant

EMPC 376/2015

IN THE MATTER OF a challenge to a determination of the

Employment Relations Authority

AND BETWEEN MARRA CONSTRUCTION (2004) LIMITED

Plaintiff

AND FREDRICK PRETORIUS Defendant

Hearing: (on the papers dated 12 August and 14 September 2016) Appearances: D Jacobson, counsel for Mr F Pretorius

K Patterson, counsel for Marra Construction (2004) Limited

Judgment: 18 November 2016

COSTS JUDGMENT OF JUDGE B A CORKILL

### Introduction

[1] This judgment deals with costs issues arising from two decisions. The first related to an unsuccessful application made by Mr Fredrick Pretorius to remove part

FREDRICK PRETORIUS v MARRA CONSTRUCTION (2004) LIMITED NZEmpC AUCKLAND [\[2016\] NZEmpC 152](#) [18 November 2016]

of a relationship problem from the Employment Relations Authority (the Authority)

to this Court, which was issued on 19 April 2016.<sup>1</sup>

[2] The second related to the disposition of a challenge and a cross-challenge which was the subject of a judgment resolving time limitation issues which was issued on 2 August 2016.<sup>2</sup> My conclusions when dealing with the time limitation issues were as follows:<sup>3</sup>

[110] I have found that Mr Pretorius' claim in simple contract cannot proceed. There was no express agreement as to the quantum of payment arrangements for overtime; consequently there was no viable cause of action which could be assessed for time limitation purposes.

[111] I have found, however, that his claim for remuneration on a quantum meruit basis if established for overtime or for bonus payments, would not be statute barred by s 142 of the Act, since payment was due at the conclusion of the project in March 2010. I have also concluded that Mr Pretorius' claim, in the alternative, under the MW Act would not be statute barred in respect of established breaches which occurred after 3 March 2008.

[112] Finally, any claims for unpaid entitlements under the Holidays Act, where non-payment occurred after the same date would not be statute barred if they were to be made out.

[113] Accordingly, Mr Pretorius' challenge is partially allowed, and Marra's challenge is dismissed. Because my conclusions differ in some respects from those of the Authority, the determination of the Authority is set aside and this decision stands in its place.

### **Counsel's submissions**

[3] Mr Pretorius sought costs on the basis of the principle that costs should follow the event. His counsel, Mr Jacobson, stated that total costs, after allowance for \$96.60 which related to his attendances when dealing with an aspect of the application for removal, amounted to \$17,849.15.

[4] Mr Jacobson stated that this sum included a disbursement of \$992.45 for

charges rendered to Mr Jacobson's firm by the New Zealand Law Society (NZLS)

<sup>1</sup> *Pretorius v Marra Construction (2004) Ltd* [2016] NZEmpC 43.

<sup>2</sup> *Pretorius v Marra Construction (2004) Ltd* [2016] NZEmpC 95, (2016) 10 NZELC 79-066. The Court also issued a judgment on 11 December 2015 dealing with a request by Marra Construction (2004) Ltd for an extension of time to file a challenge out of time; it was granted but no order for costs was made: *Marra Construction (2004) Ltd v Pretorius* [2015] NZEmpC

222.

<sup>3</sup> *Pretorius v Marra Construction (2004) Ltd*, above n 2 (footnotes omitted).

for research of Commonwealth cases on quantum meruit. He submitted that Mr Pretorius should be fully reimbursed for the outlay he had incurred. Additionally, he sought a disbursement of \$204.44, being the filing fee of the statement of claim on Mr Pretorius' challenge.

[5] Then Mr Jacobson submitted that the Court should fix costs in the Authority in relation to the preliminary determination of the Authority that the Court had set aside.<sup>4</sup>

[6] Finally, costs in respect of the application for costs were sought, in the sum of \$1,500.

[7] Mr Jacobson also referred to the Court's Guideline Scale, which applies to cases filed after 1 January 2016. He said that after allowing \$2,899 in respect of Marra's successful defence of the removal application, the Guidelines produced a figure of \$22,969 in the plaintiff's favour.

[8] Counsel for Marra, Mr Patterson, acknowledged that costs should follow the event, although he said that these were not usually payable until the proceedings are concluded.

[9] Then Mr Patterson provided detailed submissions as to whether Mr Pretorius could establish any of his claims.

[10] Next, Mr Patterson acknowledged that the actual costs incurred for Mr Pretorius were reasonable, having regard to the work undertaken. However, he submitted that the usual reduction to 66 per cent should be applied, having regard to the criteria in respect of increased or indemnity costs described in r 14.6 of the High Court Rules which could not be established.

[11] Turning to the issue of the Guideline on costs, he agreed that this was a

Category 2, Band B case. He disagreed, however, with Mr Jacobson's analysis of

individual items from the relevant schedule.

4 *Pretorius v Marra Construction (2004) Ltd* [2015] NZERA Auckland 314.

[12] Mr Patterson submitted that there should be a reduction from 66 per cent of fair and reasonable costs, to take account of Mr Pretorius' lack of success with regard to his removal application. He submitted that having regard to the lack of merit in Mr Pretorius' claims, and making allowance for Mr Pretorius' unsuccessful removal application, a correct assessment under the Guidelines should be reduced by

80 per cent.

[13] Mr Patterson argued that cost issues in the Authority had not been removed to the Court and could not be considered by it.

[14] Finally he submitted that any allowance for costs incurred by Mr Pretorius in bringing his application for costs should be determined having regard to the degree of success achieved.

## Discussion

[15] The key legal principles relating to consideration of costs are well settled. The starting point is cl 19 of Sch 3 of the Act, which confers wide discretionary powers on the Court in these terms:<sup>5</sup>

### 19 Power to award costs

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

(2) The court may apportion any such costs and expenses between the parties or any of them as it thinks fit, and may at any time vary or alter any such order in such manner as it thinks reasonable.

[16] It is well established from Court of Appeal decisions that the Court is required first to determine whether costs incurred by a successful party were reasonably incurred, and then after an appraisal of all relevant factors, decide at which level it is reasonable for the unsuccessful party to contribute to the successful party's costs. Sixty-six per cent is generally regarded as a starting point, although the Court has discretion to consider whether there are factors justifying an increase

or a decrease, given the discretionary nature of the assessment.<sup>6</sup>

<sup>5</sup> See also [Employment Court Regulations 2000](#), reg 68(1).

<sup>6</sup> *Victoria University of Wellington v Alton-Lee* [2001] NZCA 313; [2001] ERNZ 305 (CA), *Binnie v Pacific Health*

[17] With regard to Mr Patterson's submission that costs should not be paid until the conclusion of a proceeding, I observe that there is no rule to this effect. The timing of an order for costs is a matter of discretion for the Court. In any event, all matters which have come to this Court have now been resolved. I am not persuaded that the settling of costs should be deferred.

[18] As noted, both counsel referred to the Court's Guideline as to costs. For two reasons, I do not intend to utilise the scale on this occasion. First, the amount claimed on behalf of Mr Pretorius with reference to the Guideline significantly exceeds his actual costs; the Guideline does not therefore assist since its object is to provide a basis for assessing a reasonable contribution to costs. Secondly, no detailed breakdown of the analysis conducted for Mr Pretorius has been provided to the Court; it would appear that separate assessments have been undertaken in respect of both the challenge and the cross-challenge, which is not appropriate in the circumstances of this case where these two proceedings arose from one determination and were heard together.

[19] In any event, Mr Patterson accepted that Mr Pretorius' costs were fair and reasonable. Accordingly, these provide an appropriate starting point for the assessment of costs.

[20] In my view, the inclusion of the NZLS charges for research is appropriate as this was a relevant expense. Had NZLS not undertaken this work, counsel would have. The deduction for costs incurred with regard to Mr Pretorius' own application for leave is also appropriate. The starting point is accordingly \$17,849.15. Sixty-six per cent of this sum is \$11,780.44.

[21] Mr Jacobson argued in effect that Mr Pretorius should receive indemnity costs. The essence of his submission in support of this proposition was that having regard to the figure produced under the Guideline, which exceeded actual costs by some \$5,000, it was appropriate to allow Mr Pretorius a full recovery of his

reasonably incurred costs.

*Ltd* [2003] NZCA 69; [2002] 1 ERNZ 438 (CA); *Health Waikato Ltd v Elmsly* [2004] NZCA 35; [2004] 1 ERNZ 172 (CA) and

[22] I do not consider this is a sufficient justification for allowing indemnity costs, principally for the reasons I have already given to the effect that the Guideline assessment undertaken for Mr Pretorius is excessive. A 66 per cent starting point of actual costs is appropriate.

[23] I do not accept the submission made for Marra that Mr Pretorius' claims are, in substance, misconceived and that the merits should be considered when determining the present costs application. Mr Pretorius succeeded on the time limitation issues which came before this Court. That is all the Court was concerned with. No findings as to the substance of his claims were made. It was ruled that those issues were for investigation by the Authority.

[24] I do not overlook the point raised by Mr Patterson that Mr Pretorius failed to establish that his claim for overtime and bonus payments based in simple contract was within time; this was because there was no express agreement as to these elements so that there was no viable cause of action which could be assessed for time limitation purposes. But Mr Pretorius did succeed in establishing there was a jurisdictional basis for a claim in quantum meruit for overtime and for bonus payments, which was not statute-barred. Accordingly, Mr Pretorius succeeded on the time limitation issues which arose with regard to his claims for overtime and bonus payments; he also succeeded on the time limitation issues relating to his other claims. Accordingly, he succeeded on all necessary time limitation issues.

[25] To this point there is no basis for discounting Mr Pretorius' costs below  
66 per cent.

[26] However, it is appropriate to consider an allowance for Marra's success in resisting Mr Pretorius' removal application. Since no figures as to Marra's actual costs in this regard have been submitted, I cannot make a separate assessment with regard to that outcome. The prudent approach to discount Mr Pretorius' entitlement to costs, from the 66 per cent amount referred to earlier.

[27] This requires the exercise of the Court's discretion. Taking account of the unsuccessful removal application, I consider a fair contribution to Mr Pretorius' costs is reached by reducing the starting figure of \$11,780.44 to \$9,500.

[28] I decline to make any findings with regard to costs incurred with regard to the Authority's determination which I set aside. I have no information as to whether the Authority has determined the issue of costs on this topic; more particularly, there has been no challenge of such a determination which would bring that issue to this Court.

[29] Finally, I deal with the application for costs of \$1,500 on the application for costs. Mr Pretorius has not been fully successful in respect of his application. I was referred to the approach adopted on this topic in *Hoff v The Wood Lifecare (2007) Ltd*, where \$1,000 was awarded.<sup>7</sup> I consider this is a fair sum for the costs application which was brought in this case.

[30] The filing fee disbursement incurred by Mr Pretorius is recoverable, in the sum of \$204.44.

## Conclusion

[31] I order Marra to pay Mr Pretorius the sum of \$10,500 as a contribution to his costs, and a disbursement in the sum of \$204.44.

B A Corkill

Judge

Judgment signed at 4.45 pm on 18 November 2016

<sup>7</sup> *Hoff v The Wood Lifecare (2007) Ltd* [2015] NZEmpC 156 at [29].