



# Employment Court of New Zealand

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## Titoki Securities Trust v Wallace [2016] NZEmpC 11 (16 February 2016)

Last Updated: 1 March 2016

### IN THE EMPLOYMENT COURT AUCKLAND

#### [\[2016\] NZEmpC 11](#)

EMPC 235/2015

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

AND IN THE MATTER   of an application for costs

BETWEEN                TITOKI SECURITIES TRUST  
                                 Plaintiff

AND                        SHARON WALLACE Defendant

Hearing:                By memoranda of submissions filed on 6 and 29 January  
                                 and 10  
                                 February 2016

Appearances:        P Swarbrick, counsel for plaintiff  
                                 Defendant in person

Judgment:             16 February 2016

### COSTS JUDGMENT OF CHIEF JUDGE G L COLGAN

[1] The defendant seeks costs upon the plaintiff's discontinuation of its challenge

to a determination of the Employment Relations Authority.<sup>1</sup>

[2] The defendant has limited means, her only income being an Accident Compensation Corporation payment of \$176.32 per week, resulting from an injury which occurred whilst in the employment of the plaintiff, Titoki Securities Trust (the Trust). In these circumstances, the defendant needed to watch carefully her legal costs and so took limited advice from lawyers about defending that challenge but was not formally represented in the proceeding by those lawyers. The costs of that legal advice have not been challenged by the plaintiff and are said to amount to

\$1,035 (including GST).

<sup>1</sup> *Titoki Securities Trust v Wallace* [2015] NZERA Auckland 394.

TITOKI SECURITIES TRUST v SHARON WALLACE NZEmpC AUCKLAND [\[2016\] NZEmpC 11](#) [16

February 2016]

[3] The plaintiff opposes the defendant's application for costs on grounds including that she "is not legally represented". The plaintiff also submits that the costs claimed by the defendant were either incurred unnecessarily or do not relate to this proceeding. It says that it has always made clear to the defendant that its challenge was filed for the express purposes of preserving its rights of challenge whilst it sought (in the event unsuccessfully) to persuade the Authority to reopen its investigation and to increase the costs that it had awarded to the Trust. The plaintiff says, therefore, that it was unnecessary for Ms Wallace to take any steps to defend the challenge and

she should not be rewarded for doing so.

[4] Between them the defendant and the plaintiff's lawyers have helpfully set out an account of the relevant events in chronological order. In the original proceedings between the parties, the Trust was successful in defending Ms Wallace's personal grievance.<sup>2</sup> In a subsequent determination, the Authority awarded the Trust the sum of \$7,000 towards its legal costs.<sup>3</sup>

[5] In August 2015 the Trust applied to the Authority to reopen its investigation of the Trust's costs' claim in that jurisdiction and, at the same time, challenged the Authority's costs' determination.

[6] In a covering letter to Ms Wallace, the Trust's lawyers said:

As it may prove not to be necessary for the Employment Court to deal with this matter, we would not oppose any application by you to the Employment Court for an extension of time for you to file a Statement of Defence, pending advice from the Authority as to whether it has agreed to reopen its investigation in respect of the costs issue. Such an extension of time would mean that you would not need to take any steps in relation to the Court proceedings unless it became absolutely necessary to do so. ...

[7] On 2 September 2015 Ms Wallace applied to the Court for leave to extend the time for filing her statement of defence. On the same day the Court issued a Minute

granting leave until:

<sup>2</sup> *Wallace v Titoki Securities Trust* [2015] NZERA Auckland 94.

<sup>3</sup> *Wallace v Titoki Securities Trust* [2015] NZERA Auckland 214.

- advice was received from the Authority that it refused to reopen its investigation; or
  - there was a re-determination of the costs' matter in the Authority if it agreed to reopen its investigation; or
- 1 December 2015.

[8] On the last day before 1 December 2015 Ms Wallace filed a statement of defence. Ms Wallace may well not have been aware whether the Authority had determined the question of reopening one day before that time limit. That is confirmed by the Authority's practice of sending determinations to parties, and that time limits run from the date of signing a determination and not its receipt by a party. In my view, it was reasonable for Ms Wallace to file her statement of defence on

30 November 2015.

[9] The Authority issued its determination on the reopening question on 14

December 2015, refusing the plaintiff's application for reopening. Four days later

the plaintiff filed a notice of discontinuance of its proceeding in this Court.

[10] In these circumstances, I consider that it was proper and reasonable for Ms Wallace to take legal advice about her position; to take the steps that she did to apply to extend the time for filing a statement of defence; and to file that statement of defence in the absence of an Authority determination by the date specified in the Court's Minute, 1 December 2015.

[11] Ms Wallace sought advice from two lawyers, Hazel Armstrong Law which specialises in accident compensation law, and Helen White, barrister and employment law specialist. Excluding GST, their fees were respectively \$300 and \$600.

[12] The plaintiff says that the advice sought from Hazel Armstrong Law appears to have related to the proceedings brought by the defendant in the Authority. The Trust says that on 2 September 2015 Ms Wallace submitted a 75-page response to its

application to the Authority to reopen the investigation in that forum, based in part on legal advice from Hazel Armstrong Law. Although Ms Wallace was successful in opposing the Trust's application to reopen the Authority's investigation, the Authority determined questions of costs in that forum by refusing to make any orders as between the parties.

[13] The narration of the work performed on Hazel Armstrong Law's bill of costs is brief and refers to it being "regarding the costs issue", "[c]onsidering new ERA and Employment Court documents" and providing oral and written advice. The invoice is dated 31 August 2015. I assume, therefore, that it relates to legal advice sought and provided before that date. As well as I can discern, I conclude that the legal costs from Hazel Armstrong Law relate in part to the issues then before the Authority and in part to those before the Court. The fairest course, in these circumstances, is to attribute those in equal measure. The costs are, in any event, very modest.

[14] The narration on the bill of costs from the barrister (Helen White) is similarly brief. It refers to reading material provided to counsel; advising Ms Wallace; and undertaking other communications to the point of discontinuance of the Trust's challenge. The "Project" is described as "Costs Claim by Employer, reopening application and appeal". Two hours' work was charged for. Again, in the circumstances, I propose to treat this as a bill dealing with proceedings both in the Authority (which are not compensable in this Court) and in the Court. They, too, will be assumed to have been incurred in equal measure.

[15] That means that Ms Wallace incurred legal costs in relation to this challenge amounting to \$450 (excluding GST). So far as I can assess the question of their reasonableness, I conclude that those costs were both reasonable and properly incurred.

[16] I see no reason to depart from the Court's usual practice of awarding two-thirds of costs actually and reasonably incurred unless there are particular factors requiring uplift or decrease, of which there is none in this case.

[17] Accordingly, the plaintiff is required to pay the sum of \$300 towards the defendant's costs.

GL Colgan  
Chief Judge

Judgment signed at 10.30 am on Tuesday 16 February 2016

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