Employment Court of New Zealand

Wills v Farmlands Co-Operative Society Limited [2021] NZEmpC 44 (14 April 2021)

Last Updated: 20 April 2021

IN THE EMPLOYMENT COURT OF NEW ZEALAND CHRISTCHURCH

I TE KŌTI TAKE MAHI O AOTEAROA ŌTAUTAHI

[2021] NZEmpC 44
EMPC 218/2019

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
AND IN THE MATTER	of an application for costs
BETWEEN	SUSAN WILLS Plaintiff
AND	FARMLANDS CO-OPERATIVE SOCIETY LIMITED Defendant

Hearing:	On the papers
Appearances:	A Sharma, counsel for plaintiff S Townsend, counsel for defendant
Judgment:	14 April 2021

COSTS JUDGMENT OF JUDGE K G SMITH

[1] Susan Wills unsuccessfully challenged a determination of the Employment Relations Authority refusing leave to extend the time available to her to raise a personal grievance with her former employer, Farmlands Co-Operative Society Ltd.1

[2] Costs were reserved. The parties were unable to agree about them. Farmlands has now applied for the Court to fix costs.

[3] Farmlands has sought costs of $10,755 calculated by using the Court's Guideline Scale and in reliance on a previous allocation of the proceeding to Category

1 *Wills v Farmlands Co-Operative Society Ltd* [2020] NZEmpC 227.

2, Band A in that scale.2 The amount sought was derived by adding up the steps taken in the litigation, amounting to 4.5 days, and applying the rate of $2,390 per day.3

[4] While not seeking an uplift in costs, Farmlands' counsel, Ms Townsend, pointed out that the company made two settlement offers to Ms Wills. Both were without prejudice and reserved the right to refer to them in a costs application. The first offer was made on 28 February 2020. It transpires that Ms Wills' counsel, Ms Sharma, has no record of receiving this offer. The second offer was made on 24 September 2020 and was for $10,000. It was offered on the basis that the whole amount could be received as compensation under s 123(1)(c)(i) of the Employment Relations Act 2000 (the Act), or it could be divided between that compensation and a contribution to legal costs in amounts Ms Wills nominated. The second offer was rejected.

[5] Ms Wills opposed the application for costs. She considered costs should lie where they fall or, alternatively, be

substantially reduced from what might otherwise be ordered to take account of her financial circumstances. Ms Sharma made the following submissions for her:

(a) Farmlands' costs were excessive and not reasonably incurred.
(b) To claim full scale costs would not result in a just outcome.
(c) An assessment of reasonable costs depends on the features of the case including the steps required to be taken. There was minimal input by Farmlands to the interlocutory applications but its costs claim included them, inflating the total sought.
(d) Ms Townsend declined the opportunity to appear at the hearing by AVL. Had she done so that would have had the effect of reducing costs.

2. "Employment Court of New Zealand Practice Directions" <www.employmentcourt.govt.nz> at No 16.

3 The application contained the formula 4.5 days x $2,390 but erroneously calculated the amount as

$10,775. The figure in this decision corrects that error.

(e) Farmlands' claim for costs includes attendances in the Authority which was unfair. The Authority had closed its file in the absence of a costs application by Farmlands.

(f) Ms Wills has limited financial means so costs should lie where they fall.

(g) In the alternative, Ms Wills' limited financial means should have the effect of reducing costs to a modest amount that could be paid over time.

[6] Farmlands elected not to respond to these submissions. However, it should be noted that it did not include in the claim any steps taken by it in the Authority. It did not seek reimbursement for the costs of Ms Townsend's travel to Nelson for the hearing.

[7] The Court has a wide discretion when it comes to costs.4 The discretion is to be exercised judicially and on a principled basis. Any conduct that increases or contains costs can be taken into account.5 The Court can have regard to a settlement offer made without prejudice except as to costs, taking what has been described as a "steely" approach if a party has unreasonably refused to accept such an offer.6

Analysis

[8] The Court has adopted the Guideline Scale to assist in exercising its discretion. The scale is designed so that costs are reasonably predictable, can be expeditiously assessed and are consistent. The guideline, however, does not fetter the discretion.

[9] Farmlands' calculations included claiming for all steps taken in defending the challenge including preparation for, and participation in, directions conferences, attendances during the hearing of an interlocutory application and at the substantive hearing.

4. Employment Relations Act 2000, sch 3 cl 19; and see for example *Elisara v Allianz New Zealand Ltd* [2020] NZEmpC 13, [2020] ERNZ 20.

5 Employment Court Regulations 2000, reg 68.

6 *Bluestar Print Group (NZ) Ltd v Mitchell* [2010] NZCA 385, [2010] ERNZ 446 at [20]; and

Elisara v Allianz, above n 4.

[10] Ms Sharma concentrated on arguing that what was claimed by Farmlands is excessive and Ms Wills has limited financial means. She accepted costs follow the event, but argued that they ought to be a reasonable contribution to costs actually and reasonably incurred, referring to a useful starting point for such an assessment as two- thirds of costs (presumably two-thirds of costs determined to be actual and reasonable).7

[11] Farmlands' claimed costs were said to be excessive because of its passive participation in two interlocutory applications. One of them was by Ms Wills and unsuccessfully sought non-party discovery. The other was by Ms Wills' former lawyer seeking to set aside a witness summons he had been served with or, in the alternative, allowing him to give evidence by AVL. The first application was dealt with on the papers and Farmlands did not oppose it or make submissions. The second was dealt with urgently by telephone. Ms Townsend appeared at the hearing but abided the Court's decision.8 Farmlands claimed costs for its attendances for the second application but not the first one.

[12] I do not agree with Ms Sharma's approach to the costs claim. In promoting predictability, expedition and consistency, the Guideline Scale takes into account factors designed to arrive at a fair and reasonable notional daily rate. Ms Sharma's submissions effectively invited a further discount from that daily rate in the method she proposed, but that is not

warranted. Usually, the costs actually incurred by the successful party are material in a limited way, because that party cannot profit by recovering more than has been spent. In this case Farmlands has provided copies of the invoices for legal services it has paid for demonstrating more was spent in fees than the amount claimed.

[13] I am also not persuaded that the claim is excessive because of Ms Townsend's passive participation in the application by Ms Wills' former lawyer. While Ms Townsend did not make submissions about that application it was appropriate for Farmlands to be represented when it was argued. The application was made close to

7. She drew support from cases such as *PBO Ltd (formerly Rush Security Ltd) v da Cruz* NZEmpC Auckland ARC 87/04, 12 May 2006; *Binnie v Pacific Health Ltd* [2003] NZCA 69; [2002] 1 ERNZ 438 (CA) at 438; *de Bruin v Canterbury District Health Board* [2013] NZEmpC 49.

8 *Wills v Farmlands Co-Operative Society Ltd* [2020] NZEmpC 178.

the hearing and Farmlands was entitled to ensure that it was informed about the possible attendance of a witness, which may have had implications for the case it was required to address.

[14] Ms Sharma's other major submission was that Ms Wills is of limited financial means so that costs should lie where they fall or be reduced and paid by instalments. Ms Wills supplied information about her personal circumstances. It is sufficient for this judgment to provide only a general overview of them. She owns her own house which is mortgaged. She has not worked in full-time employment since August 2018 after suffering an injury. Her only income is from ACC. Her fortnightly income was itemised as were her outgoings. After meeting those outgoings what is left each fortnight is a modest surplus. She is also the primary carer for her elderly father which impacts on her ability to earn.

[15] Ms Sharma argued that there is an established approach that a party's ability to pay is a relevant consideration if payment would place an undue hardship on that person.9 That was said to justify a reduction in what would otherwise have been ordered "including to nil".10 Her submission was that the Court must consider the plaintiff's ability to pay costs and to balance the interests of both parties while taking into account broader public policy considerations.11 She went further and argued that hardship should not be a barrier to access to justice.

[16] The ability of a liable party to pay was dealt with recently in *Elisara v Allianz New Zealand Ltd*.12 In that decision Chief Judge Inglis observed that earlier decisions which dealt with financial hardship in relation to costs orders did not reflect a "bright line approach" to the Court's discretion.13 A formulation was preferred where there may be circumstances arising in a particular case warranting a departure from the usual approach but that needs to be weighed against other relevant factors including the

9. Relying on cases such as *Merchant v Chief Executive of the Department of Corrections* [2009] ERNZ 108.

10 Relying on *Binnie v Pactific Health Ltd*, above n 7; *T&R Distributor's v Grimes* NZEmpC Christchurch CRC 25/05, 23 November 2006; *Koia v Attorney-General in Respect of the Chief Executive of the Ministry of Justice (No 3)* [2004] NZEmpC 120; [2004] 2 ERNZ 506; *Bay Milk Distributors Ltd v Jopson* [2010] NZEMPC 34; and *Prime Range Meats Ltd v McNaught* [2014] NZEmpC 179.

11 Relying on *Singh v Eric James & Associates Ltd* [2010] NZEmpC 25 and *McKean v Board of Trustees of Wakaaranga School* NZEmpC Auckland ARC 65/04, 24 September 2008.

12 *Elisara v Allianz*, above n 4.

13 At [14].

interests of the successful party and the broader public interest. In *Elisara v Allianz* the Court quoted a passage from *Scarborough v Micron Security Products Ltd* that bears repeating:14

There may be a number of reasons why a successful party would wish to have a costs judgment in their favour, despite the opposing party not immediately being in a position to satisfy such an award. They may decide against taking enforcement action, or may wish to wait and see whether at some stage in the future the opposing party's personal circumstances change. Substantially reducing, or eliminating, a costs liability at the stage at which costs are assessed, on the basis of the unsuccessful party's financial position at that particular point in time, denies the successful party the ability to make decisions as to whether, and when, to seek to enforce an award it would otherwise be entitled to.

[17] I agree with those general comments in *Elisara v Allianz*.

[18] I do not accept Ms Sharma's submission that this case is one justifying departing from the usual approach to costs. The financial information Ms Wills disclosed is not sufficient to deprive the plaintiff of an award of costs or reduce the amount to which it would otherwise be entitled. While her circumstances show that she has limited means it is also apparent that she owns property that, presumably, has equity. She has an income which is sufficient to meet her present outgoings leaving a small surplus each fortnight.

Conclusion

[19] The defendant is entitled to costs of $10,755 and I order accordingly.

[20] There is no award of costs for preparing the application for costs.

Judgment signed at 10.50 am on 14 April 2021

K G Smith Judge

14. *Scarborough v Micron Security Products Ltd* [2015] NZEmpC 105, [2015] ERNZ 812 at [38] (footnote omitted).
