

**IN THE EMPLOYMENT COURT
CHRISTCHURCH**

**[2014] NZEmpC 232
CRC 10/14**

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

BETWEEN JESSE KENMARE
 Plaintiff

AND FULTON HOGAN LIMITED
 Defendant

Hearing: (on the papers dated 4 and 24 November 2014)

Representation: A Sharma, counsel for the plaintiff
 B Scotland, counsel for the defendant

Judgment: 19 December 2014

COSTS JUDGMENT OF JUDGE B A CORKILL

Introduction

[1] In my judgment of 17 June 2014, in which I declined an application for interim reinstatement which came before the Court by way of a challenge to a decision of the Employment Relations Authority (the Authority),¹ I reserved the issue of costs and directed that it be determined after completion of the proceedings which were before the Authority.

[2] In its determination of 5 September 2014, the Authority declined to make an order for reinstatement, although it made other orders.² That decision of the Authority is now the subject of a de novo challenge in this Court.

[3] Fulton Hogan seeks costs, pursuant to leave reserved, and counsel submits:

¹ *Kenmare v Fulton Hogan Ltd* [2014] NZERA Christchurch 63.

² *Kenmare v Fulton Hogan Ltd* [2014] NZERA Christchurch 138.

- a) Legal costs of \$13,705, excluding GST, were incurred in defending the challenge – relevant invoices have been placed before the Court.
- b) Costs usually follow the event, and the starting point is generally two-thirds of the actual and reasonable costs incurred.
- c) Its costs were reasonably incurred, and are broadly consistent with a costs award in respect of a Category 2B interlocutory matter in the High Court.
- d) A contribution towards costs of \$5,000 is sought. This is below the two-thirds point so as to take into account Mr Kenmare's financial position as he lost his job. However, it also reflects Fulton Hogan's success on the challenge.
- e) The onus is on the plaintiff to establish his financial position, and in the absence of discharge of that onus, the Court should presume he is able to pay. It was understood that Mr Kenmare had obtained further employment.

[4] For Mr Kenmare, it was submitted:

- a) Fulton Hogan had presented evidence to the Court which was different from the evidence it presented to the Authority.
- b) A reasonable starting point would be \$3,000 plus GST, having regard to costs previously awarded in the Authority, and to the way in which the matter was able to be dealt with in this Court.
- c) Mr Kenmare is unable to pay an order of costs. An affidavit has been placed before the Court which details the challenging financial position in which he finds himself.
- d) Having regard to his impecunious position, costs should lie where they fall.

- e) An order for costs has also been sought by Fulton Hogan in relation to the proceedings in the Authority; a costs determination has yet to be issued.

Analysis of issues

[5] There is no controversy as to the correct approach to the determination of costs. The usual basis for awarding costs in this Court is that costs will follow the event, and usually an award will be made amounting to two-thirds of the actual and reasonable costs incurred by the successful party. Factors may be taken into account which either increase or decrease that starting point.³

[6] The first issue in this case is to determine the quantum of reasonable costs. I have carefully considered the invoices rendered to Fulton Hogan. I take into account the following factors:

- a) For the purposes of a costs application, the amount charged is higher than is appropriate for use as a starting point.
- b) Reference was made to the amount ordered in the Authority in this case; the amount ordered in the Authority is not a guide as to what is appropriate in respect of the proceeding in this Court.
- c) Reference was also made to a calculation of costs under the High Court Rules. It is not clear how counsel for the defendant has made the assessment which resulted in the submission that the costs actually incurred were reasonably consistent with a Category 2B interlocutory matter. My assessment, on that basis, is that a determination under the High Court Rules would result in a figure of \$8,656.⁴

[7] Taking all factors into account, I consider a fair and reasonable sum would be \$8,000, two-thirds of which is \$5,333.

³ *Binnie v Pacific Health Ltd* [2002] 1 ERNZ 438 (CA) at [14].

⁴ Taking into account items 2, 23, 24 and 26 (allowing .25 days for oral submissions) of Sch 3 of the High Court Rules, Category 2.

[8] The second main issue relates to Mr Kenmare's ability to pay. The defendant responsibly accepts that this is a factor which the Court will need to consider. Authorities such as *Gates v Air New Zealand Ltd* support such an approach.⁵ In that decision, Judge Couch put the issue in this way:⁶

A factor which must be considered in the overall exercise of my discretion to award costs is the ability of the plaintiff to pay. The established principle is that a party ought not to be ordered to pay costs to the extent that doing so would cause undue hardship. What this principle allows for is that payment of any substantial sum will cause a measure of hardship to some litigants, particularly individuals. That is to be expected and is considered to be an acceptable consequence of unsuccessfully engaging in litigation. It also recognises that the primary focus of an award of costs should be on compensation of the successful party. It is only when payment of an award which achieves the purpose of justly compensating the successful party would cause a degree of hardship which is excessive or disproportionate that the interests of the unsuccessful party must be recognised by reducing the award which would otherwise be appropriate.

[9] I am satisfied that the affidavit evidence filed by Mr Kenmare confirms that he has a modest income, few assets and significant debt. Bank statements placed before the Court support that conclusion.

[10] The Court has to balance those factors against the fact that Mr Kenmare brought an application for interim reinstatement which required determination shortly before the Authority hearing, and was dismissed. There is no reason why costs should not follow the event in the present circumstances, and that Fulton Hogan should receive some contribution to its costs.

[11] Mr Kenmare is ordered to contribute to Fulton Hogan's costs in the sum of \$1,500.

B A Corkill
Judge

Judgment signed at 3.00 pm on 19 December 2014

⁵ *Gates v Air New Zealand Ltd* [2010] NZEmpC 26, cited in *Hamon v Coromandal Independent Living Trust* [2014] NZEmpC 108 at [14]-[15]. See also *Snowdon v Radio New Zealand Ltd* [2014] NZEmpC 180 at [69].

⁶ At [21].