

**IN THE EMPLOYMENT COURT
WELLINGTON**

**[2023] NZEmpC 194
WRC 16/09**

IN THE MATTER OF proceedings removed from the
Employment Relations Authority

AND IN THE MATTER OF an application for costs

BETWEEN ELIZABETH GRACE STRACHAN
Plaintiff

AND ROBERT ALEXANDER MOODIE
(ALSO KNOWN AS "MISS ALICE")
TRADING AS MOODIE & CO, A LAW
FIRM
First Defendant

AND ROBERT ALEXANDER MOODIE
Second defendant

AND SUZANNE PATRICIA MOODIE
Third Defendant

AND RA & SP MOODIE LIMITED
Fourth Defendant

Hearing: By memoranda of submissions filed on 30 July and 31 August 2012

Appearances: Peter Churchman, Lauren Beecroft and Rachel Vokes, counsel for
plaintiff
Robert Moodie in person and as counsel for third and fourth
defendants

Judgment: 15 November 2012

COSTS JUDGMENT OF CHIEF JUDGE G L COLGAN

[1] The parties have been unable to settle questions of costs between themselves and the plaintiff seeks an order. Ms Strachan claims a full indemnity for her legal costs of \$160,114.11 plus disbursements of \$4,872.41. She proposes that if an

indemnity award is not warranted, then the Court should allow an uplift, from the starting point of a two-thirds contribution to actual and reasonable costs, to 80 per cent of these amounting to \$128,091.28 plus the above disbursements.

[2] The defendants' application for judicial review and for leave to appeal having both been dismissed,¹ it is appropriate to now determine costs.

[3] As to the merits of a costs award, Mr Moodie points out that the plaintiff was only partially successful in her proceeding. She did not succeed in her claims to remuneration for full-time employment in 2005. Mr Moodie submits that the plaintiff did not succeed in her claims to a share of fees for work performed by her in 2005 and 2006. Next, Mr Moodie submits that Ms Strachan was unsuccessful in her claim to compensation for loss of a promise of partnership. Penultimately, Mr Moodie says that the plaintiff did not succeed in her claims against the third defendant, Mrs Moodie, or in those brought against the fourth defendant, RA & SP Moodie Limited.

[4] Mr Moodie is correct that Ms Strachan did not succeed in her claims against either Mrs Moodie or RA & SP Moodie Limited. That said, however, the time taken up at trial dealing with these defendants (and, therefore, the associated preparation time) was minimal and should not sound materially in costs.

[5] Mr Moodie's first three points outlined above in opposition to an order for costs are better made however. They will be reflected in the reduction of the order to which I am satisfied Ms Strachan would otherwise be entitled.

[6] There is no dispute that an award of costs should be a reasonable one towards costs actually and reasonably incurred. The usual starting point for that reasonable contribution is two-thirds but this can be adjusted up or down, taking into account relevant circumstances of the particular litigation.²

¹ *Moodie v The Employment Court and Strachan* [2012] NZCA 508.

² See: *Victoria University of Wellington v Alton-Lee* [2001] ERNZ 305 (CA); *Binnie v Pacific Health Ltd* [2002] 1 ERNZ 438 and, *Health Waikato Ltd v Elmsly* [2004] 1 ERNZ 172.

[7] I start with an assessment of the reasonableness of the costs actually incurred by Ms Strachan. Supported by copies of invoices, these can be broken down into counsel's fees of \$117,143.57, solicitors' costs (including those of junior counsel who appeared at the trial) of \$42,970.54, and disbursements including court hearing fees of \$4,165, photocopying charges of \$334.80 and binding charges of \$372.61. The hourly rates of counsel and solicitors involved with the file have been disclosed and they are reasonable and commensurate with both the nature of the particular work undertaken at various stages and the seniority and experience of those lawyers. Having junior counsel for the plaintiff was appropriate in the circumstances. I accept that there was an element of discount of the professional fees reflecting the plaintiff's personal circumstances.

[8] As Mr Churchman points out, on a number of occasions before the trial the defendants were put on notice of the plaintiff's intention to seek indemnity costs. This was precipitated by a number of unmeritorious, obstructive, and delaying tactics adopted by Mr Moodie. These included the late abandonment of claims to document disclosure after the plaintiff had been put to the expense of preparing objections to these. Such conduct was continued well into the trial in several instances. One example was Mr Moodie's prolonged assertion that Ms Strachan did not have a law degree, well beyond a stage by which it was clear that this assertion could not be maintained. There were others referred to in the principal judgment.

[9] I accept the plaintiff's submission that the length of the hearing was increased substantially and unnecessarily by Mr Moodie's conduct of it. Although the plaintiff had only two witnesses (one of whose evidence was admitted by consent), Mr Moodie called 18 witnesses with the hearing taking a further 10 days than originally scheduled. It is not, however, the number of witnesses but the quality of their evidence and the manner of its handling in court, that count more in costs.

[10] About half of the entire extended hearing time was taken up by Mr Moodie's extensive cross-examination of witnesses, much of which was repetitive and of limited value to the issues that had to be decided. Some of it was, unfortunately I have to say, also nit-picking. In response to this Mr Moodie was warned on a number of occasions that this might sound in costs.

[11] These factors would all indicate a significant uplift from the starting point of two-thirds of actual and reasonable costs.

[12] I do, nevertheless, take into account the valid points made by Mr Moodie that Ms Strachan's claims against Mrs Moodie and RA & SP Moodie Limited did not succeed as was the fate also of the plaintiff's claim for compensation for loss of a promise of partnership. Mr Moodie's valid points about Ms Strachan's lack of success in her 2005 claims are in the same category.

[13] In these circumstances, the plaintiff's fall-back position on an award of indemnity costs is reasonable at 80 per cent of actual and reasonable costs incurred.

[14] This amounts to \$128,091.28 as a contribution towards costs and Ms Strachan is also entitled to have a full reimbursement of her disbursements referred to above, totalling \$4,872.41. I direct the first defendant to pay these sums to the plaintiff.

GL Colgan
Chief Judge

Judgment signed at 11 am on Thursday 15 November 2012