

**IN THE EMPLOYMENT COURT OF NEW ZEALAND
WELLINGTON**

**I TE KŌTI TAKE MAHI O AOTEAROA
TE WHANGANUI-A-TARA**

**[2022] NZEmpC 213
EMPC 220/2020**

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

AND IN THE MATTER OF an application for costs

BETWEEN KIM ELIZABETH ASHBY
 Plaintiff

AND NIWA VESSEL MANAGEMENT
 LIMITED
 Defendant

Hearing: On the papers

Appearances: A Halse, advocate for plaintiff
 P Shaw, counsel for defendant

Judgment: 29 November 2022

COSTS JUDGMENT OF JUDGE J C HOLDEN

[1] Having been successful in her challenge, Ms Ashby applies for costs.¹

[2] Her application attached a schedule based on the Court’s Practice Directions Guidelines.² The total costs sought are \$50,787.50. In addition, disbursements of \$7,601.60 are sought, which primarily include the \$4,852.00 fee (inclusive of GST) from the clinical psychologist who appeared for Ms Ashby, along with travel and accommodation costs. She also seeks \$306.67 for the Court filing fee and \$751.32 for the hearing fee.

¹ *Ashby v NIWA Vessel Management Ltd* [2022] NZEmpC 174.

² “Employment Court of New Zealand Practice Directions” <www.employment.govt.nz> at No 16.

[3] The situation regarding Ms Ashby's representation is a little complicated. Initially, she engaged CultureSafe New Zealand Ltd (CultureSafe) to act for her, which it did up until 4 May 2022. CultureSafe is now in liquidation, but the liquidator has provided an invoice for those services which shows costs of \$18,174.80 and disbursements of \$2,221.48 (both exclusive of GST). The GST inclusive figure for costs and disbursements is \$23,455.72.

[4] The main part of the hearing of this matter occurred within the period of CultureSafe's representation, on 7 and 8 April 2022.

[5] After 4 May 2022, Ms Ashby was represented by Mr Halse. A draft invoice he has supplied through Maniototo Enterprises Ltd (t/a Hamilton Culturesafe) for the period from 4 May until October 2022 includes proposed fees of \$24,325 and disbursements of \$1,346.85 (both exclusive of GST).

[6] Two issues arise immediately. First, the total costs award cannot exceed the amount of Ms Ashby's actual costs.³ Second, there is a disparity between the amount being charged to Ms Ashby up until 4 May and then suggested in the draft invoice for the period since then.

[7] NIWA Vessel raises some other issues for me to take into account, when exercising my discretion under the Employment Relations Act 2000, including:⁴

- (a) the costs sought include for the application for leave to extend time to file a statement of claim, which was needed because Ms Ashby failed to file her challenge within the period provided for in s 179(2) of the Employment Relations Act;
- (b) costs are sought in respect of memoranda that were unnecessary and/or inappropriate;

³ *Cornish Truck and Van Ltd v Gildenhuis* [2019] NZEmpC 57 at [9].

⁴ Employment Relations Act 2000, sch 3, cl 19.

- (c) disbursements are sought for travel and accommodation when the Court was open to the matter proceeding via AVL. They also are sought for travel and accommodation for Ms Ashby's sister (her support person) and for her out of town representative.

[8] I agree that there were documents filed by Mr Halse that were unnecessary. I also take into account that the application for leave to extend time was because of Ms Ashby's late challenge. I accept the figure of \$16,500 for costs up until 4 May 2022 (exclusive of GST).

[9] As noted, there is a disparity between the invoiced costs and the suggested costs for the recent period. The suggested costs seem disproportionate to the work involved over this period. No breakdown has been provided. I propose dealing with costs for the period from 4 May 2022 until 21 September 2022, when the judgment was issued, based on the Guideline Scale.

[10] Reviewing the Court file, the amount that I allow for that period is \$7,170, covering two days for preparation for the hearing (including preparation of submissions) and one day for the appearance at the resumed hearing by Mr Halse.

[11] This brings the total fees to \$23,670.

[12] As Ms Ashby is an individual, and not GST registered, she must pay GST on her fees, which are not recoverable from the Inland Revenue Department. Accordingly, I allow an uplift on the fees to account for GST, bringing the figure to \$27,220.50.

[13] In the circumstances of this case, I accept the travel and accommodation costs for Ms Ashby, her sister and her representative. Therefore, I am prepared to accept the disbursements claimed in total, being \$7,601.60 plus \$204.44 for the Court filing fee⁵ and \$751.32 for the hearing fee, which brings the amount payable by NIWA Vessel to Ms Ashby to \$35,777.86. That sum is to be paid by NIWA Vessel within 14 days of the date of this judgment.

⁵ Not the \$306.56 sought, which seems in error.

[14] An issue has arisen as to whom the payment should be made. NIWA Vessel has proposed that it make payment direct to Ms Ashby and there is some sense in that. However, Ms Ashby believes she will be disadvantaged if the monies are paid into her bank account. She wants the monies to be paid to Hamilton Culturesafe.

[15] Although I have some concerns over what Ms Ashby proposes, her wishes are clear. Accordingly, I confirm that the full amount is to be paid to Hamilton Culturesafe for the benefit of Ms Ashby. This is in the firm expectation that \$23,455.72 (less any amount Ms Ashby has already paid) is promptly paid by Hamilton Culturesafe to CultureSafe New Zealand Ltd (in liquidation) so that Ms Ashby's debt to that company is cleared. Likewise, Hamilton Culturesafe should pay any other outstanding debts for disbursements out of the costs award so that Ms Ashby's obligations to pay those disbursements are satisfied. What happens to the balance of the moneys received is then a matter between Ms Ashby and Mr Halse.

Other matters

[16] In the memoranda filed with the Court, Mr Halse also raises issues regarding satisfaction of the judgment itself, and NIWA Vessel has responded. The parties agree that the judgment should be satisfied promptly. While I left it open to the parties to return to the Court if they could not agree the figure for loss of earnings, that would seem to be a waste of the parties' time and money. The parties ought to be able to agree on a figure. Finally, I note that the Court has no role in matters of taxation. The parties' obligations with respect to the Inland Revenue Department are matters between them and that Department.

[17] Ms Ashby sought costs on her application for costs. It is unusual for the Court to award costs on applications for costs and there is no basis here for doing so. Accordingly, there is no further costs order on the application.

J C Holden
Judge

Judgment signed at 3.30 pm on 29 November 2022