

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

**I TE KŌTI TAKE MAHI O AOTEAROA  
ŌTAUHAHI**

**[2020] NZEmpC 38  
EMPC 33/2019**

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	GOLEMAN WELLINGTON CLEANING LIMITED Plaintiff
AND	MICHAEL NICOLLE Defendant

Hearing: On the papers

Appearances: P Pa'u, advocate for plaintiff  
J Sanders, counsel for defendant

Judgment: 6 April 2020

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**COSTS JUDGMENT OF JUDGE K G SMITH**

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[1] On 21 January 2019, the Employment Relations Authority issued a determination resolving a claim by Michael Nicolle against Goleman Wellington Cleaning Ltd. He sought compliance with the record of settlement they had entered into under s 149 of the Employment Relations Act 2000 (the Act).<sup>1</sup> In addition, Mr Nicolle sought a penalty against Goleman for breaching that settlement agreement.

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<sup>1</sup> *Nicolle v Goleman Wellington Cleaning Ltd* [2019] NZERA 26 (Member Dallas).

[2] The settlement agreement was signed on 18 May 2018.<sup>2</sup> It required payment by instalments. Goleman withheld two of those payments leading to Mr Nicolle's application for a compliance order and penalty.

[3] The background to the proceeding needs brief elaboration. In May 2018 Mr Nicolle was assisting Goleman's staff to complete written assessments for training he had previously conducted but for which the paperwork had been misplaced.<sup>3</sup> Goleman alleged that, at some time during this work, Mr Nicolle made disparaging remarks to its staff about it, including that it was losing clients, staff, and was in a precarious financial position.<sup>4</sup> Payment to Mr Nicolle was withheld because Goleman alleged these remarks breached the settlement agreement. By the time the Authority conducted its investigation those payments had been made leaving the claim for a penalty as the only live issue.

[4] The Authority considered the circumstances in which payment was withheld were unsatisfactory and that a penalty was appropriate. A penalty of \$3,000 was imposed.<sup>5</sup> Exercising its discretion, the whole of that sum was awarded to Mr Nicolle. In a subsequent determination costs were awarded in his favour.<sup>6</sup>

[5] Goleman challenged both determinations seeking to set them aside. In addition, a penalty against Mr Nicolle was sought for allegedly breaching the settlement agreement. Not surprisingly, Mr Nicolle defended the proceeding and maintained that he was not in breach of the agreement.

[6] The challenge was set down for hearing on 24 and 25 February 2020. On 11 February 2020, without prior notice, Goleman withdrew the challenge by memorandum in which it acknowledged potential liability for costs. Costs have not been agreed and Mr Nicolle has applied for them.

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<sup>2</sup> At [6].

<sup>3</sup> At [8].

<sup>4</sup> At [8].

<sup>5</sup> At [21].

<sup>6</sup> *Nicolle v Goleman Wellington Cleaning Ltd* [2019] NZERA 113 (Member Dallas).

[7] The Court has a broad discretion in awarding costs.<sup>7</sup> That discretion must be exercised on a principled basis and in the interests of justice. Since 1 January 2016 the discretion has been informed by the Court’s Guideline Scale, designed to support the objective that costs should be predictable, expeditiously determined, and consistent.<sup>8</sup> Exercising the discretion is assisted by reg 68 of the Employment Court Regulations 2000 enabling the Court to take into account conduct which has contained or increased costs.

[8] The regulations do not contain a procedure to deal with costs when a proceeding has been withdrawn or discontinued by a plaintiff but the High Court Rules 2016 do.<sup>9</sup> Rule 15.23 provides that, unless the defendant otherwise agrees or the Court otherwise orders, a plaintiff who discontinues a proceeding against the defendant must pay to the defendant costs of and incidental to the proceeding including the discontinuance.<sup>10</sup>

[9] Goleman accepts that it is liable for costs and there are no circumstances that would lead to a different result. What is in issue is the amount that has been claimed.

[10] At a directions conference Mr Pa’u and Mr Sanders, who act for the plaintiff and defendant respectively, agreed that the appropriate Guideline Scale categorisation for this hearing was Category 1, Band A. That was confirmed in a minute to the parties on 2 April 2019 and has not been altered subsequently.

[11] Mr Sanders submitted that applying each of the steps in that guideline for a 1A proceeding would produce a costs figure of \$9,222, calculated at 5.8 days at the rate of \$1,590 per day. An uplift was sought to \$14,145 to take into account the GST Mr Nicolle has paid which he cannot claim and a settlement offer made without prejudice except as to costs.

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<sup>7</sup> Employment Relations Act 2000, sch 3 cl 19.

<sup>8</sup> Employment Court “Employment Court of New Zealand: Practice Directions” (1 August 2016) <[www.employmentcourt.govt.nz](http://www.employmentcourt.govt.nz)> at 18.

<sup>9</sup> The High Court Rules apply by virtue of Employment Court Regulations 2000, reg 6(2)(a)(ii).

<sup>10</sup> See *Wendco (NZ) Ltd v Unite Inc* [2019] NZEmpC 29.

[12] The Guideline Scale applies the daily rate from sch 2 to the High Court Rules 2016. That rate changed on 1 August 2019. Before that date the daily rate for Category 1 proceedings was \$1,480. All the steps claimed in Mr Sanders' submissions were calculated at the revised daily rate. However, only three of the steps in sch 4 in the Guideline occurred after the rate changed last August. Adjusting the calculations to reflect the rate that applied at relevant times reduces the amount to \$8,804. Mr Nicolle has paid lawyers' fees substantially exceeding that sum.

[13] Mr Nicolle is not GST registered and an uplift was claimed because of that. A further uplift was sought because a settlement offer was made by him on 31 July 2019. The offer was for the plaintiff to pay the full amount awarded by the Authority as a penalty, the subsequent costs determination, and a further \$4,872 plus GST as a contribution to Mr Nicolle's costs. That offer was not accepted. There was little in this offer of benefit to Goleman except, potentially, containing its costs.

[14] Mr Pa'u's submissions claimed that the costs sought were excessive given that the proceeding was reasonably simple, as was evident in it being allocated Category 1, Band A. The costs incurred by Mr Nicolle were criticised as very high, because there were no interlocutory hearings, disclosure was dealt with informally and extensive preparation ought not to have been required. He submitted that the case did not involve any novel or complex legal concepts or issues and was expected to be conducted in one day. Mr Pa'u did not make any submissions about an uplift to recognise Mr Nicolle not being registered for GST but objected to the settlement offer being taken into account. That objection was linked to Goleman's overall position that the actual costs incurred were excessive.

[15] Dealing with specific aspects of the costs claim, exception was taken to claiming for two interlocutory applications (step 29 in the Guideline), the preparation of authorities and common bundle (step 38) and for replying to an amended pleading (step 10). In each case the dispute was that little ought to have been required and these steps should be disallowed.

[16] Step 29 refers to Goleman's application for a stay of execution of the Authority's determination. That stay was granted.<sup>11</sup> Subsequently Goleman sought a variation to the stay to cover the Authority's costs determination. The amount allocated under the Guideline Scale for these steps would be approximately \$450 each. Even if the steps required on Mr Nicolle's behalf were reasonably modest, it was still necessary for the applications to be considered and responded to. They are appropriate and no adjustment is required.

[17] Similarly, the criticism about responding to the amended pleading is unfounded. It was necessary for Mr Nicolle to consider the amended pleading and respond to it. Applying the Guideline Scale would result in an allocation of approximately \$890 for this step. I am satisfied that the allocation is reasonable.

[18] The final matter raised by Mr Pa'u was that the costs claimed included an allocation in Mr Nicolle's favour for preparing the bundle of documents (step 38). That was a task Goleman was directed to undertake. However, Mr Sanders explained that this claim was made because he had to provide information to Goleman more than once for inclusion in the bundle of documents and to assist in its preparation. Including the step in Mr Nicolle's costs claim was reasonable in the circumstances.

[19] I am satisfied that each step claimed by Mr Nicolle was appropriate and that he is entitled to an award of costs of at least the adjusted amount. I reject Mr Pa'u's submission that the costs actually incurred were excessive but, in any event, they are relevant only to the extent that Mr Nicolle cannot recover more than he has paid.<sup>12</sup>

[20] That assessment leaves for evaluation whether an uplift is appropriate. I accept that an uplift should be made to take into account Mr Nicolle's GST status. Starting with an assessment using the Guideline Scale (rounded) of \$8,800, an uplift to \$10,120 is appropriate.

[21] This proceeding began life as a challenge to a penalty imposed by the Authority for failing to comply with a settlement agreement. The Authority's determination

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<sup>11</sup> *Goleman Wellington Cleaning Ltd v Nicolle* [2019] NZEmpC 51.

<sup>12</sup> *Bluestar Print Group (NZ) Ltd v Mitchell* [2010] NZCA 385, [2010] ERNZ 446; and *Health Waikato Ltd v Elmsly* [2004] 1 ERNZ 172 (CA) at [50].

made it plain that Goleman wilfully chose not to perform the settlement agreement because it considered Mr Nicolle had breached it. It was not entitled to exercise such a self-help remedy, so it was not surprising the Authority considered a penalty was appropriate. Goleman was, perhaps, fortunate that the penalty was not higher.

[22] Against Goleman's concession about why the payment was withheld, its challenge faced a significant uphill battle. What Goleman did do, however, was commit Mr Nicolle to being entangled in expensive litigation.

[23] The settlement offer, if accepted, would have ended this litigation long ago. Accepting it would have spared substantial expense for both parties. A "steely" approach to such offers is required.<sup>13</sup> I am satisfied an uplift to recognise that offer is justified but not by using the methodology relied on by Mr Sanders, which was to seek a sum amounting to two-thirds of Mr Nicolle's actual costs. An uplift is appropriate given that the claim had little prospect of success, committed the defendant to a fully-fledged defence, and was abruptly ended a few days before the hearing by which time a significant amount of preparation had been completed. I consider a further uplift from the adjusted sum should be made to bring the costs award to \$14,000.

## **Outcome**

[24] Goleman is to pay to Mr Nicolle costs of \$14,000.

[25] The funds currently held by the Registrar of the Court, including all accumulated interest, are to be released to Mr Nicolle.

K G Smith  
Judge

Judgment signed at 3.15 pm on 6 April 2020

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<sup>13</sup> *Elmsley*, above n 12, at [53].