

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

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

**[2020] NZEmpC 67
EMPC 349/2018**

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
AND IN THE MATTER OF	an application for costs
BETWEEN	FRASER MADDIGAN Plaintiff
AND	DIRECTOR-GENERAL OF CONSERVATION Defendant

Hearing:	On the papers
Appearances:	Plaintiff in person K Radich, counsel for defendant
Judgment:	19 May 2020

COSTS JUDGMENT OF CHIEF JUDGE CHRISTINA INGLIS

[1] The issue now before the Court is an application by Mr Maddigan for costs following my judgment of 17 December 2019, finding that he was unjustifiably dismissed from his employment.¹ I ordered the defendant to pay Mr Maddigan a sum equivalent to 13 weeks' lost wages, the sum of \$18,000 compensation under s 123(1)(c)(i) of the Employment Relations Act 2000 (the Act) (minus a 20 per cent deduction for contribution) and a penalty of \$5,000 for breach of good faith (75 per cent of which was to be paid to Mr Maddigan and the remainder to the Crown).

¹ *Maddigan v Director-General Department of Conservation* [2019] NZEmpC 190.

[2] Mr Maddigan seeks costs of \$2,500 and a sum equivalent to 15 days' long service leave. The defendant opposes any award of costs and says that the issue of long service leave is not properly before the Court.

[3] The central purpose of a costs award is to provide the successful party with a reasonable contribution to the costs they have incurred. Mr Maddigan succeeded in some, although not all, aspects of his challenge. Ordinarily he would be entitled to a contribution towards costs. The difficulty is that it does not appear that Mr Maddigan incurred any legal costs on his challenge. While he was represented in the Employment Relations Authority and was awarded a contribution of \$10,000 towards his costs in that forum, he appeared on his own behalf in the Court.

[4] There is no doubt that Mr Maddigan would have spent a great deal of personal time and effort in preparing for, and attending at, the hearing. However, the generally accepted position is that no costs are awarded in such circumstances.² Further, while I accept that Mr Maddigan incurred greater legal costs in the Authority than were awarded in his favour, that is not a factor that can be taken into account in setting costs on his challenge to the Court.

[5] I accordingly decline Mr Maddigan's application for a contribution of \$2,500 towards his costs. Mr Maddigan is, however, entitled to the filing and hearing fees on his challenge. These should be paid by the defendant in full within a period of 14 days of the date of this judgment.

[6] Mr Maddigan asks for an order that he be paid out his accrued long service leave (equivalent to 15 days). The Director-General of Conservation opposes this request on two grounds. I deal with them in reverse order.

[7] The second argument is that cl 3.4 of the collective agreement effectively prevents any payment. That provision states that an employee is entitled to long service leave on completion of specified lengths of service, and that such leave is to be taken in one period and before the next entitlement is due or it will be forfeited. A note to cl 3.4 states that where an employee resigns or is dismissed, the employee

² *McGuire v Secretary for Justice* [2018] NZSC 116, [2019] 1 NZLR 335.

forfeits any outstanding long service leave to which they would otherwise be entitled. Counsel for the defendant submits that it is very clear, on the basis of cl 3.4, that Mr Maddigan's outstanding long service leave was forfeited on his dismissal.

[8] As Mr Maddigan points out, the dismissal on which the defendant relies to avoid its obligations in relation to long service leave was found to be unjustified. It would be startling if the reference to "dismissal" in cl 3.4 was read to include any unjustified dismissal carried out by the Director-General. That would plainly lead to perverse results. And while it is said that Mr Maddigan had plenty of opportunity to use his leave during his time with the Department, that option was effectively taken out of his hands by the unjustified action of the defendant.

[9] The second argument advanced on behalf of the Director-General centres on the importance of the pleadings.³ As counsel for the Director-General points out, the statement of claim makes no specific mention of long service leave, or any entitlement to it. It is said to be too late now for the Court to be asked to make such orders in the plaintiff's favour.

[10] The fundamental purpose of pleadings is to put the Court and the opposing party on fair notice of the case being advanced. The claim did refer to the plaintiff suffering loss as a result of the defendant's unjustified actions for which relief was sought, and it included a claim for lost earnings pursuant to s 123(1)(b) of the Act. That provision states that where the Court determines that an employee has a personal grievance, it may, in settling the grievance, provide (amongst other things) for the reimbursement to the employee of a sum equal to the whole or any part of the wages or other money lost by the employee as a result of the grievance. A claim for unpaid entitlements relating to long service leave would fall within the scope of this provision, and there are cases in which the Court has been prepared to grant particular forms of relief where it considers it just to do so, although not specifically claimed by the

³ See for example *Blueskin Bay Forest Heights Ltd v Paterson Pitts Partners Ltd* [2014] NZCA 268 at [22].

successful party. The case of *Fernandez v Rappongi Excursions Ltd t/a Denny's Restaurants* offers a recent example.⁴

[11] The point is, however, that no order for relief in relation to long service leave was made by the Court in its judgment on Mr Maddigan's challenge. In effect, substantive orders are now being sought in the context of an application for costs, and after the case has closed. There are difficulties in doing so.

[12] Mr Maddigan had been employed by the Department for around 20 years at the time he was unjustifiably dismissed. He had, by that stage, accrued 15 days' long service leave. He wishes to be paid for that outstanding leave. In the particular circumstances, and having regard to the broader interests of justice, I consider it appropriate to adjourn this aspect of the plaintiff's application (the claim for a payment equivalent to 15 days' long service leave). It may be that a direction to mediation on this residual issue would be beneficial, and I invite the parties to discuss matters further.⁵ The parties are to advise the Court within a period of 10 working days of the date of this judgment if mediation is considered appropriate (and, if not, why that is so) or, alternatively, advise the Court if no direction is required because the matter has otherwise been resolved. The file should then be referred to me for any further directions or orders.

Christina Inglis
Chief Judge

Judgment signed at 4 pm on 19 May 2020

⁴ *Fernandez v Rappongi Excursions Ltd t/a Denny's Restaurants* [2019] NZEmpC 99 at [60] and [92]. Leave to appeal was declined by the Court of Appeal in *Rappongi Excursions Ltd v Fernandez* [2020] NZCA 37.

⁵ Employment Relations Act 2000, s 188(2).