

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

**I TE KŌTI TAKE MAHI O AOTEAROA  
TĀMAKI MAKĀURAU**

**[2022] NZEmpC 119  
EMPC 394/2021**

IN THE MATTER OF            an application for judicial review

AND IN THE MATTER OF an application to disqualify counsel

AND IN THE MATTER OF an application for costs

BETWEEN                      H  
   Applicant

AND                              EMPLOYMENT RELATIONS  
   AUTHORITY  
   First Respondent

AND                              RPW  
   Second Respondent

AND                              C  
   Third Respondent

Hearing:                      On the papers

Appearances:                H, applicant in person  
   S W Hood and A Lawson, counsel for RPW

Judgment:                    5 July 2022

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**INTERLOCUTORY (NO 2) JUDGMENT OF JUDGE K G SMITH  
(Application for costs)**

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[1]     On 20 May 2022, I dismissed the application by H seeking to disqualify counsel for the second defendant, Mr Hood, and his firm Norris Ward McKinnon from

acting any further in this proceeding.<sup>1</sup> Costs were reserved. Agreement about them has not been reached.

[2] The Court's power to award costs is conferred by cl 19 of sch 3 to the Employment Relations Act 2000 (the Act).<sup>2</sup> Costs are discretionary, but that discretion must be exercised on a principled basis and in accordance with the interests of justice. Costs usually follow the event and require an unsuccessful party to make a reasonable contribution to the costs incurred by the successful party.<sup>3</sup>

[3] The assessment of costs under cl 19 is augmented by reg 68 of the Employment Court Regulations 2000. Under that regulation the Court may consider the conduct of parties tending to increase or contain costs.

[4] Exercising the Court's discretion is assisted by a practice direction containing a scale intended to support, so far as possible, the policy objective that determining costs should be predictable, expeditious and consistent.<sup>4</sup> Having made that point, however, the scale is an aid to the Court's discretion and does not replace it.

[5] RPW seeks costs by applying Category 2B from the scale to each of the steps taken in relation to H's application. The claim made is for preparing and appearing at a directions conference, filing a notice of opposition to the application, preparing written submissions and obtaining a certificate of judgment. The sum calculated under the scale is \$5,736. Mr Hood sought an uplift to \$8,030.40, or an increase of 40 per cent.

[6] The claim for an uplift was submitted to be appropriate having regard to previous circumstances where the Court has ordered an uplift including where:<sup>5</sup>

- (a) inappropriate cases were initiated;

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<sup>1</sup> *H v Employment Relations Authority* [2022] NZEmpC 87; the application extended to a former employee of the law firm.

<sup>2</sup> Employment Relations Act 2000, sch 3 cl 19(1).

<sup>3</sup> *Victoria University of Wellington v Alton-Lee* [2001] ERNZ 305 (CA).

<sup>4</sup> "Employment Court of New Zealand Practice Directions" <[www.employmentcourt.govt.nz](http://www.employmentcourt.govt.nz)> at No 16.

<sup>5</sup> See O'Gorman *Sims Court Practice* (online ed, LexisNexis) at [HRC 14.6.5].

- (b) proceedings were pursued without reasonable justification; and
- (c) the unsuccessful party carried on the litigation in a significantly inefficient manner.

[7] Mr Hood sought to justify an uplift by pointing out that H had unsuccessfully made a nearly identical application to disqualify him in another proceeding between the same parties.<sup>6</sup> In that proceeding the costs awarded to RPW were increased by 20 per cent. The Judge commented that attendances were required to deal with a misguided application that had substantially and unnecessarily added to RPW's costs.<sup>7</sup>

[8] Mr Hood's second submission in support of an uplift was that H had taken steps without obtaining leave. He was referring to H filing affidavits outside the parameters of the timetabled directions necessitating a further telephone directions conference and related attendances.

[9] The third ground relied on was that H made extremely serious but unsubstantiated allegations.

[10] In summary, the case for an uplift was that the application to disqualify counsel was unnecessary and inappropriate but required RPW to incur legal expense to rebut it.

[11] H has not replied to RPW's application for costs or Mr Hood's submissions. The time allowed for him to respond has passed and enquiries by Registry staff about a response have gone unanswered.

[12] There is no reason to delay this decision. An order of costs is appropriate. RPW has succeeded and is entitled to defray the expense it has incurred. I agree with Mr Hood that the appropriate costs category and time band is 2B.

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<sup>6</sup> *H v RPW* [2020] NZEmpC 141 at [37].

<sup>7</sup> *H v RPW* [2020] NZEmpC 192 at [7].

[13] The next issue is whether RPW has established that an uplift in costs from the scale ought to be ordered. The first ground is unhelpful because it is not immediately apparent that the circumstances relied on in the earlier decision, and in this case, were the same. Taking a cautious approach I have put that matter aside.

[14] The third ground, about the seriousness of the allegations, is effectively dealt with in the decision which dismissed them.

[15] However, there is merit in the second ground, that RPW was put to unnecessary expense because of steps taken by H late in the proceeding and without leave. The filing of two substantial affidavits, one of which required a telephone directions conference, must have led to further attendances increasing the expense incurred by RPW. This ground is sufficient to warrant an uplift.

[16] The claim for an uplift is successful, but 40 per cent would be excessive. In my assessment, the uplift should be 20 per cent. That brings the total to \$6,883.20 which I round to \$6,800.

## **Outcome**

[17] H is to pay costs to RPW of \$6,800.

K G Smith  
Judge

Judgment signed at 4.15 pm on 5 July 2022