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

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

**[2023] NZEmpC 110**
**EMPC 387/2022**

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| IN THE MATTER OF | a challenge to a determination of the Employment Relations Authority |
| AND IN THE MATTER OF | an application for costs |
| BETWEEN | HAMILTON HINDIN GREENE LIMITED<br>Plaintiff |
| AND | JAMES SMALLEY<br>Defendant |

Hearing: On the papers

Appearances: T Mackenzie, counsel for plaintiff
S Brookes, counsel for defendant

Judgment: 21 July 2023

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**COSTS JUDGMENT OF JUDGE K G SMITH**

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[1] In October 2022, the Employment Relations Authority released a preliminary determination in a dispute between Mr Smalley and Hamilton Hindin Greene Limited (HHG).[1]

[2] Mr Smalley applied to the Authority claiming that HHG had incorrectly calculated his holiday pay entitlements when his employment ended.[2] Additionally, he claimed that his former employer owed him one month's notice, and that he was incorrectly paid sick leave and for working on public holidays.[3]

1 *Smalley v Hamilton Hindin Green[e] Ltd* [2022] NZERA 525 (Member Beck).
2 At [2].
3 At [2].

[3] The Authority's determination was a preliminary one because it was required to address an issue that emerged from two settlement agreements signed by Mr Smalley and HHG. The first settlement agreement was signed in mid-2017. It resulted in Mr Smalley resigning from his employment and immediately undertaking a period of employment for HHG on a fixed-term basis.[4]

[4] The second settlement agreement was entered into in March 2018. It had the effect of ending the employment relationship, but the parties immediately entered into a separate one for Mr Smalley to provide services to HHG as an independent contractor.[5]

[5] Both agreements were expressed to be in full and final settlement of any claims the parties might make against each other. However, they both acknowledged that no entitlements under the Minimum Wage Act 1983 and the Holidays Act 2003 were foregone.

[6] At issue in the preliminary determination was whether the settlement agreements precluded Mr Smalley's claim, as HHG contended.

[7] The Authority held that the agreements did not compromise Mr Smalley's claim.[6]

## The challenge

[8] HHG challenged the determination. It confined the dispute to putting in issue the conclusion that the settlement agreement in 2017 did not bar Mr Smalley from pursuing alleged wage and holiday arrears. It did not seek to disturb the Authority's conclusion about the 2018 settlement agreement.

[9] Not surprisingly, Mr Smalley responded and advanced an affirmative defence, by referring to an inability to contract out of minimum entitlements.

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4 At [11].
5 At [16].
6 At [31].

## Preparations for hearing

[10] HHG's challenge was the subject of a directions conference on 10 February 2023. As a result of that conference, and by agreement, a direction was made for evidence to be provided by affidavits with leave to cross-examine if required. The challenge was to be set down for one day.

[11] HHG filed an affidavit from Ian Perry. Mr Smalley filed an affidavit and relied on one from an expert witness, James Gallagher, and a bundle of documents was prepared.

## Discontinuance

[12] The proceeding was set down to be heard on 21 July 2023. On 23 May 2023, HHG discontinued its challenge without prior notice to Mr Smalley. He has now applied for costs.

## Costs following discontinuance

[13] The Court's power to award costs is in cl 19 of sch 3 to the Employment Relations Act 2000 (the Act). The power is discretionary. In exercising it the Court may have regard to any conduct of the parties tending to increase or contain costs.[7]

[14] The Act and Employment Court Regulations 2000 do not specifically address costs where a plaintiff discontinues. However, r 15.23 of the High Court Rules 2016 provides that unless the defendant otherwise agrees, or the Court otherwise orders, a plaintiff who discontinues a proceeding against a defendant must pay costs to the defendant of, and incidental to, the proceeding up to and including the discontinuance.[8]

[15] The effect of the rule is that a defendant in Mr Smalley's position has the benefit of a presumption that costs will be awarded to him. That presumption can be displaced.[9]

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7 Employment Court Regulations 2000, reg 68.
8 High Court Rules 2016, applied via reg 6.
9 See generally: David Bullock and Tim Mullins *The Law of Costs in New Zealand* (Lexis-Nexis, Wellington, 2022) at 2.55.

[16] Mr Mackenzie accepted the presumption applied to HHG's discontinuance and confirmed that the company did not seek to displace it. What it disputed was how much Mr Smalley claimed.

## The costs claim

[17] At the directions conference mentioned earlier this proceeding was provisionally assigned category 2B for costs purposes under the Court's Practice Direction Guideline Scale.[10] The guideline acknowledges that this provisional classification may be reviewed at a later stage.

[18] Mr Smalley sought 2B costs of $17,566.50, making a claim for that band and time allocation for each step taken in the litigation up to the point where the notice of discontinuance was filed.

[19] HHG's response was that an award of that amount would be unreasonable and unjust. It sought adjustments which, if accepted, would reduce its costs exposure to $6,214.

## Mr Smalley's claim in more detail

[20] Mr Smalley's claim was itemised in a table in submissions from his counsel, Mr Brookes. The table was:

| **Step in the proceeding** | | **Allocated days** | **Cost** |
|---|---|---|---|
| 2 | Commencement of defence | 1.5 | $3,585 |
| 14 | Preparation for case management conference | 0.4 | $956 |
| 15 | Filing memorandum for case management conference | 0.4 | $956 |
| 16 | Appearance at case management conference | 0.25 | $597.50 |

[10] "Employment Court of New Zealand Practice Directions" <www.employmentcourt.govt.nz> at No 18.

| | | | |
|---|---|---|---|
| 22 | Notice requiring disclosure | 0.8 | $1,912 |
| 36 | Defendant's preparation of briefs or affidavits | 2 | $4,780 |
| 38 | Defendant's preparation of list of issues, agreed facts, authorities and common bundle | 1 | $2,390 |
| 39 | Preparation for hearing (50% sought) | 1 | $2,390 |
| **Total Costs** | | | **$17,566.50** |

[21] Mr Brookes supplemented these calculations with other considerations in support of an order being made. Among them he explained that Mr Smalley served a notice requiring disclosure on HHG, as provided for in reg 42, for disclosure of certain documents held by HHG. The notice covered a one-month period beginning on 1 August 2017 and concluding on 31 August 2017. It was not objected to but disclosure did not occur because HHG discontinued the proceeding.

## Analysis

[22] Mr Mackenzie took issue with uniformly applying 2B to each step. Underpinning his submission was a concern that the hearing would have been, in his view, a "fairly simple" re-run of arguments in the Authority. The thrust of this argument was that steps necessary to adequately prepare for this hearing had already been developed for the Authority investigation.

[23] I agree with Mr Mackenzie that the provisional allocation of 2B is open to review and may be adjusted if that is necessary to reach a just outcome.

[24] HHG placed in issue all of the steps claimed by Mr Smalley. Each disputed step is examined in turn.

*Step 2*

[25] The daily rate for category 2 is $2,390. Step 2 is for commencing the defence and the claim was for the band B allocation of 1.5 days, amounting to $3,585.

[26] Mr Mackenzie submitted that to allow the claim in full would be excessive for what was described as a short defence on a narrow subject. HHG considered that an allocation of one day would be sufficient, reducing this step to $2,390.

[27] I disagree. Describing the statement of defence as short and on a narrow issue belies its content. The pleadings as to the effect of the 2017 settlement agreement were reasonably thorough. It included an affirmative defence in which Mr Smalley pleaded that it was not lawfully possible to enter into a settlement agreement which compromised undisputed minimum entitlements.

[28] I consider an allocation of 1.5 is appropriate. The claim is allowed.

*Step 14*

[29] Step 14 is for preparation for a case management meeting. The claimed time allocation is 0.4, producing $956.

[30] Mr Mackenzie correctly submitted that what occurred was a directions conference which is provided for in step 11. The conference was described as requiring little more than the completion of a timetable and associated directions and ought to be band A, reducing the amount to $478.

[31] I agree that the conference was straightforward. I allow $478.

*Step 15*

[32] Mr Mackenzie raised similar issues about this step as he did for step 14, namely that it was about the preparation of a memorandum for the directions conference and ought to be assessed at band A. If accepted that would reduce the claim from $956 to $478.

[33] I disagree. The memoranda provided by counsel were comprehensive and that explained, at least partly, why the conference was able to be conducted efficiently. While Mr Mackenzie is correct to say that the step claimed ought to be step 12, I do not accept his assessment that the allocation should be smaller. The amount allowed is $956.

*Step 16*

[34] Mr Mackenzie submitted that the claim about step 16 ought to have been for an appearance at a first or subsequent directions conference, that is step 13. I agree. The allocation ought to be 0.2, reducing the claim to $478.

*Step 22*

[35] This step is a claim for issuing the notice requiring disclosure. HHG maintains that no allowance should be made for this step. Mr Mackenzie criticised the notice as too wide and excessive. He commented that the notice came after HHG had invited Mr Smalley to informally discuss disclosure, and reconsider the breadth of what was asked for, but was ignored.

[36] Not surprisingly, Mr Brookes' response was that Mr Smalley was entitled to serve a notice and it was prudent of him to do so, given the rejection of his informal attempt to obtain disclosure. It was said that any delay by attempting another informal request would have impacted on Mr Smalley's preparation and, in any event, HHG did not object to the notice.

[37] To disallow this step is tantamount to saying that it was unnecessary for Mr Smalley to seek disclosure of documents that might be relevant to the litigation. It was not surprising Mr Smalley took the formal step of serving a notice once his earlier request was knocked back. The notice was not objected to and it is, I consider, too late now to raise issues about its breadth. The amount allowed is $1,912.

*Step 36*

[38] Step 36 as claimed should have been for step 35; preparing briefs or affidavits. Mr Smalley sought $4,780.

[39] HHG's response was that no allocation should be made for this step, for two reasons. The first reason was that claiming two days to prepare them was excessive given their similarities to affidavits from the same witnesses in the Authority. Mr Mackenzie analysed each of those affidavits and compared the content of them to

affidavits filed in the Authority. His comparison was intended to illustrate significant commonality between them to support disallowing this step.

[40] Mr Brookes accepted there was some commonality between the affidavits but pointed out that it was necessary to review the evidence to respond to the affidavit from Mr Perry, for HHG.

[41] There are similarities between the affidavits in each jurisdiction, but that does not take this assessment very far given the subject matter of the dispute. Although there was overlap Mr Smalley's affidavit was longer, and covered more material, than the one he filed for the Authority investigation. The similarities provide no basis to reduce this step to nil.

[42] Mr Smalley was entitled to respond to HHG's challenge and, once he did so, that committed him to presenting the evidence he relied on. Of necessity that must have meant reviewing and responding to the evidence from the company. If Mr Mackenzie's submission was directed at attempting to avoid double-dipping on the costs for the same work in two jurisdictions, then I do not accept the proposition. HHG's evidence still needed to be reviewed and affidavits prepared in response.

[43] I am not persuaded that the criticisms of the affidavits justify an alteration to the claim. The amount allowed is $4,780.

*Step 38*

[44] While claimed step 38 this claim is step 37, for preparing the defendant's list of issues, agreed facts, authorities and common bundle.

[45] Mr Mackenzie criticised this claim because no list of issues, agreed facts or authorities were prepared. He submitted that this aspect of the costs application bordered on being vexatious because the common bundle was the same one already prepared for the Authority apart from an additional two-page document. The defendant, he submitted, prepared the bundle in the Authority and costs will need to be assessed for that work in due course. His point was that there cannot have been much if any cost involved in effectively producing the same bundle for the Court.

[46] Additionally, Mr Mackenzie sought a costs credit of 0.25 of a day because, it was argued, Mr Smalley was knowingly putting HHG to the unreasonable cost of responding to this claim.

[47] Part of Mr Mackenzie's submissions included an unflattering commentary on the appropriateness of this part of Mr Smalley's claim, drawn from his analysis of a judgment between the same parties in the High Court. Those submissions were irrelevant and unhelpful. They have not been considered further.

[48] Mr Brookes accepted that Mr Smalley did not prepare a list of issues or agreed facts, but explained that the costs table in his submissions referred to them simply as part of the description of the step. The claim for costs was made on the basis that a bundle of documents was compiled, filed, and served.

[49] It is unclear why Mr Smalley prepared a bundle, given that exhibited to Mr Perry's affidavit was the whole bundle used in the Authority. This claim is disallowed, but I am not persuaded that HHG's claim for a costs credit is justified.

*Step 39*

[50] This step is for preparation for the hearing and should have been step 38. Mr Smalley claimed 50 per cent of the time allocation under band B.

[51] HHG sought a nil allocation for this step. Mr Mackenzie's submission was that it was difficult to accept Mr Smalley had embarked on so much preparation by the time of the discontinuance in May when the hearing was scheduled for July. Three reasons were put forward. First, because the existence of the notice for disclosure indicated Mr Smalley was still seeking information which suggests something other than hearing preparation. Second, the hearing would have been a re-run of previous arguments already canvassed in the Authority, presumably meaning further preparation would not be extensive. Third, the timetable required HHG to file submissions in advance of the hearing, ten clear days beforehand, to which the defendant would respond. While not stated expressly, the submission suggests Mr Mackenzie anticipated that all or most of the preparation was more likely to take

place far closer to the hearing date in July than at the point in time when the notice of discontinuance was filed.

[52] Mr Brookes' response was that Mr Smalley had started preparing for the hearing, and commenced preparing submissions and cross-examination. That was said to justify the claim of 50 per cent of the step being allowed.

[53] There is no basis to put aside counsel's assurance that preparation had begun. This claim is allowed.

## Conclusion

[54] I am satisfied that Mr Smalley is entitled to an award of costs. Taking into account the adjustments referred to earlier, HHG is ordered to pay costs to Mr Smalley of $14,579.

[55] No application has been made for costs arising from the time required to apply for costs. Consequently, no further order is made.

K G Smith
Judge

Judgment signed at 3.40 pm on 21 July 2023