IN THE EMPLOYMENT COURT OF NEW ZEALAND
AUCKLAND

I TE KŌTI TAKE MAHI O AOTEAROA
TĀMAKI MAKAURAU

[2024] NZEmpC 204
EMPC 43/2023

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
AND IN THE MATTER OF	an application for costs
BETWEEN	CODY JOYCE Plaintiff
AND	ULTIMATE SITEWORKS LIMITED Defendant

EMPC 30/2024

IN THE MATTER OF	an application for sanction under s 140 of the Employment Relations Act 2000
BETWEEN	ULTIMATE SITEWORKS LIMITED Plaintiff
AND	CODY JOYCE Defendant

Hearing:	On the papers
Appearances:	L Anderson, advocate for C Joyce D Fleming, counsel for Ultimate Siteworks
Judgment:	29 October 2024

COSTS JUDGMENT OF JUDGE J C HOLDEN

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[1] Ultimate Siteworks Ltd was successful in defending a challenge brought by Cody Joyce to a determination of the Employment Relations Authority.[1] It now seeks costs.

Ultimate Siteworks seeks an award based on its actual costs

[2] Ultimate Siteworks submits that in setting the level of a costs award in this case, the Court should take account of:

(a) the parties' respective degrees of success;

(b) the applicable guidance scales;

(c) the parties' actual costs in respect of the matters they were successful in;

(d) offers made by Ultimate Siteworks on a "without prejudice save as to costs" basis (Calderbank offers);

(e) the parties' respective financial positions; and

(f) their conduct in relation to the proceedings.

[3] By agreement, this proceeding was provisionally assigned category 2B for costs purposes under the Practice Directions Guideline Scale.[2] Ultimate Siteworks has calculated scale costs on that basis. In doing so, it has taken account of its mixed success on four interlocutory matters[3] and the lack of success on its application for a sanction.[4]

[4] Ultimate Siteworks arrived at a figure that exceeds, by some margin, its actual costs on the substantive matter. It seeks an overall award of costs and disbursements

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1 *Joyce v Ultimate Siteworks Ltd* [2024] NZEmpC 64.

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

3 *Joyce v Ultimate Siteworks Ltd* [2023] NZEmpC 85; and *Joyce v Ultimate Siteworks Ltd (No 2)* [2023] NZEmpC 153.

4 *Joyce v Ultimate Siteworks* Ltd, above n 1, at [59].

of $15,370.29, based on its actual costs in the substantive proceeding with a modest contribution towards its costs in respect of the interlocutory matters. In addition, Ultimate Siteworks seeks $675 in respect of the present application for costs.

[5] Ultimate Siteworks says that this is appropriate in the circumstances of this case.

[6] It points to two Calderbank offers that it made to Mr Joyce, the acceptance of either of which would have been more beneficial to Mr Joyce than the ultimate outcome. The first Calderbank offer was made in June 2023, after Ultimate Siteworks's application for security for costs was declined but before any of the other interlocutory applications were made, and before any work was undertaken on preparation for the substantive hearing. Not only was this offer more favourable to Mr Joyce than the ultimate outcome of the proceedings, it was, Ultimate Siteworks says, unreasonably rejected.

[7] The second Calderbank offer made by Ultimate Siteworks was on 7 February 2024, three weeks before the substantive hearing was due to commence. Again, it would have been more beneficial to Mr Joyce than the ultimate outcome.

[8] Ultimate Siteworks submits that the effect of the Calderbank offers is that its costs should not be offset to the extent that they otherwise might have been by a notional award in favour of Mr Joyce in respect of matters he succeeded in.

[9] Ultimate Siteworks also says that the parties' respective financial positions should be treated as a neutral factor given that, in opposition to Ultimate Siteworks's application for security for costs, Mr Joyce gave evidence that he could readily meet any costs award that may be imposed against him. Further, Ultimate Siteworks says it is not in a strong financial position and has had to borrow in order to meet the costs of defending Mr Joyce's claims.

[10] The final factor raised by Ultimate Siteworks, being the conduct of the parties, took on something of a life of its own and it is convenient to deal with it first.

Ultimate Siteworks raised concerns about the behaviour of Mr Joyce's advocate

[11] While Ultimate Siteworks says that Mr Joyce raised unreasonable or unnecessary points in his challenge, its principal concerns are about the conduct of Mr Joyce's advocate, Lawrence Anderson.

[12] Initially, Ultimate Siteworks sought orders from the Court, which I understood to be in the nature of contempt orders against Mr Anderson. The request for orders was withdrawn, with Ultimate Siteworks being content for the conduct issues to be dealt with in the context of the application for costs.

[13] While Ultimate Siteworks has made submissions in respect of these matters, as its actual costs are below scale, no uplift is sought. Rather, Ultimate Siteworks submits that the conduct of Mr Joyce and his representative should be taken into account when considering to what extent costs in its favour should be offset by any notional award in favour of Mr Joyce.

[14] Issues regarding Mr Anderson's conduct first came to the attention of the Court in the lead-up to a directions conference held on 6 October 2023. Documents filed in respect of the interlocutory matters then before the Court included correspondence from Mr Anderson that was unprofessional, and which included abuse towards Mr Fleming.

[15] The matter was discussed at the directions conference, and I made it clear that representatives are expected to deal with each other with respect and courtesy and to co-operate to bring the substantive matter to a conclusion. Following the conference, Mr Anderson filed a memorandum with the Court, acknowledging that the communications were inappropriate, apologising to the Court and saying that he would "undertake to adhere to the required standards of expectations" going forward. He apologised to Mr Fleming.

[16] Mr Fleming, counsel for Ultimate Siteworks, says there was a short-lived improvement in Mr Anderson's conduct but that, more recently, Mr Anderson has reverted to what Mr Fleming describes as "repeated acts of harassment", including:

(a) sending further abusive written emails;

(b) making phone calls and sending texts to counsel late at night, including at 1.21 am on the day the substantive hearing was scheduled to commence and conveying a desire to disturb Mr Fleming; and

(c) posting one star Google reviews of Mr Fleming and of Ultimate Siteworks's previous advocate, using multiple accounts.

[17] The parties each filed a number of memoranda and affidavits in respect of this issue.

[18] Mr Anderson says the matters raised by Mr Fleming are not relevant to the present application; they did not impact on costs.

[19] He also says they did not amount to contempt of Court. In addition, Mr Anderson notes that some of the material supplied by Mr Fleming relates to Ultimate Siteworks's previous representative and to other proceedings unrelated to this one, where Mr Fleming and Mr Anderson are on opposing sides. While some comments are in dispute, Mr Anderson accepts that he made most the communications that Mr Fleming refers to, indeed many are in writing or have been recorded. But Mr Anderson says he is entitled to opinions and to freedom of speech. Mr Anderson also says Mr Fleming and Ultimate Siteworks's previous representative are not blameless either, he says they talked over him and shouted at him. Mr Anderson continues to be disparaging of the way Ultimate Siteworks's case was conducted.

[20] There are three key points underlying the conduct issue for consideration in the context of costs. First, the concerns relate to the behaviour of Mr Anderson, rather than Mr Joyce. Nevertheless, the conduct of a representative may reflect on their client; the client generally will be responsible for any costs implications that arise due

to the conduct of the case.[5] However, where the conduct of a representative is in issue, the Court has previously suggested that there must be a sufficient connection between the alleged poor behaviour of that representative and the party they represent, so that it would be just to make that party responsible for the conduct through a costs order.[6] It is not clear that a sufficient connection exists here.[7]

[21] Second, the impact of Mr Anderson's behaviour is principally on Mr Fleming (and to a limited extent on the advocate that previously represented Ultimate Siteworks), rather than on Ultimate Siteworks. Nevertheless, I accept that Ultimate Siteworks was itself concerned about the correspondence being received from Mr Anderson.

[22] Third, the conduct does not appear to have increased the costs of Ultimate Siteworks.[8] While costs are at the Court's discretion,[9] they are compensatory, not punitive.[10] Given the relatively modest actual costs, it was appropriate that no uplift was sought in respect of the conduct in the circumstances. The conduct also does not form a basis for allowing other costs that otherwise would not have been ordered.

[23] I nevertheless make the following comments.

[24] Although the conduct of concern occurred outside the court process, the relationship between the representatives has arisen because of the court process. As I noted to the representatives in this case, the Court expects representatives to deal with

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5 See Employment Relations Act 2000, sch 3 cl 19 which confines the power to award costs as against parties to the proceeding; and *McKean v Board of Trustees of Whakaaranga School* EMC Auckland AC38/08, 24 September 2008 at [12]. See also, for the circumstances in which it is appropriate to join a non-party for costs purposes, *Kidd v Equity Realty (1995) Ltd* [2010] NZCA 452; and *Aarts v Barnardos New Zealand Ltd* [2013] NZEmpC 145 at [19]–[44].

6 *Shaw v Bay of Plenty District Health Board* [2022] NZEmpC 112 at [30].

7 See generally *Aarts v Barnardos New Zealand Ltd*, above n 5, at [41]: "It would also be unjust to penalise in costs those who exercise a statutory right of indiscriminate representation of litigants, even where the standard of their advocacy is poor and the litigation is dealt with by others at greater cost.".

8 See Employment Court Regulations 2000, reg 68.

9 Employment Relations Act 2000, sch 3 cl 19.

10 *New Zealand Labourers etc IUOW v Fletcher Challenge Ltd* (1990) ERNZ Sel Cas 644, [1990] 1 NZILR 557 (LC); and *Nicholson v Ford* [2019] NZEmpC 30 at [9].

each other with respect and courtesy. The conduct raised is therefore a cause for concern from the Court's perspective.

[25] The information provided to the Court demonstrates that Mr Anderson has behaved unprofessionally and at times, I accept, in an abusive manner. There are however limits to the Court's ability to involve itself in the conduct of representatives;[11] at present there are no rules that address this issue.[12]

[26] Mr Anderson is not a lawyer; nor is he a member of either the Employment Law Institute or the Arbitrators and Mediators Institute of New Zealand. It seems there is no applicable professional body to which the Court can refer his conduct. If Mr Anderson had been a member of such a body, this is a step I would have considered taking.

[27] I note, however, that he, and other representatives in a similar position, cannot avoid the scrutiny of the Court in respect of conduct in the course of a court proceeding merely because they are not a member of any recognised professional body. While s 236 and sch 3 cl 2 of the Employment Relations Act 2000 permit a party to be represented by another person, a representative does not have an unfettered right to appear before the Court. The Court is not obliged to sit still and see its own processes abused. When that happens, the Court has the inherent power to control the representatives in relation to matters before it.[13] Provisions such as s 236 are an extension of a person's right to appear by allowing that person to be represented, rather than the conferral of a right of appearance on the representative.[14] The Court may regulate the conduct of a representative where, in the course of a court proceeding,

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11 See *Postles v Airways Corp of New Zealand Ltd* [2002] 2 ERNZ 808 (EmpC) at [33]; *Hurst v Eagle Equipment Ltd* [2011] NZEmpC 110 at [18]; *Aarts v Barnardos New Zealand Ltd*, above n 6, at [31]; *Ward v Concrete Structures (NZ) Ltd* [2019] NZEmpC 111 at [11]–[12]; and *Noble v Ballooning Canterbury.com Ltd* [2020] NZEmpC 60, [2020] ERNZ 149 at [41].

12 I note that the Employment Court has a broad power to make rules pursuant to s 212 of the Employment Relations Act 2000. Compare *Ward v Concrete Structures (NZ) Ltd*, above n 11, at [12].

13 *H v Employment Relations Authority* [2022] NZEmpC 87, [2022] ERNZ 340 at [34]–[38], citing *Siemer v Solicitor-General* [2013] NZSC 68, [2013] 3 NZLR 441. See, for an example of this approach in respect of a lawyer, *Owen v McAlpine Industries Ltd* [1999] 1 ERNZ 870 (EmpC) at 875–878. See also *Postles v Airway Corp of New Zealand Ltd*, above n 11, at [33]–[39].

14 See *Port of Tauranga Ltd v Bay of Plenty Regional Council* [2022] NZEnvC 92 at [10], in which Chief Judge Kirkpatrick of the Environment Court was referring to s 275 of the Resource Management Act 1991, which is similar in effect to s 236 of the Employment Relations Act.

they engage in unacceptable conduct. In my view, and recognising there is conflicting authority, this can include preventing a representative from continuing with a proceeding where the circumstances require that.[15]

[28] Mr Anderson has some mentoring support. If he wishes to continue with his advocacy role before the Authority and Court, it would be worth his while to enlarge on that, perhaps with an experienced and respected representative that Mr Anderson trusts.

Costs are payable

[29] I turn now to consider the other matters raised with respect to costs.

[30] In relation to those matters, Mr Anderson submits that costs should lie where they fall on a basis of mixed success, both in the substantive proceedings and in the interlocutory activity that preceded it. Mr Anderson points to Ultimate Siteworks's unsuccessful applications for security for costs and for a strike out. He says that Mr Joyce succeeded in obtaining a stay and that the disclosure issues raised by Ultimate Siteworks turned out to be a wasteful exercise given that no documentation sought existed. Mr Anderson also says some of the time claimed is excessive or not properly claimable.

[31] Ultimate Siteworks provided a schedule for category 2B scale costs in respect of the substantive proceedings. Based on that, but with some figures (including the total) corrected, the calculation is:

Item	**Step**	**(part) days**	**Recoverable cost, at daily recovery rate of $2,390**
2	Statement of defence	1.5 days	$3,585
10	Pleading in response to amended pleading (x 2)	1.2 *(0.6 x 2)*	$2,868

[15] *H v Employment Relations Authority*, above n 13, at [38]. Compare *Bache v Essex County Council* [2000] 2 All ER 847 (CA) at 848–856.

11	Preparation for first directions conference	0.4	$956
12	Filing memorandum for first or subsequent directions conference (x 3)	1.2 *(0.4 x 3)*	$2,868
13	Appearance at first or subsequent case conference	0.8 *(0.2 x 4)*	$1,912
35	Witness statements	2	$4,780
37	Defendant's bundle, documents etc	1	$2,390
38	Preparation for hearing, submissions	2	$4,780
39	Attendance at substantive hearing	1.5 days (two days of actual hearing time, less 25 per cent to allow for time relating to application for fine by Ultimate Siteworks)	$3,585
	Total	**11.6**	**$24,748**

[32] Ultimate Siteworks acknowledges that some steps involved comparatively little work, and that adjustments could be made to scale costs, but submits that would still produce a total costs figure of around $20,000.

[33] Ultimate Siteworks also calculated category 2B scale costs in respect of disclosure at $4,780, and for the other interlocutory applications at $3,824 per application.

[34] Ultimate Siteworks succeeded in its application for orders for disclosure of information. Mr Joyce was successful in obtaining a stay, but that was conditional on him making payment into court, which he did not do. He succeeded on the other two interlocutory matters. On balance, I find that the position on costs (including disbursements) in respect of the interlocutory matters is neutral.

[35] Mr Joyce was unsuccessful in respect of his claim and, in some aspects of it, his lack of success should have been readily apparent to him and to Mr Anderson. I do not accept, however, that the points Ultimate Siteworks says were unreasonable, or

unnecessary, materially prolonged the hearing. They would not have warranted an uplift to scale costs, had one been sought.

[36] Ultimate Siteworks failed in its application for sanctions for breach of the compliance order, but little time was spent on that matter in the hearing, and I do not reduce costs on that account.[16]

[37] Mr Joyce does not raise the financial position of the parties; I agree with Ultimate Siteworks that it is a neutral factor.

[38] The Calderbank offers made by Ultimate Siteworks prior to the hearing of this proceeding clearly would have put Mr Joyce in a much better position than he achieved. They were unreasonably declined.

[39] Overall therefore, I consider it appropriate that Ultimate Siteworks be awarded its actual costs for the substantive matter only (excluding interlocutory matters) of $12,614.83 since they were below scale costs that might otherwise be claimed, even with appropriate downward adjustments for the steps that involved comparatively little work.[17] That figure is exclusive of GST, but Ultimate Siteworks will be GST-registered so no uplift for GST is made.

[40] I do not make any order for costs on the application for costs. While I acknowledge the conduct concerns raised by Mr Fleming, ultimately these were matters that sat outside the issue of costs and it was those matters that took up most of the time and energy on the application for costs.

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16 See *Breen v Prime Resources Company Ltd* [2024] NZEmpC 27 at [10], for the proposition that costs will not be reduced simply because a successful party loses one part of its case, the Court assesses how much time was devoted to that matter.

17 *Cornish Truck & Van Ltd v Gildenhuys* [2019] NZEmpC 57 at [9].

[41] Mr Joyce is to pay the sum awarded of $12,614.83 to Ultimate Siteworks within 28 days of the date of this judgment.

J C Holden
Judge

Judgment signed at 10.30 am on 29 October 2024