

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

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

**[2021] NZEmpC 12
EMPC 85/2020**

IN THE MATTER OF a challenge to a determination of the
 Employment Relations Authority

AND IN THE MATTER OF applications for costs

BETWEEN SHAUN EVANS
 Plaintiff

AND JNJ MANAGEMENT LIMITED
 Defendant

Hearing: On the papers

Appearances: A Mapu, advocate for plaintiff
 J Leenoh and E Morrison, counsel for defendant

Judgment: 16 February 2021

COSTS JUDGMENT OF JUDGE J C HOLDEN

[1] Mr Evans filed a non-de novo challenge to a determination of the Employment Relations Authority (Authority) in which he challenged the Authority's findings that he could not pursue a claim for disadvantage.¹ Mr Evans did not challenge the Authority's finding regarding his dismissal.

[2] Mr Evans was largely successful in his challenge and was awarded \$5,000 for unjustifiable disadvantage.²

¹ *Evans v JNJ Management Ltd* [2019] NZERA 337 (Member Larmer).

² *Evans v JNJ Management Ltd* [2020] NZEmpC 181.

[3] Now both he and JNJ Management Ltd (JNJ) seek costs.

[4] Mr Evans seeks costs in the Court for Category 2B based on the scale used by the Court, totalling \$30,741.37 (exclusive of GST):³

Item	Proceedings	Allocated days or part days	Total
1	Commencement of proceeding by way of challenge by plaintiff	2	\$4,780
11	Preparation for first directions conference	0.4	\$956
12	Filing memorandum for first directions conference	0.4	\$956
13	Appearance at first directions conference	0.2	\$478
14	Preparation for case management meeting	0.4	\$956
15	Filing memorandum for case management meeting	0.4	\$956
16	Appearance at case management meeting for sole or principal representative		\$149.37
36	Plaintiff's or defendant's preparation of briefs or affidavits	2	\$4,780
37	Plaintiff's preparation of list of issues, agreed facts, authorities and common bundle	2	\$4,780
39	Preparation for hearing	2	\$4,780
40	Appearance at hearing for sole or principal representative	1	\$2,390
53	Preparation of written submissions (application for leave)	2	\$4,780
Total			\$30,741.37

³ "Employment Court of New Zealand Practice Directions" <www.employment.govt.nz> at No 16.

[5] He also seeks \$3,250 for costs in the Authority.

[6] JNJ seeks \$12,152.98 on the basis it made a Calderbank offer to Mr Evans to settle his claims for \$5,000, which was unreasonably rejected.

[7] It says the amount sought is a reduction on scale costs, which would have been \$22,824.50.

[8] Mr Evans filed his challenge to the determination one day late and therefore applied for an extension of time. JNJ opposed that application, but was unsuccessful. Costs on that application were reserved.⁴

[9] It was after it received that judgment that JNJ offered Mr Evans \$5,000 to settle the case.

Factors to be considered

[10] The Court has a discretion as to costs which it must exercise in a principled way and in accordance with the interests of justice. The Court may have regard to an offer that has been made on a Calderbank basis.⁵

[11] There are a number of factors here that I consider to be relevant to the exercise of the Court's discretion.

[12] Mr Evans was required to make submissions in support of his application for an extension of time, which were not straightforward.

[13] He also was, as noted, largely successful in his challenge. However, some proportionality must be applied in a case like this. A disadvantage claim will generally lead to an award significantly less than an award that might be achieved for an unjustifiable dismissal. An award of costs of over \$30,000 is simply disproportionate to the value of the case. In any event, Mr Evans has not provided evidence of the total

⁴ *Evans v JNJ Management Ltd* [2020] NZEmpC 16.

⁵ Employment Court Regulations 2000, reg 68(2)(a).

fees actually charged and, in some cases, the time estimate in the scale is higher than one would expect to be required for the particular step.

[14] The Calderbank offer, while equating the amount Mr Evans ultimately won in the substantive case, did not include an offer with respect to costs, which by then included costs incurred in respect of the application for an extension of time. Nevertheless, I take into account that JNJ initiated a discussion around settlement, and that Mr Evans effectively rebuffed that discussion by reverting with an unrealistic offer on a non-negotiable basis.

[15] The costs in the Authority were for the dismissal personal grievance as well as for the disadvantage personal grievance, with the dismissal personal grievance clearly being the focus. In those circumstances, JNJ would remain entitled to costs in the Authority, but I have taken into account that those costs may have been for a lesser amount had the disadvantage personal grievance been found for Mr Evans.

[16] Taking all these matters into account, in the exercise of my discretion, I consider Mr Evans is entitled to costs and that an appropriate order is that JNJ pay Mr Evans \$18,000, inclusive of GST and disbursements. That sum is to be paid within 20 working days of the date of this judgment.

[17] There is no award for costs on the application for costs.

J C Holden
Judge

Judgment signed at 11.30 am on 16 February 2021