

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

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

**[2020] NZEmpC 5
EMPC 350/2019**

IN THE MATTER OF an application to extend time to file a
 challenge to a determination of the
 Employment Relations Authority

AND IN THE MATTER of an application for costs

BETWEEN KERRY DUNCAN
 Applicant

AND SOUTHERN MILK TRANSPORT
 LIMITED
 Respondent

Hearing: On the papers

Appearances: K Duncan, applicant in person
 J Copeland, counsel for respondent

Judgment: 17 February 2020

COSTS JUDGMENT OF JUDGE K G SMITH

[1] Southern Milk Transport Ltd has applied for costs against Kerry Duncan following his unsuccessful application for leave to extend the time in which he could challenge a determination of the Employment Relations Authority.¹

[2] The Authority issued a determination on 14 August 2019 in which it held that Mr Duncan had breached a record of settlement he entered into with Southern Milk,

¹ *Duncan v Southern Milk Transport Ltd* [2019] NZEmpC 183.

pursuant to s 149 of the Employment Relations Act 2000 (the Act).² The Authority ordered Mr Duncan to comply with that settlement and imposed a penalty on him of \$3,000, \$2,250 of which was payable to Southern Milk. The remainder of that penalty was to be paid to the Authority and then into the Crown bank account. The final order by the Authority was that Mr Duncan pay Southern Milk costs of \$1,800, and disbursements of \$71.56.

[3] Belatedly, on 23 September 2019, Mr Duncan sought leave to extend the time within which he could challenge the Authority’s determination.³ That application was unsuccessful and was dismissed. Costs were reserved.

[4] Southern Milk sought costs, in its application of 16 December 2019. Mr Duncan has not replied, either within the time provided for in the judgment or at any time subsequently.

[5] Southern Milk is claiming costs of \$2,868 calculated on the basis of Category 2, Band A, in the Court’s Guideline Scale as follows:

	Allocated days or part days pursuant to Band A	Allocated day x Daily Recovery Rate of \$2,390.00
Preparation for first directions conference	0.2	\$478.00
Appearance at first directions conference	0.2	\$478.00
Preparation of written submissions	0.5	\$1,195.00
Obtaining judgment without appearance	0.3	\$717.00
	Total Cost	\$2,868.00

² *Southern Milk Transport Ltd v Duncan* [2019] NZERA 473.

³ Employment Relations Act 2000, s 179(2).

[6] The Court has a broad discretion when it comes to considering costs applications.⁴ The discretion must be exercised in the interests of justice and in accordance with established principles. As is well known, since 1 January 2016, the exercise of that discretion has been assisted by reference to the Court's Guideline Scale.⁵ The Guideline was intended to support the policy objective that costs should be predictable, expeditious and consistent. It should be noted, however, that the Guideline does not replace the exercise of the Court's discretion.

[7] Usually costs follow the event, and there is no reason to depart from that practice in this case.⁶ It is appropriate for costs in this proceeding to be determined on the basis of applying Category 2, Band A; that is the proceeding was of average complexity requiring representation by a lawyer of skill and experience considered average in the Employment Court.

[8] I am satisfied that each step taken by Southern Milk was required to prepare for and participate in the proceeding; and that the costs claimed are reasonable in the circumstances.

Outcome

[9] Mr Duncan is ordered to pay to Southern Milk costs of \$2,868.

K G Smith
Judge

Judgment signed at 3 pm on 17 February 2020

⁴ Employment Relations Act 2000, sch 3 cl 19.

⁵ Employment Court Practice Directions, No 16 (<www.employmentcourt.govt.nz/legislation-and-rules>).

⁶ *Victoria University of Wellington v Alton-Lee* [2001] ERNZ 305 (CA) at [48].