

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

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

**[2021] NZEmpC 147
EMPC 188/2018
EMPC 399/2018**

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
AND IN THE MATTER OF	an application for proceedings removed
AND IN THE MATTER OF	an application as to costs
BETWEEN	BRIAN SAIPE Plaintiff
AND	TRUDE JEAN BETHELL (ALSO KNOWN AS TRUDE JEAN BETHELL-PAICE) Defendant

Hearing: On the papers

Appearances: S Greening, counsel for plaintiff
R Hooker, counsel for defendant

Judgment: 9 September 2021

COSTS JUDGMENT OF JUDGE J C HOLDEN

[1] Ms Bethell successfully defended Mr Saipe’s proceedings in the Employment Court.¹ She now seeks cost of \$49,000, together with disbursements.² Ms Bethell advises that her actual costs totalled \$50,887.50, inclusive of GST.

¹ *Saipe v Bethell* [2021] NZEmpC 33, [2021] ERNZ 74.

² Disbursements appear to comprise photocopying and courier charges.

[2] As well as the substantive proceeding, Ms Bethell filed two interlocutory applications:

- (a) an application for security for costs, that she withdrew; and
- (b) an application to dismiss Mr Saipe’s claims, which was successful in part.³

[3] The case was allocated category 2B for costs purposes under the Employment Court’s Guideline Scale.⁴ Mr Hooker, counsel for Ms Bethell, has calculated costs according to the Scale:

Item	Proceedings	Days
<i>Commencement</i>		
2	Commencement of defence to challenge by defendant	1.5
<i>Interlocutory applications</i>		
28	File interlocutory application (application to dismiss/strike out proceedings – 5 October 2018)	0.6
28	File interlocutory application (application for security for costs – 15 October 2019)	0.6
30	Preparation of submissions for interlocutory application to dismiss/strike out proceedings	1.0
32	Appearance at interlocutory hearing	0.5
<i>Case management</i>		
11	Preparation for first directions conference	0.4
12	Filing memoranda for first and subsequent directions conferences (13 memoranda identified)	4.4
13	Appearance at conferences (reference to 10 Minutes of the Court)	1.0

³ *Saipe v Bethell* [2019] NZEmpC 103.

⁴ “Employment Court of New Zealand Practice Directions” <www.employment.govt.nz> at No 16.

<i>Trial Preparation and hearing</i>		
36	Defendant's preparation of briefs	2.0
38	Defendant's preparation of list of issues, agreed facts, authorities and common bundle	1.0
39	Preparation for hearing	4.0
40	Appearance at hearing for sole or principal representative	3.0
	Total	20.0
	Daily rate of \$2,390	\$47,800

[4] Ms Bethell also refers to an offer to settle without prejudice except as to costs (the "Calderbank offer").

[5] Mr Saipe accepts some costs are payable but says the appropriate level is \$25,095.

[6] The main issues in contention are:

- (a) the position regarding GST;
- (b) the treatment of costs for the interlocutory applications;
- (c) the level of costs appropriate for case management; and
- (d) the effect of the Calderbank offer.

The Court has discretion as to costs

[7] The Court has the discretion to order any party to pay to any other party such costs and disbursements as the Court thinks reasonable.⁵

⁵ Employment Relations Act 2000, sch 3 cl 19.

[8] The Guideline Scale adopted by the Court is not intended to replace the Court's ultimate discretion but assists the Court in the exercise of that discretion. The starting point is that costs generally follow the event.

[9] The Court may have regard to a Calderbank offer.⁶ Indeed, a “steely” approach is required if a party has unreasonably refused to accept a Calderbank offer.⁷

GST not recoverable from Mr Saipe

[10] In his memorandum in response to the application, Mr Greening, counsel for Mr Saipe, notes that Mr Saipe understands that Ms Bethell is GST registered. Although reply submissions were filed by Mr Hooker, no comment was made in relation to Ms Bethell's GST status. It would seem she is GST registered given the case centred on a business Ms Bethell operates at Bethell's Beach. I also take into account Mr Saipe's role at the business, which would have meant he would be aware of its GST status.

[11] An uplift on costs may be allowed to recognise GST where a party is not GST registered and therefore is not able to recover the GST paid on their legal costs. However, where a party is GST registered, the GST component of their legal costs can be claimed back from the Inland Revenue Department and therefore an uplift is not appropriate.⁸

[12] I accept that Ms Bethell would be GST registered and therefore her actual costs to be considered for the purposes of this application, comprise the GST exclusive amount of \$44,250.

No costs recoverable for interlocutory applications

[13] As noted, Ms Bethell initially applied for security for costs but then withdrew her application. No costs are recoverable for that application.

⁶ Employment Court Regulations 2000, reg 68(2)(a).

⁷ *Bluestar Print Group (NZ) Ltd v Mitchell* [2010] NZCA 385, [2010] ERNZ 446 at [20]; *Elisara v Allianz New Zealand Ltd* [2020] NZEmpC 13, [2020] ERNZ 20.

⁸ *New Zealand Venue and Event Management Ltd v Worldwide NZ LLC* [2016] NZCA 282 at [10]; *Stormont v Peddle Thorp Aitken Ltd* [2017] NZEmpC 159 at [35]-[37].

[14] In respect of Ms Bethell's application to dismiss Mr Saipe's claims, the parties had mixed success. Ms Bethell's application was successful insofar as the disadvantage claim was concerned but unsuccessful with respect to the claim concerning the dismissal. Given that result, I am satisfied that costs should lie where they fall in respect of that application.

Case management costs recoverable in part

[15] Ms Bethell has claimed that Scale costs for case management would total 5.8 days. Some of the memoranda filed on her behalf did not result in a conference but are claimed by analogy. Ms Bethell also points to email correspondence with the Court Registry. Mr Saipe challenges the level of costs sought for case management and says that no more than one day should be allowed.

[16] An examination of the Court's file shows five memoranda filed by Ms Bethell together with two joint memoranda. Although minutes were issued by the Court, in many cases that was not as a result of a directions conference.

[17] Stepping back and looking at the case management involved in these proceedings, I am satisfied that 2.5 days should be allowed in the calculation.

[18] The Scale also only allows two days preparation time for a hearing, rather than the four days claimed. That too should be reduced.

[19] The removal of the interlocutory applications from the calculation and the reduction in case management and preparation time leads to a Scale costs assessment of 12 days. Using the daily rate of \$2,390, this leads to Scale costs of \$28,680.

The Calderbank offer is relevant

[20] Ms Bethell made a Calderbank offer on 15 September 2020, offering Mr Saipe \$14,000 to settle his claim. That offer was open until 22 September 2020. As is clear, Mr Saipe did not achieve an outcome as favourable as the offer.

[21] The Calderbank letter would not impact on costs that pre-dated it but is relevant to the component of Ms Bethell's claim after 22 September 2020. The invoices covering the period from then until the conclusion of the hearing included fees of approximately \$32,500 (exclusive of GST). This contrasts with Scale costs of \$19,120.

[22] Here, the letter from Mr Hooker set out the difficulties Mr Saipe faced with his claim. Mr Saipe already had been unsuccessful in the Authority. His rejection of the settlement offer was not reasonable. Accordingly, I take the Calderbank offer into account, and increase the Scale costs by one third for that portion of the proceedings.

[23] Accordingly, and allowing a modest sum for disbursements, there is an order that Mr Saipe pay Ms Bethell \$35,200, for costs and disbursements.

[24] No application has been made in respect of costs on the application for costs and no order is made.

J C Holden
Judge

Judgment signed at 9.30 am on 9 September 2021