

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

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

**[2021] NZEmpC 5
EMPC 263/2020**

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
AND IN THE MATTER OF	an application for costs
BETWEEN	FVB Plaintiff
AND	XEY Defendant
AND	EBD Intervener

Hearing: On the papers

Appearances: D Fleming, counsel for plaintiff
M O'Brien, counsel for defendant

Judgment: 3 February 2021

COSTS JUDGMENT OF JUDGE J C HOLDEN

[1] The plaintiff successfully challenged the Authority's determination of 24 August 2020 regarding non-publication orders.¹ The plaintiff now seeks costs.

¹ *FVB v XEY* [2020] NZEmpC 182.

[2] These proceedings were allocated to Category 2B for costs purposes. The plaintiff has calculated time according to the Employment Court’s Guideline Scale:²

Item	Proceedings	Days
1	Commencement of proceedings by way of challenge by plaintiff	2
11	Preparation for first directions conference	0.4
28	Filing interlocutory application (application for urgency and stay of ERA orders pending court determination)	0.6
13	Appearance at first directions conference	0.2
36	Plaintiff’s preparation of briefs/affidavits	2
37	Other steps in proceeding: preparation of plaintiff’s bundle of evidence	0.5
39	Preparation for hearing	2
40	Appearance at hearing for sole or principal representative (8 quarter days)	2
Total		9.7

[3] Applying the daily rate for Category 2 proceedings to these steps leads to a costs figure of \$23,183 (excluding GST).

[4] Actual costs incurred by the plaintiff in respect of these proceedings totalled \$12,397 (including GST) plus disbursements of \$1,039.65 (including GST).

[5] The plaintiff therefore seeks an order for costs and disbursements of \$13,436.65.

[6] The defendant does not dispute that costs are due but says the plaintiff should not be awarded costs in relation to the plaintiff’s draft application and draft affidavit

² “Employment Court of New Zealand Practice Directions” <www.employment.govt.nz> at No 16.

and memorandum, as the stay application was not filed in the proper form and so, the defendant says, was made in error.³ The amount in issue, the plaintiff says, is \$554.24.

[7] The Court has a discretion as to costs which it must exercise in the interests of justice and in accordance with established principles. The Guideline Scale has been adopted to assist the Court and to promote predictability, expedition and consistency.⁴ A party, however, cannot obtain an award for costs that is greater than the amount expended.

[8] The sole issue here is whether there should be a reduction from the actual amount of the plaintiff's costs to take account of the allegedly incorrect form being used initially. On that point, I agree with the plaintiff that this case is different from *X v Chief Executive of the Department of Corrections*, cited by the defendant, in that the step taken was required notwithstanding that the form used may not have been the correct one. The defendant does not suggest that any additional time was needed because of alleged process error.

[9] Accordingly, I do not consider that any reduction on actual costs is warranted for that step. Overall too, the fees are reasonable.

[10] It follows that the defendant is ordered to pay the plaintiff the amount of \$13,436.65 for costs and disbursements with such payment to be made within 20 working days of this judgment.

[11] There is no costs award in relation to the application for costs.

J C Holden
Judge

Judgment signed at 2 pm on 3 February 2021

³ *X v Chief Executive of the Department of Corrections* [2018] NZEmpC 159 at [11].

⁴ *Xtreme Dining Ltd, (T/A Think Steel) v Dewar* [2017] NZEmpC 10, [2017] ERNZ 26 at [25].