

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

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

**[2024] NZEmpC 67
EMPC 233/2023**

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
AND IN THE MATTER OF	an application for costs on an application to strike out proceedings
BETWEEN	JOHN ROBERTS Plaintiff
AND	THE CHIEF EXECUTIVE OF THE DEPARTMENT OF CORRECTIONS Defendant

Hearing: On the papers

Appearances: JM Roberts and MJ Morrissey, counsel for plaintiff
K Radich, counsel for defendant

Judgment: 2 May 2024

COSTS JUDGMENT OF JUDGE KATHRYN BECK

[1] Pursuant to the Court's judgment dated 23 February 2024, the plaintiff, Mr Roberts, was successful in defending the strike-out application brought by the defendant. Leave was granted to him to apply for costs if agreement could not be reached between the parties.¹

[2] The parties have not been able to agree costs and have filed submissions.

¹ *Roberts v The Chief Executive of the Department of Corrections* [2024] NZEmpC 25.

[3] The plaintiff seeks an uplift of scale costs, being a total of \$11,329.20 plus GST. The defendant agrees that costs are payable but says that such costs should be in the range of \$5,019 to \$6,214 for reasons which will be set out below.

[4] Mr Roberts has provided details of the actual costs incurred. It is not disputed that these are in excess of the amount sought.

[5] Both parties agree that the applicable costs category in the circumstances is 2B. They disagree with how the Court's guideline scale should be applied, and on whether there should be an uplift.

The law

[6] The starting point for costs is sch 3 cl 19 of the Employment Relations Act 2000. That provision confers a broad discretion as to costs and is augmented by reg 68(1) of the Employment Court Regulations 2000, which enables the Court to have regard to the conduct of the parties tending to increase or contain costs. A guideline scale has been adopted to guide the setting of costs.²

[7] As the guideline scale makes clear, it is intended to support (as far as possible) the policy objective that the determination of costs be predictable, expeditious and consistent. However, it is not intended to replace the Court's ultimate discretion as to costs.

Analysis

Steps 11–13

[8] While this costs application relates to an interlocutory application, the plaintiff submits that the directions conference held on 1 September 2023 was almost solely concerned with responding to the defendant's application to strike out. Accordingly, he submits that costs in relation to that conference sit properly within this matter as

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

opposed to forming part of any costs consideration for the substantive proceeding in the future.

[9] The defendant submits that any costs in relation to the directions conference should await the conclusion of the proceedings as a whole. In the alternative, Ms Radich, counsel for the defendant, submits that the costs claimed for the steps are excessive compared to the time that would actually have been spent.

[10] I agree with the plaintiff that the directions conference dealt almost solely with the defendant's application to strike out. It did not otherwise deal with the substantive proceeding before the Court. Accordingly, I consider that costs associated with it should be included in the current assessment. However, I also agree with the defendant that to apply the normal time allocation for a directions conference is not appropriate in the circumstances. Those time allocations are put forward on the basis that all the matters referred to in the Court's "Directions Conference Guidelines" will be dealt with.³ That was not the case here.

[11] Accordingly, I agree that the time sought should be reduced as follows:

Step in the proceeding		Allocated days	Costs
11	Preparation for first directions conference	0.4 (reduced to 0.2)	\$478
12	Filing memorandum for first or subsequent directions conference	0.4 (reduced to 0.2)	\$478
13	Appearance at first or subsequent directions conference	0.2	\$478
			\$1,434

³ Employment Court of New Zealand "Directions Conference Guidelines" (December 2021) <www.employmentcourt.govt.nz>.

Steps 29–32

[12] Steps 29 and 30 are for the filing of an opposition to an interlocutory application and the preparation of written submissions. The parties agree on the application of the guideline scale to these steps.

[13] The plaintiff seeks 0.6 days for the preparation of a bundle of authorities for the hearing (step 31).

[14] The defendant submits that this step envisages the preparation of a bundle of evidential documents for a hearing, not a bundle of authorities. Counsel says there was no bundle of evidential documents filed for this interlocutory application, so the step is not applicable. I agree that that is what is anticipated by this step in the guidelines.

[15] Further, the defendant submits that the plaintiff did not need to prepare a bundle of authorities because the defendant offered to prepare a joint bundle. The parties disagree on this point, but I do not consider I need to resolve the issue, given my finding that a bundle of authorities is not what is anticipated by step 31 in the guidelines in any case.

[16] Accordingly, I consider the appropriate costs in relation to these steps are as follows:

Step in the proceeding		Allocated days	Costs
29	Filing opposition to interlocutory application	0.6	\$1,434
30	Preparation of written submissions	1	\$2,390
32	Appearance at hearing of defended application for sole or principal representative	0.5	\$1,195
			\$5,019

Step 33

[17] The hearing was a half-day which was attended by both Mr Jim Roberts and Mr Morrissey on behalf of the plaintiff. The plaintiff seeks costs in relation to the appearance of Mr Morrissey. Counsel submits that Mr Morrissey has been responsible for a great deal of the work, that the defendant's defence was a novel and technical statutory issue, and that it was appropriate for two counsel to appear. The plaintiff also submits that second counsel meets the expectations of the superior courts in relation to the involvement of junior counsel.

[18] The defendant says there is no basis for awarding costs for the appearance of a second junior counsel at an interlocutory hearing which lasted less than half a day, particularly where that counsel did not present any of the submissions. Counsel agrees that it is appropriate and no doubt beneficial for Mr Morrissey to attend the hearing but says that this was a training and development opportunity and as such, no cost ought to rest with the defendant.

[19] I agree that this was not a matter that required second counsel. The proceeding's complexity was within the normal range and, as noted by Ms Radich, Mr Morrissey did not take any active steps during the hearing. I do not consider that costs are payable in relation to this step.

Uplift sought by plaintiff

[20] The plaintiff has sought an uplift of 20 per cent on the grounds that the application for strike-out was without merit. Counsel submits the application was never able to satisfy the high threshold required to succeed.

[21] There is nothing in the conduct of this proceeding that would justify an uplift. While the application was unsuccessful, it was able to be determined according to the usual test for such matters. The defendant did nothing to prolong the hearing in any way. I do not consider there is a basis to depart from the guideline scale.

Costs on application for costs

[22] The plaintiff also seeks costs for the preparation of its memorandum and the application for costs. It acknowledges that such an award should be modest.

[23] While costs on applications for costs are sometimes awarded, that is not the general position. In the present proceedings, there was an exchange of memoranda which were not complicated. Further, the plaintiff has had limited success in relation to the matters that were in dispute between the parties on this issue of costs.

[24] There is no basis for an award of costs for the application for costs.

Outcome

[25] The defendant is ordered to pay the plaintiff \$6,453 as a contribution to its costs. That payment is to be made within 14 days of the date of this judgment.

Kathryn Beck
Judge

Judgment signed at 9.45 am on 2 May 2024