

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

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

**[2024] NZEmpC 135  
EMPC 234/2023**

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

AND IN THE MATTER OF an application for costs

BETWEEN ATTAPORN CHANTAMA  
Plaintiff

AND MCKERCHAR LAMB LIMITED  
First Defendant

AND DAVID MCKERCHAR  
Second Defendant

Hearing: On the papers

Appearances: P J Brown, counsel for plaintiff  
D McKerchar, agent for first defendant and in person for the  
second defendant

Judgment: 29 July 2024

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**COSTS JUDGMENT OF JUDGE M S KING**

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**Background**

[1] The first defendant has applied for costs following the discontinuance of the plaintiff's claim in this Court. Despite the discontinuance, costs remain outstanding, and efforts to resolve the issue between the parties have been unsuccessful.

[2] On 12 July 2023 the Court granted the plaintiff's application for leave to file a challenge out of time.<sup>1</sup>

[3] On 22 March 2024 the Court issued a judgment granting the plaintiff's application to join Mr McKerchar, the sole director of the first defendant, in his personal capacity as a defendant in the proceedings.<sup>2</sup> The judgment required the plaintiff to file and serve any amended statement of claim by 5 April 2024.<sup>3</sup>

[4] On 8 April 2024 the plaintiff filed a notice of the discontinuance withdrawing his claim in this Court.

### **Application**

[5] On 2 May 2024 the first defendant filed a memorandum seeking costs following the discontinuance.

[6] Initially the first defendant was represented by counsel. It seeks to recover the costs it incurred while represented. The first defendant has provided an invoice, dated 31 July 2023, from its lawyers for \$3,500 (plus GST of \$525) and disbursements of \$175.

[7] The first defendant also seeks to recover an accountant's fee of \$2,300. It does so on the basis that the fee arose from preparing financials for its lawyer's review as part of the proceedings. The first defendant has not provided a copy of its accountant's invoice, or any information from the accountant detailing their attendances.

[8] On 14 August 2023 counsel for the first defendant filed a notice of change of representation. From that date, Mr McKerchar represented the first defendant as its agent in these proceedings. The first defendant seeks to recover costs for Mr McKerchar's time at a rate of \$120 per hour. A summary of the time claimed is set out below:

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<sup>1</sup> *Chantama v McKerchar Lamb Ltd* [2023] NZEmpC 104.

<sup>2</sup> *Chantama v McKerchar Lamb Ltd* [2024] NZEmpC 49.

<sup>3</sup> At [21].

	<b>Description</b>	<b>Hours</b>	<b>Total</b>
1	Time spent preparing, finalising and filing notice of opposition and affidavit in support	14.5	\$1,740
2	Time spent preparing, finalising and filing submissions in opposition	6	\$720
3	Time spent off work travelling to Dunedin to meet with liquidation specialists	6	\$720
<b>TOTAL</b>		<b>26.5</b>	<b>\$3,180</b>

[9] Despite providing the time allocations above, the first defendant seeks a costs award of \$3,960 for 33 hours of Mr McKerchar’s time at a rate of \$120 per hour. No basis was provided in support of the additional 6.5 hours that have been claimed. A total costs award of \$10,460 is claimed by the first defendant for its previous legal counsel fees, accountant fees and Mr McKerchar’s time.

[10] Mr Brown, counsel for the plaintiff, submits that a costs award of \$1,908 is reasonable in the circumstances in accordance with category 1, band A of the Guideline Scale for steps 8, 11, 13, and 29.

### **Costs principles**

[11] The Court has a broad discretion as to costs.<sup>4</sup> The discretion 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.

[12] To assist the Court in exercising the discretion, a Guideline Scale is used, the objective being to achieve predictability, consistency and expediency in determining costs. The scale does not displace the Court’s discretion.<sup>5</sup>

<sup>4</sup> Employment Relations Act 2000, sch 3 cl 19.

<sup>5</sup> “Employment Court of New Zealand Practice Directions” <[www.employmentcourt.govt.nz](http://www.employmentcourt.govt.nz)> at No 18.

[13] Where a plaintiff discontinues a matter, they are presumptively liable to meet the first defendant's costs.<sup>6</sup>

### **Analysis**

[14] While the claim did not progress to a substantive hearing, the first defendant was required to take a number of steps prior to the date of discontinuance.

[15] I assess the present proceedings to be of average complexity and that a normal amount of time for attendance was reasonable in the circumstances. Given this assessment, I find that the proceedings fall within a category 2, band B classification under the Guideline Scale. This finding is consistent with statements made by counsel for each party in memoranda filed early on in these proceedings prior to the directions conference on 16 August 2023.

[16] I accept that the first defendant is entitled to claim reasonable costs associated with its lawyer's attendances. These included consideration of the statement of claim, drafting and filing a statement of defence, and preparing a memorandum for a directions conference (which Mr McKerchar subsequently attended as the first defendant's agent). From my own review of the Guideline Scale, I am led to an allocation of 2.3 days. At a category 2 daily rate of \$2,390, that leads to scale costs of \$5,497, as set out below.

	<b>Description</b>	<b>Days – Band B</b>	<b>Total</b>
2	Commencement of defence to challenge by defendant	1.5	\$3,585
11	Preparation for first directions conference	0.4	\$956
12	Filing memorandum for first or subsequent directions conference	0.4	\$956
<b>TOTAL</b>		<b>2.3</b>	<b>\$5,497</b>

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<sup>6</sup> See High Court Rules 2016, r 15.23.

[17] The Guideline Scale demonstrates that the amount invoiced by legal counsel for \$3,675, which includes the lawyer's fee of \$3,500 (GST exclusive) and disbursements of \$175, is reasonable.

[18] However, a small reduction to that sum will need to be made in light of the fact that the fee also relates to the assistance of counsel in respect of the application for leave to file a challenge out of time. Judge Corkill previously indicated that costs on that application would lie where they fall.<sup>7</sup>

[19] Additionally, as the first defendant is seeking to recover the entire legal fee on an indemnity basis, it is necessary to consider the GST element of that fee. Where indemnity costs are sought, GST is only recoverable where the claimant is not registered for GST. If the first defendant is registered, it would be able to recover the GST component of its legal costs, and ordering GST would effectively result in a double recovery.<sup>8</sup> Mr McKerchar has advised the Court that both he and the first defendant are "GST Deregistered". As a result, there is nothing preventing the GST component from being recoverable.

[20] However, I do not accept the defendant's claim of costs for Mr McKerchar's time. Mr McKerchar acted as the first defendant's agent in these proceedings.<sup>9</sup> The costs of an agent can generally be recovered by a party in the employment jurisdiction where that agent has charged the party for their services.<sup>10</sup> There is no evidence that Mr McKerchar charged the first defendant for his services as representative.<sup>11</sup> Further, as Mr McKerchar is the sole director and shareholder of the first defendant, it may be arguable that the rules for self-represented litigants should apply. A self-represented litigant is generally only entitled to claim disbursements.<sup>12</sup>

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<sup>7</sup> *Chantama v McKerchar Lamb Ltd*, above n 1, at [14].

<sup>8</sup> *New Zealand Venue and Event Management Ltd v Worldwide NZ LLC* [2016] NZCA 282, (2016) 23 PRNZ 260 at [13]–[16].

<sup>9</sup> A company is unable to appear in person, see *Commission of Inland Revenue v Chesterfields Preschools Ltd* [2013] NZCA 53, [2013] 2 NZLR 679 at [25]–[34], but may be represented by an agent rather than counsel in the Employment Court, see Employment Relations Act, s 236 and sch 3 cl 2.

<sup>10</sup> *Hutchison v Nelson City Council* [2014] NZEmpC 202 at [16]–[18].

<sup>11</sup> High Court Rules, r 14.2(1)(f).

<sup>12</sup> *McGuire v Secretary for Justice* [2018] NZSC 116, [2019] 1 NZLR 335 at [55]–[56] and [82]–[88].

[21] In any case, the first two categories of costs claimed for Mr McKerchar's representation related to the plaintiff's joinder application, and the defendants are not entitled to costs on that application. The third category relates to a meeting with liquidation specialists, and it is not clear why costs ought to be granted for that meeting.

[22] I now turn to the first defendant's claim for reimbursement of its accountant's fees. There is insufficient information to determine whether the accountant's fees were a valid disbursement that can be claimed in relation to this proceeding. I decline to make an order for costs for the first defendant's accountant's fees.

[23] Finally, it is reasonable for the Court to factor into its assessment of costs, the costs arising from the plaintiff's successful application to join Mr McKerchar as a party to the proceeding.<sup>13</sup> Costs were reserved.<sup>14</sup> Had the plaintiff applied for costs, he would have been entitled to Guideline Scale costs of approximately \$3,824.<sup>15</sup>

[24] I consider that it is just and reasonable to exercise my discretion to reduce the costs the first defendant is entitled to claim, by the amount in [23] above. A further reduction also needs to be made in light of the fact that fees also covered the involvement of counsel for the first defendant on the application for leave to file a challenge out of time. Finally, I do not consider the defendant is entitled to indemnity costs for the period during which it was represented and a reduction must also be made to acknowledge that. In those circumstances, I consider that costs ought to lie where they fall.

## **Outcome**

[25] The first defendant sought costs, however, given the circumstances of this proceeding, including the plaintiff's successful interlocutory application and the first

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<sup>13</sup> Employment Relations Act, s 189(1).

<sup>14</sup> *Chantama v McKerchar Lamb Ltd*, above n 2, at [22].

<sup>15</sup> "Employment Court of New Zealand Practice Directions", above n 5, at No 18, see steps 28 and 30.

defendant being unable to claim for the attendances by its director, costs are to lie where they fall.

M S King  
Judge

Judgment signed at 3 pm on 29 July 2024