

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

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

**[2025] NZEmpC 12
EMPC 408/2023**

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

AND IN THE MATTER OF an application for costs

BETWEEN HAVEN FALLS FUNERAL HOME
 LIMITED
 Plaintiff

AND KIM TEPANIA
 Defendant

Hearing: On the papers

Appearances: J Duckworth, counsel for plaintiff
 A Kersjes, advocate for defendant

Judgment: 5 February 2025

COSTS JUDGMENT OF JUDGE M S KING

Background

[1] The plaintiff, Haven Falls Funeral Home Ltd, applied for a stay of execution of orders made against it by the Employment Relations Authority (the Authority).¹ In the Court's judgment of 19 March 2024, the application for a stay was declined.² On 18 July 2024, the Court ordered the plaintiff to pay the defendant, Ms Tepania, a total of \$6,955.20 for costs on the stay application.³ Subsequently, the plaintiff advised the Court by memorandum that the challenge was discontinued. On 15 October 2024, the

¹ *Tepania v Haven Falls Funeral Home Ltd* [2023] NZERA 587 (Member Lynch).

² *Haven Falls Funeral Home Ltd v Tepania* [2024] NZEmpC 47.

³ *Haven Falls Funeral Home Ltd v Tepania* [2024] NZEmpC 130.

defendant made a further application for costs regarding the substantive matter which this judgment now addresses.

[2] The defendant claims that because the plaintiff ceased the proceedings, it is fair and reasonable that any costs the defendant incurred to date should be met by the plaintiff. The defendant has produced an invoice addressed to the plaintiff dated 15 October 2024 for \$14,876.40, which her representative submits relate only to the Court proceedings and not those already dealt with by the Court.

[3] The defendant relies on the Employment Court Guideline Scale.⁴ She says that costs should be calculated on a category 2 band b basis and that she is entitled to 4.1 days for her representative's attendances, which included preparing the statement of defence, preparing and filing of memorandums and attendance at case management conferences. The time allocation of 4.1 days, applied to the category 2 daily recovery rate of \$2,390, totalling \$9,799. The defendant submits that is a fair and reasonable award of costs in the circumstances. In support of the reasonableness of such an award, the defendant also points to delays and requests for the notice of discontinuance as a factor to also be considered.

[4] At the request of the Court, the defendant subsequently filed a memorandum itemising the attendances claimed and corresponding time allocations, which is set out below. The memorandum did not identify specific items in the Guideline Scale, and the total time allocation recorded in the table is 4.5 days, which is higher than what is sought by the defendant in her application for costs.

⁴ "Employment Court of New Zealand Practice Directions" <www.employmentcourt.govt.nz> at No 18.

Proceedings	Days	Total \$
Commencement of defence	2.0	4,780
Drafting and filing of statement of defence	0.8	1,912
Preparation for conference call	0.4	956
Drafting and filing memorandum for conference call	0.4	956
Conference call attendance	0.3	717
Interlocutory application	0.6	1,434
Total	4.5	\$10,755

[5] The plaintiff submits that the costs application should be declined. The plaintiff's key submissions include that the defendant has not been invoiced for her representative's attendances as the invoice submitted with the defendant's application for costs is addressed to the plaintiff. It submits that the defendant has not incurred any legal fees. The plaintiff relies on r 14.2(1)(f) of the High Court Rules 2016, which states that one of the general principles applying to the determination of costs is that "an award of costs should not exceed the costs incurred by the party claiming costs". It submits that the defendant cannot claim compensation for costs she has not yet incurred.

[6] The plaintiff also raises issues with the time allocations claimed in the defendant's costs application. The plaintiff submits that:

- (a) The defendant is claiming time allocations in excess of the Guideline Scale. Specifically, the defendant is claiming 2.8 days for the commencement of the defence and drafting and filing of a defence, whereas the Guideline Scale at item 2 only provides for an allocation of 1.5 days.
- (b) The defendant is seeking to double dip, claiming costs for attendances that were previously awarded by the Court in an earlier costs judgment.⁵ Specifically, the defendant is claiming attendances for preparing and attending a directions conference; however, the plaintiff submits that

⁵ *Haven Falls Funeral Home Ltd v Tepania*, above n 3.

the parties only attended one directions conference that took place on 15 December 2023. The defendant's preparation and attendance at this conference was accounted for by the Court when issuing its earlier costs judgment. While two further directions conference dates were scheduled, the conferences were adjourned by consent, and the defendant did not file any memorandum in relation to either of these conferences.

- (c) The defendant is claiming costs for attendances related to filing an interlocutory application, which must relate to her application for costs. It submits that there is no final position as to whether a successful party may claim costs for seeking costs; however, the memoranda filed are one-page documents and are routine.

Analysis

[7] The Court has a discretion as to costs.⁶ There is a presumption that the discontinuing party pay the costs of the other party up to the date of the discontinuance, and this is not easily displaced.⁷

[8] The purpose of r 14.2(1)(f) is to prevent parties from profiting from an award of costs.⁸ However, where a party is represented, and their representative reserves the right to issue an invoice, that party will be entitled to costs so long as the costs have actually been incurred and so long as those costs are ultimately paid, even if only after the costs award is made.⁹ For costs to be incurred, it is not necessary for them to have been the subject of invoices.¹⁰

[9] I have reviewed the attendances claimed by the defendant. I accept that the defendant has claimed time allocations in excess of the Guideline Scale, for time

⁶ Employment Relations Act 2000, sch 3 cl 19.

⁷ High Court Rule 2016, r 15.23; *Yarrall v Earthquake Commission* [2016] NZCA 517, (2016) 23 PRNZ 765 at [12]; and *Pride v Barker* [2024] NZEmpC 94 at [8].

⁸ *LDJ v EZC* [2024] NZEmpC 163 at [11].

⁹ See *Innovative Landscapes (2015) Ltd v Popkin* [2020] NZEmpC 96, [2020] ERNZ 262 for a survey of the relevant authorities.

¹⁰ *LDJ v EZC*, above n 8, at [12]; *Caisteal An Ime Ltd v A Labour Inspector of the Ministry of Business, Innovation and Employment* [2024] NZEmpC 83 at [18] and [24]–[25]; and *McGuire v Secretary for Justice* [2018] NZSC 116, [2019] 1 NZLR 335 at [85]–[88] and [93].

allocations for attendances that were previously accounted for in the Court's earlier judgment, and for attendances that did not occur. I consider the defendant at most would be entitled to claim 2.1 days for her attendances under the Guideline Scale, as set out below.

Item	Proceedings	Days
2	Commencement of defence to challenge by defendant	1.5
28	Filing interlocutory application (application for costs)	0.6
Total		2.1

[10] The parties were unable to reach agreement on the issue of costs. I consider that in these circumstances it was appropriate for an application to be made for costs to be determined. An application was, therefore, inevitable, and the defendant is entitled to recover the costs for preparing it. However, I consider that a time allocation of 0.6 days sought by the defendant in accordance with the Guideline Scale at item 28 is not appropriate, due to the brief application and subsequent memorandum filed at the request of the Court. In the circumstances it is appropriate to allocate a lesser time allocation of 0.3 days for preparing the defendant's costs application.

[11] Accordingly, I am satisfied that the amount of \$4,302 is appropriate in the circumstances.

Outcome

[12] The plaintiff is ordered to pay the defendant \$4,302 within 14 days of this judgment.

M S King
Judge

Judgment signed at 10 am on 5 February 2025