

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

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

**[2025] NZEmpC 179
EMPC 114/2023**

IN THE MATTER OF challenges to determinations of the
Employment Relations Authority

AND IN THE MATTER OF an application for costs

BETWEEN VXO
Plaintiff

AND HEALTH NEW ZEALAND – TE WHATU
ORA (IN RESPECT OF THE FORMER
NORTHLAND DISTRICT HEALTH
BOARD)
Defendant

Hearing: On the papers

Appearances: VXO, plaintiff in person
D Grindle, counsel for defendant

Judgment: 18 August 2025

COSTS JUDGMENT OF JUDGE J C HOLDEN

[1] This judgment resolves Health New Zealand – Te Whatu Ora’s application for costs for this proceeding.¹

[2] Although Health New Zealand submits it would have been reasonable for it to have sought an uplift in costs, it is content with scale costs. Its calculation for costs using the Court’s Guideline Scale, and adopting a categorisation of 2B, leads to costs of \$86,876.50, which is less than the costs actually incurred by Health New Zealand

¹ *VXO v Health New Zealand – Te Whatu Ora* [2025] NZEmpC 114.

of approximately \$105,000.² It therefore applies for an order that VXO pay it \$86,876.50 for costs.

[3] VXO filed submissions and an affidavit in response to the application. He has applied to the Court of Appeal for leave to appeal the substantive judgment and submits that the issue of costs should be deferred until the outcome of the appeal, with no order for costs being made at this stage. Alternatively, he seeks that the enforcement of costs be deferred.

[4] He has, however, made substantive submissions on costs, including that an offer he made in respect of costs that was without prejudice save as to costs (a “Calderbank offer”) should be taken into account as evidence of a willingness on his part to reasonably resolve the matter, rather than continue the litigation process. He says further that the Court should consider his financial hardship so that any costs award should be reduced, reserved, or deferred in accordance with the interests of justice.

[5] In his affidavit, VXO confirms that he is unemployed in New Zealand, and has not been employed since his employment with Health New Zealand ended. In an email he sent to Mr Grindle, counsel for Health New Zealand, VXO advised that his only income was from his UK pension, which comes to less than \$3,000 per month. He acknowledges, however, that he has been a senior doctor for many years. No financial information beyond that identified has been provided.

[6] Although Health New Zealand did not seek to rely on it, VXO advises that Health New Zealand made various Calderbank offers during earlier stages of this dispute, which VXO declined.³

² Employment Court of New Zealand “Practice Directions” (1 September 2024) <www.employmentcourt.govt.nz> at No 18.

³ The Authority recorded that four Calderbank offers were made in total while the matter was before it, with the final such offer being dated 13 October 2021 for \$42,500 pursuant to s 123(1)(c)(i) of the Act, and an additional \$8,000 as a contribution to VXO’s legal fees; see *VXO v Northland District Health Board* [2023] NZERA 210 at [8]–[9].

[7] The other Calderbank offer to which VXO refers is an offer he made on 4 July 2025 in respect of costs, which was that he would pay Health New Zealand \$9,000 for costs,⁴ with \$4,000 paid upfront and \$500 paid monthly thereafter, and that he would forego the costs outstanding to him from an Authority proceeding he says took place earlier this year.

[8] As submissions have been filed, I consider the appropriate course is to make an award at this stage, with the application for leave to appeal being factored into the timetable for payment. That has the benefits of providing the parties certainty about the amount to be paid, while giving VXO time to plan for payment. It also allows for the possibility that he succeeds in the Court of Appeal.

[9] I agree with Health New Zealand that an uplift in costs may well have been justified in these proceedings, both because of the earlier Calderbank offers and because of the way in which the proceedings were conducted in the Court by VXO, which likely increased the costs to Health New Zealand. As noted, however, no uplift is sought. VXO's Calderbank offer on costs is significantly less than what Health New Zealand is entitled to. It was, therefore, not unreasonable for Health New Zealand to reject VXO's offer, and I set the offer to one side.⁵

[10] While VXO has not disputed Health New Zealand's scale costs calculation, the Court's calculation is somewhat less:

No	Step	Allocation	\$
2	Commencement of defence to challenge	1.5	3,585
10	Statement of defence to amended statement of claim	0.6	1,434

⁴ Being 60 per cent of VXO's estimate of \$15,000 costs.

⁵ The general rule is that a Calderbank offer may, at the discretion of the court, influence the assessment of costs where it can be said that in the circumstances it was unreasonably refused; see David Bullock and Tim Mullins *The Law of Costs in New Zealand* (LexisNexis, Wellington, 2022) at 106–107.

11	Preparation for first directions conference	0.4	956
12	Filing memos/preparation for directions conferences	$0.4 \times 8 = 3.2$	7,648
13	Appearance at directions conferences	$0.2 \times 8 = 1.6$	3,824
29	Filing opposition to interlocutory application (application to admit without prejudice material)	0.6	1,434
30	Preparation of written submissions (application to admit without prejudice material)	1	2,390
29	Filing opposition to interlocutory application (application for leave to file further evidence)	0.6	1,434
32	Appearance at hearing of defended application (application for leave to file further evidence)	0.25	597.50
29	Filing opposition to interlocutory application (request for production and forensic examination of evidence)	0.6	1,434
29	Filing opposition to interlocutory application (formal motion to reopen case)	0.6	1,434
30	Preparation of written submissions (formal motion to reopen case)	1	2,390
32	Appearance at hearing of defended application (formal motion to reopen case)	0.25	597.50

23	List of documents on disclosure	2	4,780
24	Notice of objection to disclosure	0.2	478
35	Defendant's preparation of briefs	2	4,780
37	Defendant's preparation of list of issues, agreed facts, authorities and common bundle	1	2,390
38	Preparation for hearing	2	4,780
39	Appearance at hearing	Time in $\frac{1}{4}$ days .25 x 14 = 3.5	8,365
		Total	\$54,731

[11] The Court's calculation of scale costs is, therefore, \$54,731, and that amount is ordered to be paid by VXO to Health New Zealand.

[12] As there is an application for leave to appeal this matter, I order that payment is to be made within 28 days of the outcome of that appeal being known. This means if leave is not granted, payment is to be made within 28 days from the date of the Court of Appeal's judgment declining leave, or if leave is granted but the appeal is unsuccessful, then it must be made within 28 days from the date that the Court of Appeal's substantive judgment is released. Should VXO succeed in his appeal, it follows that this order has no effect; the issue of costs will need to be revisited.

J C Holden
Judge

Judgment signed at 12 pm on 18 August 2025