



# Employment Court of New Zealand

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## Drivesure Limited v McQuillan [2022] NZEmpC 215 (30 November 2022)

Last Updated: 5 December 2022

IN THE EMPLOYMENT COURT OF NEW ZEALAND AUCKLAND

I TE KŌTI TAKE MAHI O AOTEAROA TĀMAKI MAKĀURAU

[\[2022\] NZEmpC 215](#) EMPC 45/2022

IN THE MATTER OF a challenge to a determination of the

Employment Relations Authority AND IN THE MATTER OF an application for costs

BETWEEN DRIVESURE LIMITED

Plaintiff

AND MATTHEW MCQUILLAN

First Defendant

AND SACHIN RAJ

Second Defendant

AND MOHAMMED RAFIQ

Third Defendant

Hearing: On the papers

Appearances: N Tetzlaff, counsel for plaintiff

R Narayan, advocate for defendants

Judgment: 30 November 2022

### COSTS JUDGMENT OF JUDGE J C HOLDEN

[1] The defendants in these proceedings successfully defended the challenge brought by Drivesure Ltd to both a substantive determination and a costs determination of the Employment Relations Authority (the Authority).<sup>1</sup>

<sup>1</sup> *Drivesure Ltd v McQuillan* [\[2022\] NZEmpC 176](#).

DRIVESURE LIMITED v MATTHEW MCQUILLAN [\[2022\] NZEmpC 215](#) [30 November 2022]

[2] The parties have been unable to agree on costs, and therefore the defendants now apply for costs.

[3] Having been successful the defendants are entitled to an award of costs. Their calculation of scale costs is:<sup>2</sup>

Step	Time Band	Scale Cost Category
	A	

			<b>2 - \$2,390 per day</b>
2	Commencement of defence to challenge	0.5	1,195
12	Filing memorandum for directions conference to be held on 9 December 2021	0.2	478
11	Preparation for directions conference	0.2	478
13	Appearance at directions conference	0.2	478
36	Preparation of briefs or affidavits	1.0	2,390
38	Defendants' preparation of issues, agreed facts, authorities, and common bundle	0.5	1,195
39	Preparation for hearing	1.5	3,585
40	Appearance at hearing for sole or principal representative	1.5	3,585
42	Preparation of written submission	0.6	1,434
42	Preparation of cost application to the Court	0.5	1,195
		6.7	16,013
42	Witness expenses at \$200 each		600
	<b>Total</b>		<b>16,613</b>

[4] In addition, as they are not GST registered, the defendants seek an uplift to take account of GST. This would bring the GST-inclusive figure to \$19,105.

[5] The advocate for the defendants confirms that the defendants' actual costs for the proceeding are in excess of the amount now being sought. He points to there being three defendants, one of whom was in Australia, which necessitated more work than would be the case if there was only one party. They seek an uplift on scale costs.

2. "Employment Court of New Zealand Practice Directions" [www.employment.govt.nz](http://www.employment.govt.nz) at No 16.

[6] The plaintiff proposes that the appropriate level for costs is \$3,628.02.

[7] This figure is reached by taking the plaintiff's calculation using the Guideline Scale, reducing that by 33 per cent and then deducting \$5,019 for costs on the plaintiff's successful application for an extension of time to file its challenge.

[8] The plaintiff's calculation of scale costs is:

<b>Step</b>	<b>Description</b>	<b>Time Band A</b>	<b>Scale Cost Category 2 - \$2,390 per day</b>
2	Commencement of defence to challenge	0.5	1,195
11	Preparation for directions conference	0.2	478
13	Appearance at directions conference	0.2	478
36	Preparation of briefs or affidavits	1.0	2,390
38	Defendants' preparation of list of issues, agreed facts, authorities, and common bundle	0.5	1,195
39	Preparation for hearing	1.5	3,585
40	Appearance at hearing for sole or principal representative	1.5	3,585
	<b>Total</b>	<b>5.4</b>	<b>12,906</b>

[9] In explaining its calculation, the plaintiff says:

(a) The memorandum prepared for the directions conference related to the application for an extension of time, on which the plaintiff was successful. It says, therefore, that costs for step 12 should not be included.

(b) Preparation of submissions is an ordinary part of trial preparation and should be included as part of step 39, preparation for hearing. The 0.6 of a day for preparation of written submissions should therefore be excluded.

(c) 0.5 of a day for preparation of the costs memorandum is not appropriate.

(d) There is no basis for the \$600 claimed for witness expenses.

[10] It also opposes the proposed uplift for GST.

[11] The basis for the 33 per cent proposed reduction revolves largely around alleged irrelevant ancillary matters addressed in evidence in the Court.

### **The Court has discretion on costs**

[12] The Court may order any party to pay any other party such costs as the Court thinks reasonable.<sup>3</sup> It will exercise its discretion on a principled basis and in accordance with the interests of justice. The Court may consider any conduct of the parties that tends to increase or contain costs.<sup>4</sup>

[13] The Practice Directions assist the Court when it is exercising its discretion and support the policy objective that determining costs should be predictable, expeditious and consistent.<sup>5</sup> I consider that costs based generally on the Practice Directions are appropriate here.

[14] While the plaintiff's application for an extension of time to file its challenge was successful, the application was needed only because the plaintiff had failed to lodge its challenge within the timeframe provided in the [Employment Relations Act 2000](#). In the circumstances, I consider that costs should lie where they fall on that application.

[15] I allow the claim for costs on the memorandum filed for the directions conference scheduled for 9 December 2021, which covered more than just the application for extension of time.

[16] I accept the defendants' claim for costs for preparation for the hearing separately from the preparation of written submissions; the total amount claimed covering both matters is reasonable in the context of this case, bearing in mind the

<sup>3</sup> [Employment Relations Act 2000](#), sch 3 cl 19.

<sup>4</sup> [Employment Court Regulations 2000](#), reg 68.

<sup>5</sup> Above n 2, at No 16, paragraph (4).

number and location of the defendants and that scale costs have been calculated using the costs categorisation 2A, rather than the more common 2B.

[17] I do not agree that the hearing was unduly extended by the way in which the defendants conducted themselves. In my view, the case was efficiently run by both parties.

[18] I accept that there is no basis for a claim for witness expenses.

[19] Costs are not routinely awarded on costs applications. In this case, however, the defendants ought not to have had to come to the Court to obtain an order for costs. Accordingly, I allow \$240 for preparation of the application for costs.

[20] This brings the amount for costs to \$15,058.

[21] The defendants will have incurred GST on the fees paid to their advocate, which are not recoverable by them as they are not GST registered. It is appropriate for there to be an uplift to the costs award to cover GST.

[22] In conclusion, with the uplift for GST, the plaintiff is to pay the defendants the sum of \$17,316.70. Payment is to be made within 14 days of the date of this judgment.

J C Holden Judge

Judgment signed at 11 am on 30 November 2022

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