



# Employment Court of New Zealand

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## McDermott v Employment Relations Authority [2022] NZEmpC 191 (25 October 2022)

Last Updated: 28 October 2022

IN THE EMPLOYMENT COURT OF NEW ZEALAND AUCKLAND

I TE KŌTI TAKE MAHI O AOTEAROA TĀMAKI MAKĀURAU

[\[2022\] NZEmpC 191](#)

EMPC 172/2022

IN THE MATTER OF	an application for judicial review
AND IN THE MATTER OF	an application for costs
BETWEEN	JOHN McDERMOTT Applicant
AND	EMPLOYMENT RELATIONS AUTHORITY First Respondent
AND	EMPLOYSURE LIMITED Second Respondent

Hearing: On the papers  
Appearances: A Halse, advocate for applicant  
First respondent excused appearance  
J Laphorne and C Sargison, counsel for second respondent  
Judgment: 25 October 2022

### COSTS JUDGMENT OF JUDGE K G SMITH

[1] John McDermott unsuccessfully sought to judicially review a decision of the Employment Relations Authority granting an application by his former employer, Employsure Ltd, for certain evidence to be given in an investigation meeting by audio visual link.<sup>1</sup>

<sup>1</sup> *McDermott v Employment Relations Authority* [\[2022\] NZEmpC 160](#).

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[2] Costs were reserved but the parties have been unable to reach agreement about them. Employsure has now applied for costs and its application is opposed by Mr McDermott.

[3] The starting point is cl 19(1) of sch 3 to the [Employment Relations Act 2000](#). Pursuant to that clause the Court is empowered to order any party to a proceeding to pay any other party such costs and expenses as are considered reasonable.

[4] A costs award is discretionary. That discretion must, however, be exercised on a principled basis and in the interests of justice. The primary principles to apply in exercising that discretion are that costs follow the event and the unsuccessful party is to make a reasonable contribution to the costs incurred by the successful party.<sup>2</sup>

[5] The power conferred by cl 19 is supplemented by reg 68 of the [Employment Court Regulations 2000](#). The regulation provides that the Court may have regard to any conduct of the parties tending to increase or contain costs.

[6] The Court is further assisted in exercising the discretion by a Guideline Scale.<sup>3</sup> That scale is intended to support, so far as

is possible, the policy objectives that determining costs should be predictable, expeditious and consistent. The scale is an aid to the Court but does not replace the discretion.

[7] At a directions conference this proceeding was provisionally allocated to Category 2 Band B under the Court's Guideline Scale. Ms Laphorne and Mr Halse approached their submissions on the basis that 2B is appropriate. I agree.

[8] Employsure sought costs of \$12,786.50 calculated by using the steps in the scale amounting to 5.35 days. In addition, it sought costs for the time and effort taken to prepare the application for costs.

[9] Mr Halse submitted that the costs claimed by Employsure should only be for four days under the scale; which would mean a potential costs exposure for Mr

2 *Victoria University of Wellington v Alton-Lee* [2001] NZCA 313; [2001] ERNZ 305 (CA) at [48].

3. "Employment Court of New Zealand Practice Directions" <[www.employmentcourt.govt.nz](http://www.employmentcourt.govt.nz)> at No 16.

McDermott of \$9,560. He did not, however, explain what steps in Employsure's calculations should be deleted or adjusted to reach this reduced amount.

[10] The remainder of Mr Halse's submissions sought to have the consideration of costs deferred or payment of them delayed in both instances until after the Authority investigation is concluded. Part of this submission was a claim that a mistake of law has been made in the way that the Court deals with judicial review applications which will, if successfully tested, have a bearing on costs.

## Analysis

[11] An adjustment is required to the amount claimed by Employsure. Two steps under the guideline were claimed that require alteration: first, for a case management conference which should have been for attendance at a directions conference; and secondly, for obtaining judgment without an appearance, because the decision to which this step relates was delivered orally at the conclusion of an interlocutory hearing with reasons supplied subsequently. These adjustments reduce the amount able to be claimed to \$12,428.

[12] I do not agree that costs should be declined, or deferred, pending an exploration by Mr Halse of his thesis that the Court's approach to judicial review proceedings involves a mistake of law. The mistake he referred to was not described in any detail but seems to relate to the Court's usual procedure in disposing of those applications. On the material available, however, this potential argument has little if any chance of success. Employsure participated fully in this proceeding and was successful. As the successful party it is entitled to pursue a claim for costs.

[13] That brings this analysis to the request to defer deciding costs until after the Authority's investigation meeting is concluded and the determination is issued. A reason offered for adopting this proposed course of action was the prospect that the Authority might revisit its earlier decision granting Employsure's application for witnesses to give evidence by AVL. Mr Halse did not explain why any procedural step that might be taken by the Authority has any bearing on the costs incurred in this

proceeding. Whether or not the Authority revisits its earlier decision is irrelevant to the costs of this litigation.

[14] Another ground relied on to delay or defer fixing costs was that Mr McDermott expects to receive a substantial sum from the investigation meeting from which costs of this proceeding could be paid. Whatever his prospects of success are, that is not an adequate reason to deprive Employsure of a decision about costs to which it is entitled. To continue to reserve them, or delay payment in some way, would deprive Employsure of some of the benefit of the judgment in its favour by not enabling it to defray the expense it has incurred.

[15] The next ground relied on was that Mr McDermott is a beneficiary of an enforceable undertaking given by Employsure under which he is to be paid previously unpaid salary. The claim was that Employsure has not yet paid Mr McDermott and, presumably, any award of costs should be deferred so that these funds can be used. The existence of the enforceable undertaking does not assist. If Employsure is indebted to Mr McDermott he may be entitled to take recovery action but that has no bearing on his liability for the costs of this proceeding.

[16] Mr Halse's next submission was that any award should not be payable until the outcome of the investigation was known because Mr McDermott is under financial stress resulting from his dismissal and substantial period of unemployment. Mr Halse advised that Mr McDermott is now employed on a significantly lower salary than he previously earned and argued that there are no funds to meet the order sought by Employsure.

[17] Those statements about Mr McDermott's financial circumstances were not supported by evidence explaining his financial position. In the absence of that information no weight can be placed on this submission.

[18] I am satisfied Employsure is entitled to an award of costs and that there are no grounds to defer or delay an order in its favour.

[19] The last point to address is Employsure's application for costs for preparing the memorandum in which it sought costs from Mr McDermott. It has been put to the effort of preparing a costs memorandum and is entitled to a contribution towards its expense in doing so. The amount claimed was \$956 which is reasonable.

## **Conclusion**

[20] Mr McDermott is to pay Employsure;

(a) costs of \$12,428; and

(b) costs for preparing costs submissions of a further \$956.

K G Smith Judge

Judgment signed at 11.55 am on 25 October 2022

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