



# Employment Court of New Zealand

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## McKay v Wanaka Pharmacy Limited [2021] NZEmpC 116 (29 July 2021)

Last Updated: 3 August 2021

IN THE EMPLOYMENT COURT OF NEW ZEALAND CHRISTCHURCH

I TE KŌTI TAKE MAHI O AOTEAROA ŌTAUTAHI

[\[2021\] NZEmpC 116](#)

EMPC 48/2021

IN THE MATTER OF	an application for compliance order
AND IN THE MATTER OF	an application for costs
BETWEEN	NICOLA JANE MCKAY Plaintiff
AND	WANAKA PHARMACY LIMITED First Defendant
AND	WANAKA SUN (2003) LIMITED Second Defendant

Hearing: On the papers

Appearances: R Towner, counsel for plaintiff  
T Mackenzie, counsel for defendants

Judgment: 29 July 2021

### COSTS JUDGMENT OF JUDGE KATHRYN BECK

[1] Ms McKay was successful in her application for orders to be made against Wanaka Pharmacy Ltd and Wanaka Sun (2003) Ltd under [ss 138\(6\)](#) and [140\(6\)](#) of the [Employment Relations Act 2000](#).<sup>1</sup> The companies were found to have failed to comply with a compliance order made by the Employment Relations Authority and were fined a total of \$8,000, to be paid to Ms McKay within seven days.<sup>2</sup>

1 *McKay v Wanaka Pharmacy Ltd* [\[2021\] NZEmpC 79](#).

2 At [41]. Wanaka Pharmacy Ltd were fined \$6,000; Wanaka Sun (2003) Ltd were fined \$2,000.

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[2] The judgment stated that the parties had previously agreed that the matter should proceed on a Category 2B basis but that if costs could not be agreed, the parties could file submissions.<sup>3</sup> Both parties have since noted that while the proceeding was provisionally assigned with that categorisation by the Court, there was no subsequent agreement between the parties.

[3] Ms McKay has now applied for the Court to fix costs.

[4] Mr Towner, counsel for Ms McKay, submits that while Category 2B was only provisionally assigned, it is the appropriate categorisation on which costs should be calculated. He states the proceedings were not of a straightforward nature as they required consideration of the Authority's determination, the history of the litigation between the parties, and the nature of the Court's power and discretion under [s 140\(6\)](#).

[5] Mr Towner calculates that Ms McKay should be awarded \$16,969, along with reimbursement of the filing fee of \$306.

This figure accounts for the commencement of the proceedings, preparation for and attendance at a directions conference, preparation of an affidavit, and the filing of written submissions. Mr Towner has certified that this figure does not exceed the actual costs incurred by Ms McKay for his services.

[6] Mr McKenzie, counsel for the companies, claims that a costs award on that basis is disproportionate to what the companies consider was a “relatively simple proceeding”. He says that the proceeding was a straightforward one, able to be conducted by a relatively junior counsel and to be determined on the papers. Accordingly, he submits that Category 1 is appropriate.

[7] The companies also dispute the use of Band B time allocations for all of the steps except the preparation of written submissions. Mr McKenzie argues that even utilising Band A’s time allocation would overstate the actual amount of time required. It is submitted that a number of the time allocations on a Band A basis should be further reduced. He calculates that an appropriate figure would be \$5,712 inclusive of the filing fee.

3 At [42]–[43].

### Scale costs

[8] The Court adopted the Costs Guideline scale to assist parties with the calculation and settlement of costs.<sup>4</sup> The policy objectives were that the determination of costs should be predictable, expeditious and consistent.

[9] As stated in *EPB Ltd v OST*, the normal approach to costs is that two-thirds of actual and reasonably incurred costs by a successful party may be awarded.<sup>5</sup> The guideline scale is designed to accord with that approach. However, the scale was not intended to replace the Court’s ultimate discretion as to costs.

[10] In this case there is clearly a significant disparity between the parties’ respective calculations. I agree with the companies that the provisionally assigned Category 2B costs would not be reflective of the straightforward proceeding that followed. Given the brevity of some of the filing, it is difficult to identify why a substantial amount of time would be required to prepare them. However, I also agree with Mr Towner that these proceedings do bear a degree of complexity given the history of the litigation between the parties.

[11] I consider Category 2A to best reflect the proceeding that eventuated, but I will reduce the time allocated for the statement of claim from 1.6 days to one day.

[12] On that basis, the calculation is as follows:

Item	Proceedings	Days
2	Commencement of defence to challenge by defendant	1
11	Preparation for first directions conference	0.2
13	Appearance at first directions conference	0.2
43	Defendant’s preparation of briefs or affidavits	1.5
53	Preparation of written submissions	0.5
<b>Total</b>		<b>3.4</b>

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

5 *EPB Ltd v OST* [2020] NZEmpC 218 at [27].

[13] The result is a figure of \$8,126.00. I consider that amount to be an appropriate contribution towards Ms McKay’s costs.

[14] Wanaka Pharmacy Ltd and Wanaka Sun (2003) Ltd are ordered, jointly and severally, to pay Ms McKay costs in the sum of \$8,126.00, together with reimbursement of the filing fee of \$306.

Kathryn Beck Judge

Judgment signed at 3.15 pm on 29 July 2021