



# Employment Court of New Zealand

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## Tolson v Potter [2020] NZEmpC 130 (24 August 2020)

Last Updated: 27 August 2020

IN THE EMPLOYMENT COURT OF NEW ZEALAND AUCKLAND

I TE KŌTI TAKE MAHI O AOTEAROA TĀMAKI MAKĀURAU

[\[2020\] NZEmpC 130](#)

EMPC 156/2019

IN THE MATTER OF a challenge to a determination  
of the Employment Relations  
Authority  
AND IN THE MATTER OF an application for costs  
BETWEEN WARREN TOLSON  
Plaintiff  
AND TODD ROBERT POTTER  
Defendant

Hearing: On the papers  
Appearances: W Tolson, plaintiff  
P Cornegé, counsel for  
defendant  
Judgment: 24 August 2020

### COSTS JUDGMENT OF JUDGE J C HOLDEN

[1] Mr Potter, having successfully defended Mr Tolson's challenge,<sup>1</sup> now seeks costs.

[2] He seeks his actual costs of \$19,999.08 (including GST) on the basis that those actual costs are less than costs calculated on a Category 2 Band B basis, referencing the Court's Guideline Scale.<sup>2</sup> He also points to an offer made more than three months before the hearing to settle Mr Tolson's claim by paying him \$5,000 under [s 123\(1\)\(c\)\(i\)](#) of the [Employment Relations Act 2000](#). That offer was expressed to be

<sup>1</sup> *Tolson v Potter* [\[2020\] NZEmpC 98](#).

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

WARREN TOLSON v TODD ROBERT POTTER [\[2020\] NZEmpC 130](#) [24 August 2020]

without prejudice except as to costs (a Calderbank offer), and was rejected. With that in mind, Mr Potter says there is no basis for reducing any costs award from the amount claimed.

[3] The steps and amount of time allocated to those steps pursuant to Band B are as follows:

Item	Proceedings	Days
2	Commencement of defence to challenge by defendant	1.5
11	Preparation for first directions conference	0.4
12	Filing memorandum for subsequent	0.8

	directions conference	(0.4 x 2)
13	Appearance at first or subsequent directions conference	0.4 (0.2 x 2)
36	Defendant's preparation of affidavits	2
38	Defendant's preparation of common bundle	1
39	Preparation for hearing	2
40	Appearance at hearing for sole of principal representative	0.75
	<b>Total</b>	<b>8.85</b>

[4] Applying the daily rate for Category 2 proceedings of \$2,390, scale costs would be \$21,151.50 (exclusive of GST).

[5] Mr Tolson accepts that there is an amount to be paid but does not accept that the amount sought is fair.

[6] He makes two principal points:

(a) The times allocated for various steps seem excessive – Mr Tolson points to the time allocations for filing memoranda as an example.

(b) He has limited resources and it would be unfair to order him to pay the amount now claimed. He raises the issue of access to justice and notes that the amount sought exceeds his annual superannuation.

[7] He says he turned down the Calderbank offer because his claim was more about having Mr Potter accept that there was fault than the actual money.

#### **The Court has a discretion as to costs**

[8] The Court has a discretion as to costs that must be exercised in the interests of justice and in accordance with established principles. It is assisted by a Guideline Scale intended to promote predictability, expedition and consistency.<sup>3</sup>

[9] Relevant here too is reg 68, which permits the Court to have regard to any Calderbank offers that may be made a reasonable time before the hearing. If a party's decision to decline such an offer was unreasonable, that is likely to justify an uplift in costs, above what might otherwise have been awarded. The Courts are expected to adopt a "steely" approach where plaintiffs reject a Calderbank offer and then fail to achieve a better result in the litigation.<sup>4</sup>

#### **Even adjusting the time allocation, scale costs would exceed invoiced costs**

[10] Although this matter was assigned Category 2B prior to hearing, any such categorisation is subject to change if warranted. The case required the defendant to consider some legal issues of reasonable complexity; it dealt with relatively new provisions on which there was little judicial consideration. Category 2B is justified for the trial preparation. However, I acknowledge the point made by Mr Tolson regarding some of the earlier steps, which might more properly be allocated to Band A, reducing the time allowed for the preparation and memoranda for the directions conferences. That adjustment would reduce scale costs to \$19,717.50 (exclusive of GST). But, once GST is taken into account, scale costs would exceed the amount invoiced, so this does not assist Mr Tolson.

<sup>3</sup> *Xtreme Dining Ltd, (T/A Think Steel) v Dewar* [2017] NZEmpC 10, [2017] ERNZ 26 at [25].

<sup>4</sup> *Health Waikato Ltd v Elmsly* [2004] NZCA 35; [2004] 1 ERNZ 172 (CA) at [53].

#### **The Calderbank offer also supports the defendant's claim to full costs**

[11] The Calderbank offer prepared by Mr Cornegé, as counsel for Mr Potter, was detailed and explained clearly the difficulties Mr Tolson faced in his claim, the offer being made, and the consequences of a refusal to accept that offer. In making the offer, Mr Potter acknowledged that Mr Tolson had been underpaid by the employing company. Although Mr Tolson's assessment of the underpayment was higher than that accepted by Mr Potter, the acknowledgement and the offer of payment ought to have represented some vindication for Mr Tolson.

[12] It is unfortunate that Mr Tolson did not accept the Calderbank offer, but he rejected it knowing the potential consequences of doing so. The presence of the Calderbank offer supports Mr Potter's claim for full costs.

#### **Financial hardship must be weighed against other factors**

[13] In some circumstances the financial hardship caused by a costs order may be relevant, but it must be weighed against other relevant factors.<sup>5</sup> Issues of access to justice are of concern to the Court but the Court must be mindful of the rights of both the plaintiff and the defendant.

[14] Further, there may be several reasons why a successful party would wish to have a costs judgment in its favour, despite the opposing party not immediately being able to fully satisfy such an award. Reducing a costs liability at the stage at which costs are assessed, based on the unsuccessful party's circumstances at that time, means the successful party loses the ability to decide whether, when and how to seek to enforce an award it would otherwise be entitled to.<sup>6</sup>

[15] Here the Court was dealing with two individuals. It was reasonable for Mr Potter to engage counsel. He was prepared to settle even though he did not consider he was personally liable for any debt, and then successfully defended the claim.

<sup>5</sup> *Emmanuel v Waikato District Health Board* [2019] NZEmpC 125 at [14].

<sup>6</sup> *Scarborough v Micron Security Products Ltd* [2015] NZEmpC 105, [2015] ERNZ 812 at [38].

[16] Mr Tolson indicates a willingness to make payments by instalment. However, as Mr Cornegé says in his submissions, any such arrangement is a matter for agreement (or otherwise) between Mr Tolson and Mr Potter.

[17] I therefore order that Mr Tolson must pay costs to Mr Potter of \$19,999.08 (including GST).<sup>7</sup> Unless otherwise agreed between the parties, that sum is to be paid within 28 days of the date of this judgment.

[18] No costs are ordered with respect to the application for costs.

J C Holden Judge

Judgment signed at 10.30 am on 24 August 2020

7. I take from his submissions that Mr Potter is not registered for GST and so is entitled to recover his GST liability from Mr Tolson.