

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

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

**[2024] NZEmpC 130
EMPC 408/2023**

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
AND IN THE MATTER OF	an application for costs on an interlocutory application for stay of execution
BETWEEN	HAVEN FALLS FUNERAL HOME LIMITED Plaintiff
AND	KIM TEPANIA Defendant

Hearing: On the papers

Appearances: J Duckworth, counsel for plaintiff
A Kersjes, advocate for defendant

Judgment: 18 July 2024

**COSTS JUDGMENT OF JUDGE M S KING
(Application for costs on application for stay of execution)**

Background

[1] The plaintiff, Haven Falls Funeral Home Ltd (Haven Falls), applied for a stay of execution of orders made against it by the Employment Relations Authority.¹

[2] As a result of Ms Tepania initiating enforcement proceedings, Haven Falls applied for its stay application to be treated with urgency. A directions conference was convened, and orders were made granting urgency and staying the execution of the

¹ *Tepania v Haven Falls Funeral Home Ltd* [2023] NZERA 587 (Member Lynch).

Authority's determination on an interim basis pending the judgment of the Court. On 19 March 2024, the Court declined Haven Falls' application for a stay of execution. In its decision, the Court indicated that Ms Tepania was entitled to costs.²

[3] On 3 April 2024, Mr Kersjes, advocate for Ms Tepania, filed an application seeking costs of \$6,955.20. Mr Kersjes submitted that the matter should be classified as falling within category 2 band B of the Court's Guideline Scale.³

[4] Mr Kersjes submitted that he had calculated that Ms Tepania was entitled to a time allocation of 3.6 days under band B of the Guideline Scale. Based on a category 2 daily rate of \$2,390, Mr Kersjes calculated that Ms Tepania was entitled to scale costs of \$8,604. Mr Kersjes did not identify what steps he was claiming under the Guideline Scale or explain how he arrived at a time allocation of 3.6 days.

[5] Mr Kersjes has provided an invoice of Ms Tepania's actual costs which were \$6,048 (plus \$907.20 of GST), and he submitted that it is appropriate in the circumstances for her to be awarded her actual costs of \$6,955.20.

[6] Mr Duckworth, counsel for Haven Falls, is critical of Mr Kersjes' failure to explain in his application how he arrived at a time allocation of 3.6 days. In his submission such a time allocation does not reflect what took place.

[7] Mr Duckworth submitted that costs in this matter should be classified on a category 1 band A basis as the matter involved an interlocutory application which was straightforward and dealt with on the papers. Mr Duckworth submitted that Ms Tepania is entitled to a time allocation of two days under band A of the Guideline Scale. Based on a category 1 daily rate of \$1,590, Mr Duckworth submitted a costs award of \$3,180 is appropriate. The table below provides a summary of his calculations.

² *Haven Falls Funeral Home Limited v Tepania* [2024] NZEmpC 47.

³ "Employment Court of New Zealand Practice Directions" <www.employmentcourt.govt.nz> at No 18.

Step	Description	Days: Band A	Total
11	Preparation for first directions conference	0.4 <i>Guideline Scale provides for 0.6</i>	\$636
12	Filing Memorandum for first or subsequent directions conference		
13	Appearance at first or subsequent directions conference		
29	Filing opposition to interlocutory application	0.6 <i>Guideline Scale provides for 0.3</i>	\$954
30	Preparation of written submissions	1 <i>Guideline Scale provides for 0.5</i>	\$1,590
TOTAL		2 <i>Guideline Scale provides for 1.4 which would be a total of \$2,226 (at the category 1 daily rate of \$1,590)</i>	\$3,180

[8] As identified in the table above, Mr Duckworth adjusted the time allocations for the steps provided in the Guideline Scale for band A. Mr Duckworth's adjustments are summarised below:

- (a) Mr Duckworth has reduced the time allocation in the Guideline Scale for steps 11 to 13 for band A from 0.6 to 0.4 days. The rationale for doing so appears to be based on his submission that the issues raised in the matter were straightforward and the actual time spent was far lower than prescribed by the Guideline Scale.

- (b) Mr Duckworth, contrary to his submission, has increased the time allocation in the Guideline Scale for steps 29 and 30 (collectively) for band A from 0.8 to 1.6. The time allocations utilised by Mr Duckworth for steps 29 and 30 are those allocated in band B. The increased time allocation is contrary to his submission that the matter was straightforward and that the actual time spent was far lower than prescribed by the Guideline Scale.

Costs principles

[9] The Court has a broad discretion as to costs.⁴ The discretion is augmented by reg 68(1) of the Employment Court Regulations 2000, which enables the Court to have regard to the conduct of the parties tending to increase or contain costs.

[10] To assist the Court in exercising the discretion, a Guideline Scale is used with the objective being to achieve predictability, consistency and expediency in determining costs. The scale does not displace the Court's discretion.⁵

Analysis

[11] Three issues arise. First, which Guideline Scale category and band classification is reasonably applicable to this proceeding? Second, are the claimed items reasonable? Third, should the Court displace the Guideline Scale?

[12] When considering the applicable Guideline Scale classification of this proceeding, I have reviewed the attendances of the parties, specifically those of Ms Tepania and her representative. Here it was necessary for Mr Kersjes to attend, on short notice, a directions conference where the Court was considering whether to grant Haven Falls' application for urgency on its stay application. Mr Kersjes filed a memorandum setting out his client's position in advance of the directions conference. The Court granted the application for urgency. An order was made by consent to stay the execution of the Authority's determination on an interim basis to allow Haven Falls' stay application to be determined. Mr Kersjes filed a notice of opposition to the

⁴ Employment Relations Act 2000, sch 3 cl 19.

⁵ "Employment Court of New Zealand Practice Directions", above n 3, at No 18.

application for a stay of execution and an affidavit in support. Both parties filed written submissions, and the application was ultimately determined on the papers. Mr Kersjes filed an application for costs arising from the above attendances.

[13] I also note that Mr Duckworth's own submissions appear to conflate band A and band B time allocations in the Guideline Scale in Ms Tepania's favour. That conflation appears to indicate that Haven Falls accepts that it is not reasonable in the circumstances for the Court to apply a band A classification to the proceedings.

[14] Mr Duckworth submitted that the application was straightforward. However, stay applications, along with many other interlocutory applications, are usually relatively straightforward. The Guideline Scale recognises this through the allocation of relatively small amounts of time to such applications, which are considered reasonable for costs purposes. When deciding what the appropriate Guideline Scale category is, the complexity and time spent needs to be assessed in comparison to other similar interlocutory applications, rather than by way of comparison to substantive applications.

[15] Given the above circumstances, I assess the present case to fall within a category 2 band B classification. I find that the present proceedings are of average complexity and that a normal amount of time for attendances was reasonable in the circumstances. This classification is comparatively consistent with the approach taken by the Court recently in other costs proceedings arising in respect of stay applications, including a number where the applications were dealt with on the papers.⁶

[16] From my own review of the Guideline Scale, I am led to an allocation of 2.6 days. At a category 2 daily rate of \$2,390, that leads to \$6,214.

⁶ *Carrington Resort Jade LP v Knight* [2023] NZEmpC 103; *Carrington Resort Jade LP v Maheno* [2023] NZEmpC 120; *Carrington Resort Jade LP v Roy* [2023] NZEmpC 122; *Pretorius v Board of Trustees of Taupo Intermediate School* [2024] NZEmpC 14; and *Citadel Capital Ltd v Miles* [2024] NZEmpC 111; but see *Lu v Young* [2024] NZEmpC 34.

Item	Description	Days – Band B	Total
11	Preparation for first directions conference	0.4	\$956
12	Filing Memorandum for first or subsequent directions conference	0.4	\$956
13	Attendance at first directions conference	0.2	\$478
29	Filing opposition to interlocutory application	0.6	\$1,434
30	Preparation of written submissions	1	\$2,390
TOTAL		2.6 days	\$6,214

[17] I note that Ms Tepania filed an affidavit in support of her notice of opposition to the application for stay; however, the affidavit contained only one page of written text, and any costs arising in relation to the affidavit are appropriately encompassed in the costs arising in respect of the notice of opposition. Mr Kersjes has not applied for costs arising from Ms Tepania's application for costs.

[18] The Guideline Scale figure of \$6,214 is exclusive of GST, which I would allow here as Ms Tepania has paid GST and is not able to recover it as she is not GST registered.⁷ Adding GST brings the Guideline Scale figure up to \$7,146.10.

[19] These calculations demonstrate that the amount invoiced of \$6,955.20 (\$6,048 plus GST) is reasonable, and I allow it.

⁷ *New Zealand Venue and Event Management Ltd v Worldwide NZ LLC* [2016] NZCA 282.

Outcome

[20] Haven Falls is ordered to pay Ms Tepania a total of \$6,955.20 for costs on this matter. Payment is to be made within 14 days of the date of this judgment.

M S King
Judge

Judgment signed at 4.30 pm on 18 July 2024