

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

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

**[2024] NZEmpC 132  
EMPC 2/2024**

IN THE MATTER OF a challenge to a determination of the  
Employment Relations Authority

AND IN THE MATTER OF an application for stay of proceedings

AND IN THE MATTER OF an application for costs

BETWEEN GARTH CUNNINGHAM  
Plaintiff

AND HEALTHALLIANCE NZ LIMITED  
Defendant

Hearing: On the papers

Appearances: Plaintiff in person  
R Upton, counsel for defendant

Judgment: 19 July 2024

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

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**Background**

[1] HealthAlliance NZ Ltd (the defendant) has applied for costs following the plaintiff's application for a stay of execution of orders made against him by the Employment Relations Authority,<sup>1</sup> which was declined by this Court in its judgment dated 9 April 2024.<sup>2</sup>

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<sup>1</sup> *Cunningham v HealthAlliance NZ Ltd* [2023] NZERA 771 (Member Tan).

<sup>2</sup> *Cunningham v HealthAlliance NZ Ltd* [2024] NZEmpC 58.

[2] On 17 April 2024, Mr Upton, counsel for the defendant, filed an application seeking costs of \$8,245.50 on a category 2, band B basis at a daily rate of \$2,390 calculated in the following manner.

<b>Step</b>	<b>Description</b>	<b>Days</b>	<b>Total</b>
11	Preparation for first directions conference	0.4	\$956
12	Filing Memorandum for first directions conference	0.4	\$956
13	Appearance 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
31	Preparation of bundle for hearing	0.6	\$1,434
32	Appearance at hearing	0.25	\$597.50
<b>TOTAL</b>		<b>3.45</b>	<b>\$8,245.50</b>

[3] The plaintiff submits that costs should lie where they fall. His key submission in support of his position is addressed below. However, the plaintiff did not dispute the steps claimed or the amount of costs the defendant is seeking on a category 2, band B basis, as set out above.

### **Costs principles**

[4] The Court has a broad discretion as to costs.<sup>3</sup> 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.

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<sup>3</sup> Employment Relations Act 2000, sch 3 cl 19.

[5] 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.<sup>4</sup>

## **Analysis**

[6] The plaintiff took issue with the defendant not providing evidence about what the defendant's actual costs were and invoices in support. Mr Upton confirmed in his reply submissions that the costs claimed were lower than the defendant's actual costs.

[7] It is not necessary for the defendant to disclose their actual costs, particularly where no claim has been brought for indemnity or increased costs.<sup>5</sup> In any case, the defendant has subsequently advised that the costs it incurred exceed the scale costs sought.

[8] A party cannot claim any more than its actual costs, so it can assist the Court to receive at least some assurance that the costs claimed are lower than the defendant's actual costs.<sup>6</sup> Mr Upton's memorandum has resolved that issue.

[9] The plaintiff also speculated on the defendant's motives for opposing his stay application, and he was critical of the way the defendant had conducted itself in the interlocutory proceeding. I do not consider there is any basis for these submissions.

[10] While the defendant is entitled to costs, some reductions need to be made to its calculations. I do not accept that costs are appropriate for step 31 of the Guideline Scale. On the basis that the defendant filed a brief affidavit in support of its notice of opposition to the application, and it accepted prior to the hearing that a bundle of documents was not required. Removing the costs associated with step 31 completely leads to a category 2, band B rate of \$6,811.50.

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<sup>4</sup> "Employment Court of New Zealand Practice Directions" <[www.employmentcourt.govt.nz](http://www.employmentcourt.govt.nz)> at No 18.

<sup>5</sup> *Xtreme Dining Ltd, (t/a Think Steel) v Dewar* [2017] NZEmpC 10, [2017] ERNZ 26 at [26].

<sup>6</sup> *Cornish Truck & Van Ltd v Gildenhuis* [2019] NZEmpC 57 at [9].

[11] Mr Upton also seeks a contribution towards the costs incurred by the defendant in applying for costs. On the basis that costs should have been agreed, the defendant seeks a contribution of \$500. Applications for costs on costs are relatively rare but, when made, can be granted as part of the Court's broad discretion.<sup>7</sup> Here it was necessary for Mr Upton to file the application and reply submissions to progress the application and so I will allow the modest contribution of \$500.

[12] Accordingly, I am satisfied that costs of \$6,811.50 ought to be awarded in accordance with category 2, band B of the Guideline Scale and that an additional \$500 should be awarded as a contribution to the costs the defendant has incurred in applying for costs.

### **Outcome**

[13] The defendant's application for costs is successful.

[14] I order Mr Cunningham to pay the company \$7,311.50 within 21 days of the date of this judgment.

M S King  
Judge

Judgment signed at 1 pm on 19 July 2024

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<sup>7</sup> *Nisha v LSG Sky Chefs NZ Ltd* [2018] NZmpC 33 at [11]-[18].