



# Employment Court of New Zealand

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## Emmanuel v Waikato District Health Board [2019] NZEmpC 125 (10 September 2019)

Last Updated: 14 September 2019

IN THE EMPLOYMENT COURT OF NEW ZEALAND AUCKLAND

I TE KŌTI TAKE MAHI O AOTEAROA TĀMAKI MAKĀURAU

[\[2019\] NZEmpC 125](#)

EMPC 84/2018

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
AND IN THE MATTER OF	an application for costs
BETWEEN	ARTHI EMMANUEL Plaintiff
AND	WAIKATO DISTRICT HEALTH BOARD Defendant

Hearing: On the papers

Appearances: A Emmanuel, representative for  
plaintiff A Russell, counsel for  
defendant

Judgment: 10 September 2019

### COSTS JUDGMENT OF JUDGE J C HOLDEN

[1] The plaintiff, Mrs Emmanuel, was unsuccessful in her challenge in the Court.<sup>1</sup> The defendant, the Waikato District Health Board (Waikato DHB), is therefore entitled to an award of costs. The parties have been unable to resolve costs between them and the Waikato DHB now applies for costs to be awarded by the Court.

[2] The proceedings were assigned Category 1B for costs purposes under the Court’s Practice Direction Guideline Scale for costs.<sup>2</sup>

<sup>1</sup> *Emmanuel v Waikato District Health Board* [\[2019\] NZEmpC 81](#).

<sup>2</sup> Employment Court Practice Directions, No 16 <[www.employmentcourt.govt.nz/legislation-and-rules](http://www.employmentcourt.govt.nz/legislation-and-rules)>.

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[3] The Waikato DHB’s calculation of costs using Category 1B is:

Step	Proceeding	Allocated Days (Band B)
2	Commencement of defence to challenge by defendant	1.5
11	Preparation for first directions conference	0.4
13	Appearance at first or subsequent directions conference	0.2

36	Defendant's preparation of briefs	2
38	Preparation of list of issues, authorities and common bundle	1
39	Preparation for hearing	2
40	Appearance at hearing	1.5
	<b>Total</b>	8.6
	<b>At \$1,480 per day =</b>	\$12,7283

[4] The Waikato DHB has confirmed that its costs in the proceedings were \$27,840, excluding GST, and has supplied invoices evidencing that.

[5] The Waikato DHB seeks an uplift to Scale costs based on a Calderbank offer made to Mrs Emmanuel on 7 March 2019. This offer was for the proceedings to be settled by the Waikato DHB paying Mrs Emmanuel \$10,000 as compensation for hurt and humiliation. It says that, subsequent to that offer not being accepted by Mrs Emmanuel, the Waikato DHB incurred costs of \$15,000. It seeks recovery of 80 per cent of that sum, being \$12,000. This would be in substitution for the scale costs of \$6,6604 for steps 38, 39 and 40, and leads to a claim for costs of \$18,068.

3 The Waikato DHB has \$12,778 in its application, but that is incorrect.

4 Again, this figure is corrected from that in the application.

[6] Mrs Emmanuel challenges the amount sought, essentially on the following bases:

- (a) there was no letter that expressed an offer as being a "Calderbank offer";
- (b) the outcome in Court was never clear. I take this to be a submission that the failure to accept the offer of \$10,000 was not unreasonable in the circumstances;
- (c) the Waikato DHB had initially sought \$12,728 costs from Mrs Emmanuel and yet seeks the higher amount now in its application to the Court; and
- (d) Mrs Emmanuel is not in a position to pay costs as yet, due to her lack of earnings since she was dismissed.

#### **The Court had discretion in costs**

[7] The Court has a wide discretion when dealing with costs.<sup>5</sup> That discretion is to be exercised judicially and according to principle.

[8] Since 1 January 2016 the Court has used the Practice Direction Guideline Scale to assist in exercising its discretion. The Guideline Scale is predicated on the basis of a 66 per cent contribution to what would normally be considered reasonable costs.<sup>6</sup>

[9] In considering costs, the Court can have regard to an offer made without prejudice except as to costs.<sup>7</sup> Offers that are without prejudice except as to costs are often described as 'Calderbank offers', deriving from the case *Calderbank v Calderbank*.<sup>8</sup> The Courts are generally to apply a "steely approach" to the refusal to accept a reasonable Calderbank offer.<sup>9</sup>

<sup>5</sup> [Employment Relations Act 2000](#), sch 3 cl 19.

<sup>6</sup> *Xtreme Dining Ltd t/a Think Steel v Dewar* [2017] NZEmpC 10 at [32].

<sup>7</sup> [Employment Court Regulations 2000](#), reg 68.

<sup>8</sup> *Calderbank v Calderbank* [1975] 3 All ER 333 (EWCA).

<sup>9</sup> *Bluestar Print Group (NZ) Ltd v Mitchell* [2010] NZCA 385, [2010] ERNZ 446 at [20].

[10] The Waikato DHB has provided a copy of the letter dated 7 March 2019 and it is headed "Without Prejudice Except as to Costs". The letter advised Mrs Emmanuel that, if she elected not to accept the offer and went to a hearing in the Employment Court, and was unsuccessful in her claim or received an amount less than the amount offered by the Waikato DHB in the letter, the Waikato DHB reserved the right to produce the letter after the hearing in relation to any issue about costs. She was advised that this would be relevant to an argument seeking costs over and above Scale costs.

[11] It is unfortunate that Mrs Emmanuel did not accept the amount offered; it was a reasonable offer in the circumstances.

[12] Although the Waikato DHB approached Mrs Emmanuel after the substantive judgment was issued proposing she pay

Scale costs of \$12,728, it reserved its right to claim costs in a higher amount if agreement could not be reached and the Waikato DHB was required to file in the Employment Court seeking costs. Again, it was unfortunate that Mrs Emmanuel did not accept the Waikato DHB's proposal when it was made.

[13] Although Mrs Emmanuel has said she will not be able to pay any costs as yet, she has not provided details or evidence of her financial position such that it can be taken into account.

[14] In any event, the fact that a costs award would impose financial hardship on an unsuccessful litigant is not decisive. The difficulties with the Court having regard to a party's ability to pay when determining costs were discussed by (then) Judge Inglis in *Tomo v Checkmate Precision Cutting Tools Limited*.<sup>10</sup> In summary, while the Court may, in its discretion, have regard to financial hardship, that factor must be weighed against other considerations. In the present case, the previous offer to settle is an important consideration.

[15] In the circumstances, the Waikato DHB is entitled to an uplift on Scale costs for steps taken since 7 March 2019. As noted, Scale costs for those steps totalled

10 *Tomo v Checkmate Precision Cutting Tools Ltd* [2015] NZEmpC 2, [2015] ERNZ 196.

\$6,660. As that is based on 66 per cent of reasonable costs, I consider that a fair approach would be to increase costs for those steps to 100 per cent of what would be considered reasonable costs. This means I allow costs for those steps of \$10,091. The other steps appropriately attract Scale costs of \$6,068. This leads to a total sum for costs of \$16,159.

[16] The outcome then is that Mrs Emmanuel is to pay the Waikato DHB \$16,159 for costs. Unless agreed otherwise between the parties, those costs are to be paid within 21 days of the date of this judgment.

[17] There is no order for costs in respect of the application for costs.

Judgment signed at 2 pm on 10 September 2019

J C Holden Judge

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