

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

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

**[2019] NZEmpC 104
EMPC 45/2018**

IN THE MATTER OF proceedings removed from the Employment
Relations Authority

AND IN THE MATTER OF an application for costs

BETWEEN ELENA KAZEMI
Plaintiff

AND RIGHTWAY LIMITED
First Defendant

AND EDWIN FREDERICK SHAND READ
Second Defendant

AND GREGORY MICHAEL SHEEHAN
Third Defendant

AND DARRYL DEVENDRA JHINKU
Fourth Defendant

Hearing: On the papers

Appearances: T Drake, counsel for plaintiff
B A Smith and M McGoldrick, counsel for defendants

Judgment: 21 August 2019

COSTS JUDGMENT OF JUDGE J C HOLDEN

[1] Ms Kazemi succeeded in her substantive claim in the Employment Court (the Court) and is entitled to costs.¹ Those have not been agreed between the parties, and so she now applies to the Court.

¹ *Kazemi v RightWay Ltd* [2019] NZEmpC 73.

Costs for some aspects of the proceedings have been dealt with previously

[2] The Court's earlier judgment of 27 September 2018 dealt with costs in relation to the removal of the proceedings to the Court, being for:²

- (a) Ms Kazemi's challenge to the Employment Relations Authority's (the Authority's) costs determination (EMPC 121/2018);
- (b) Ms Kazemi's challenge to the Authority's determination on the application for removal (EMPC 290/2017);
- (c) Ms Kazemi's application for special leave to remove the matter to the Court (EMPC 334/2017);
- (d) Ms Kazemi's application in the Authority for removal;
- (e) The Authority's determination of costs for that application; and
- (f) Ms Kazemi's application in the Authority for a stay of the Authority proceedings.

[3] Ms Kazemi has incurred, in total, \$157,348.68 for costs and disbursements in the Authority and the Court (including GST). She now seeks an order for \$145,143.73 for costs and disbursements (inclusive of GST)³ or, in the alternative, her actual costs after she sent a without prejudice except as to costs offer, plus an appropriate sum determined by the Court for costs prior to the date of the offer.

[4] In the earlier application for costs for the removal proceedings, Mr Drake, counsel for Ms Kazemi, submitted invoices dated 27 October 2017 of \$9,779 (plus GST) and 15 February 2018 of \$14,206.50 (plus GST) and also identified costs of \$9,124.44 (plus GST) in relation to his invoice dated 3 August 2018 (out of a total for that invoice of \$21,560 (plus GST)) as covering Ms Kazemi's actual costs for the matters outlined. Ms Kazemi cannot claim in respect of those costs a second time.

² *Kazemi v RightWay Ltd* [2018] NZEmpC 112.

³ Said to represent her full costs less the amounts awarded to her in the earlier judgment, see [39].

[5] The Court's judgment on Ms Kazemi's application for a recall also dealt with costs for that application.⁴

[6] This means Ms Kazemi's costs incurred for the Court proceeding to which this judgment applies are:

Date of Invoice	Invoice Amount	Total (incl GST)
3 August 2018 (Tony Drake)	\$12,435.56 plus GST (\$21,560-\$9,124.44)	\$14,300.89
7 June 2019 (Tony Drake)	\$72,420.00 plus GST ⁵	\$83,283.00
8 March 2018 (Mark Donovan)	\$375.00 plus GST	\$431.25
31 January 2019 (Mark Donovan)	\$2,100.00 plus GST	\$2,415.00
TOTAL	\$87,330.56 plus GST	\$100,430.14

[7] In addition, Ms Kazemi incurred \$15,407.70 (including GST) for early work in the Authority and for mediation.

Court has discretion but Guideline Scale of assistance

[8] The Court has a wide discretion when dealing with costs.⁶ That discretion is to be exercised judicially and according to principle.

[9] Since 1 January 2016, the Court has used a guideline scale to assist in exercising its discretion.⁷ The Practice Direction Guideline Scale is predicated on the

⁴ *Kazemi v RightWay Ltd* [2019] NZEmpC 72 at [6].

⁵ This invoice also covered the application for a recall.

⁶ Employment Relations Act 2000, sch 3 cl 19.

⁷ Employment Court Practice Directions at 16 <www.employmentcourt.govt.nz/legislation-and-rules>.

basis of a 66 per cent contribution to what would normally be considered reasonable costs.⁸

[10] In my substantive judgment, I said that Category 2C in the Guideline Scale was warranted for the Court pleadings and for preparation for hearing. Otherwise, Category 2B remained appropriate.⁹

[11] Based on the steps Ms Kazemi took, this leads to scale costs of:

Date	Item	Event	B/C Allocation (B unless otherwise stated)	Sum Daily rate = \$2,230
27.2.2018	3	Commencement of proceeding by plaintiff	8(C)	\$17,840.00
19.04.2018	11	Preparation for first directions conference	0.4	\$892.00
19.04.2018	13	Appearance at first directions conference	0.2	\$446.00
15.05.2018	22	Notice requiring disclosure	0.8	\$1,784.00
21.05.2018	12	Filing memorandum for subsequent directions conference	0.4	\$892.00
22.05.2018	25	Notice of challenge to objection to disclosure	0.2	\$446.00
	27	Inspection of documents	1	\$2,230.00
07.06.2018	12	Filing memorandum for subsequent directions conference	0.4	\$892.00
08.06.2018	13	Appearance at subsequent directions conference	0.2	\$446.00
17.07.2018	12	Filing memorandum for subsequent directions conference	0.4	\$892.00
18.07.2018	13	Appearance at subsequent directions conference	0.2	\$446.00
	43	Plaintiff's preparation of briefs	2.5	\$5,575.00
	44	Plaintiff's preparation of list of issues, agreed facts,	2	\$4,460.00

⁸ *Xtreme Dining Ltd v Dewar* [2017] NZEmpC 10 at [32].

⁹ *Kazemi v RightWay Ltd* [2019] NZEmpC 73 at [125].

		authorities and common bundle		
	46	Preparation for hearing	4(C)	\$8,920.00
26.11.2018 to 30.11.2018 and 17.12.2018	47	Appearance at hearing. Hearing of evidence completed at lunch on fifth day of hearing. Subsequent full day required for submissions. Total hearing time = 5.5 days.	5.5	\$12,265.00
			26.2	\$58,426.00
GST ¹⁰				\$8,763.90
TOTAL				\$67,189.90

Some adjustments warranted

[12] Ms Kazemi raises two issues that she says justify an uplift in costs. First, she made a Calderbank offer to settle the proceedings for \$150,000 on 20 July 2018. Second, she submits that, because it appears that the defendants will likely recover damages from their former solicitors' insurers, an award to Ms Kazemi of indemnity costs would be just and is sought.

[13] The defendants say that there is no basis for an award of indemnity costs and costs ought not be increased because the defendants rejected the settlement offer, as their doing so was not unreasonable at the time. In the alternative, the defendants say any increase only should apply to the costs incurred after 20 July 2018.

[14] The defendants also raise some issues they say should be taken into account in an award of costs. First, Mr McGoldrick, counsel for the defendants, points to Ms Kazemi's lack of success in several aspects of her claim. Second, he says costs are due to the defendants for their application to exclude evidence. Third, he points to the costs incurred in applying for a new certificate of judgment in circumstances where the first certificate of judgment issued by the Court Registry was incorrect.

¹⁰ The defendants accept that, as Ms Kazemi is not registered for GST, she is entitled to GST on the award of costs.

[15] I agree that there is no basis for indemnity costs based on the possibility, or even likelihood, that the defendants will be indemnified by their previous solicitor's insurers. Whether parties are indemnified is not relevant to the issue of costs.¹¹ Parties to litigation often have insurance in place. There is no difference in principle whether it is the defendant's own insurers, a third party (such as the previous solicitors) or that third party's insurers that is indemnifying the defendants. Any indemnity arrangements do not warrant Ms Kazemi gaining a higher award of costs.

[16] However, the Court may have regard to Ms Kazemi's settlement offer of 20 July 2018.¹² I consider that offer, being to settle for less than Ms Kazemi achieved in the litigation, ought to be taken into account. That does not affect costs incurred up until 20 July 2018, covered in the steps up to the appearance at the directions conference on 18 July 2018, but does justify an increase thereafter. I consider that a fair way of dealing with the remainder of the costs would be to increase the award for costs for the steps after that date by 50 per cent to reflect that the scale is based on an assessment of 66 per cent of reasonable costs. This increases the total amount calculated for steps 43, 44, 46 and 47 to \$46,830 (excluding GST) and a total for costs of \$74,036. Adding GST brings this to \$85,141.40.

[17] I have some sympathy with the point made by the defendants that, had Ms Kazemi confined her claim to what was truly in dispute between the parties (which was whether the buy-in fee required by the deed poll was a premium for employment), the hearing may have been shorter and simpler. Nevertheless, Ms Kazemi was entitled to make the additional claims, she succeeded in part (although that success did not lead to any increase in damages for her), and it is likely that most of the evidence would have been given even had the case been confined to the premium issue.

[18] However, the defendants succeeded in their interlocutory application to exclude evidence, which needed submissions. Accordingly, the costs sought for filing an interlocutory application, preparation of written submissions and appearance at the

¹¹ *Evolution E-Business Ltd v Smith* [2012] NZEmpC 58 at [11]; *White v Auckland District Health Board* EmpC Auckland AC 10A/07, 15 October 2007 at [51]. (Judgment reversed but not on this point: *White v Auckland District Health Board* [2008] NZCA 451, [2008] ERNZ 635 at [29]).

¹² Employment Court Regulations 2000, reg 68.

hearing of the defendants' application are allowed, which lead to a deduction of \$4,125.50 from the costs Ms Kazemi otherwise would receive.

[19] The erroneous Certificate of Judgment was drafted at the initiative of the Court Registry, not on application from the plaintiff. This was done in accordance with the usual procedures of the Court where a penalty has been awarded.

[20] Nevertheless, it ought to have been plain to Ms Kazemi and Mr Drake that the Certificate of Judgment was wrong, if not when first received then certainly when the defendants' solicitors wrote to Mr Drake to raise the issue. Because the matter was unable to be dealt with by way of a joint approach to the Court, the defendants were required to file an interlocutory application.

[21] For that reason, I allow a further deduction of \$1,338, being the scale costs for filing an interlocutory application on a Category 2B basis. The reissued Certificate of Judgment simply followed the application, so no further amount is allowed for obtaining the Certificate of Judgment.

[22] Taking all those matters into account, the net position on costs in the Court is that the plaintiff is entitled to \$79,677.90 (inclusive of GST), being \$85,141.40 (inclusive of GST), less the costs to be deducted for the matters raised by the defendants of \$5,463.50.

[23] Ms Kazemi also is entitled to costs in the Authority. Most of her costs have already been dealt with in the context of the removal proceedings. For the remainder of the steps in the Authority, an appropriate amount of costs would be the equivalent of the sum the Authority generally allows for a first day of hearing of \$4,500. Adding GST leads to a total of \$5,175.

[24] The defendants accept that Ms Kazemi is entitled to reimbursement of claimed disbursements in the sum of \$3,339.10, covering the filing fee of \$102.22, hearing fees of \$2,253.96 and costs for printing the common bundle of \$982.92 (all inclusive of GST).

[25] In summary then, the defendants are to pay Ms Kazemi \$88,192, comprising:

- (a) \$79,677.90 (including GST) for costs in the Court;
- (b) \$5,175.00 (including GST) for costs in the Authority;
- (c) \$3,339.10 (including GST) for disbursements.

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

J C Holden
Judge

Judgment signed at 11.30 am on 21 August 2019