

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

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

**[2019] NZEmpC 57
EMPC 127/2018**

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

AND IN THE MATTER OF an application for costs

BETWEEN CORNISH TRUCK & VAN LIMITED
Plaintiff

AND BURGERT GILDENHUYS
Defendant

Hearing: On the papers

Appearances: M McGoldrick, counsel for plaintiff
D Vinnicombe, advocate for defendant

Judgment: 15 May 2019

COSTS JUDGMENT OF JUDGE J C HOLDEN

**Mr Gildenhuis applies for costs based on the Employment Court Guideline
Scale**

[1] The plaintiff, Cornish Truck & Van Limited (Cornish Truck), was wholly unsuccessful in its challenge¹ to a determination of the Employment Relations Authority (the Authority).² The defendant, Mr Gildenhuis, now applies for costs. In his initial application, he sought \$29,235.30 (inclusive of GST) for costs on the substantive challenge and a further sum of \$2,308.05 (inclusive of GST) in relation to his costs application.

¹ *Cornish Truck & Van Ltd v Gildenhuis* [2019] NZEmpC 6.

² *Gildenhuis v Cornish Truck & Van Ltd* [2018] NZERA Auckland 101.

[2] He also sought \$4,500 for costs in the Authority, together with disbursements of \$71.56, covering the filing fee (inclusive of GST). I understand the costs anyway have been paid to him by Cornish Truck. He also is entitled to be reimbursed for the filing fee. If the filing fee has not been paid to him, it is to be paid within 10 working days of this judgment.

[3] Mr Gildenhuis' advocate, Mr Vinnicombe, rendered a bill to Mr Gildenhuis for costs in the Employment Court of \$29,235.30 (inclusive of GST), basing his charges on the costs schedule in the Employment Court Costs Guideline Scale (Guideline Scale).³ The costs were calculated based on Category 2B, which is the categorisation given to these proceedings.

[4] Cornish Truck challenged the Guideline Scale calculation, and Mr Gildenhuis accepted that some amounts included in the calculation ought be removed or amended. This resulted in an amendment to the claim for costs for the substantive proceedings, resulting in the calculation that follows:⁴

Step	Proceeding	Allocated Days (Band B)
2	Commencement of defence by defendant	1.5
11	Preparation for first directions conference	0.4
12	Filing joint memorandum	0.4
13	Appearance at first directions conference	0.2
12	Preparation for second directions conference	0.4
13	Appearance at second directions conference	0.2
23 (and 45)	List of documents on disclosure (also covering the common bundle)	2.0
36	Preparation and filing of defendant's briefs of evidence	2.0
39	Preparation for hearing	2.0
40	Appearance at hearing	1.7
TOTAL DAYS		10.8

³ Employment Court Practice Directions, No 16 (<www.employmentcourt.govt.nz/legislation-and-rules>).

⁴ The arithmetic in the application and reply is not entirely accurate. In this judgment, the figures have been corrected.

	At \$2,230 per day = \$24,084
	Plus GST at 15% = \$3,612.60
	\$27,696.60

Costs were not on a “no win no fee” basis

[5] In its submission on costs, Cornish Truck says, first, that Mr Gildenhuy's costs claim arises in circumstances where the arrangement with Mr Vinnicombe was effectively on a “no win no fee” basis. Cornish Truck invites the Court to state the principles applying to such arrangements by non-lawyer advocates appearing for successful litigants in the Court in the context of the Guideline Scale. It set out various alternative approaches it says are open to the Court.

[6] However, as Mr Vinnicombe says in his memorandum in reply, he was not charging Mr Gildenhuy's on a contingency, or “no win no fee”, basis; he also was not seeking his costs as a percentage of the judgment sum. For these reasons, this is not the case to consider that type of arrangement.

The Guideline Scale does not differentiate between representatives

[7] Cornish Truck then claims that the costs ought to be discounted because Mr Gildenhuy's was represented by an advocate rather than a solicitor. It also claims that full costs ought not be awarded, even where those costs are equal to or less than the Guideline Scale, but rather the Court should still look to awarding 66 per cent of actual and reasonable costs.

[8] The Guideline Scale does not differentiate between the seniority or type of representation. Rather, it is based on the complexity of the proceedings. In that regard, whether a party chooses to be represented by Queen's Counsel, a senior solicitor, a junior solicitor or an advocate will not affect the calculation.

[9] The Court has a broad jurisdiction as to costs, conferred by cl 19 of sch 3 to the Employment Relations Act 2000. The Guideline Scale has been adopted to assist the Court in setting costs but does not replace the Court's ultimate discretion. The

Guideline Scale is predicated on the basis of a 66 per cent contribution to what would normally be considered reasonable costs.⁵ But that does not mean, if actual costs are less than or equal to those normally considered reasonable, they cannot be recovered in full. The only absolute rule is that a party cannot claim any more than its actual costs. Mr Gildenhuis has confirmed that he has received an invoice for \$29,235.30 (inclusive of GST).

[10] Subject to the correction that follows, the claimed steps were taken. The time claimed for each step reflects the Guideline Scale in respect of Band B. For completeness, I also note that Mr Vinnicombe is an experienced advocate with a legal background. He displayed the necessary skills and experience to properly conduct a proceeding of this nature.

[11] Accordingly, I see no reason to depart from the Guideline Scale in this case.

A small adjustment to the costs claimed is appropriate

[12] There then is some remaining disagreement as to whether certain steps claimed were available under the Guideline Scale. Cornish Truck says that the claim for step 12 (filing the joint memorandum) ought not be allowed, as Cornish Truck prepared and filed the joint memorandum dated 24 July 2018. Mr Vinnicombe contends that he initiated the joint memorandum and attaches email correspondence with respect to it. It is apparent that Mr Vinnicombe prepared a draft joint memorandum and that Mr McGoldrick then redid it and produced the one that ultimately was filed. It was therefore a joint exercise, and I allow the claimed 0.4 days.

[13] Cornish Truck then challenges the amount of time claimed for step 23 (the list of documents on disclosure). It says some of the two days claimed was not warranted because Mr Gildenhuis simply forwarded to Cornish Truck the e-mails that had previously been sent to the Authority (10 e-mails in total) and made a list of those e-mails. Cornish Truck suggests that a claim based on Band A (0.5 days) is appropriate. In response, Mr Vinnicombe points to a notice requiring disclosure that he says necessitated a detailed search for documents, together with compiling an index and

⁵ *Xtreme Dining Ltd t/a Think Steel v Dewar* [2017] NZEmpC 10 at [32].

providing copies. He also said that Mr Gildenhuis had to respond to a request from Cornish Trucks regarding further documentation. In his original claim, Mr Gildenhuis had sought a further day for preparation of the common bundle but concedes that two days in total, covering both the list of documents on disclosure and the preparation of the common bundle, would be appropriate. That seems a reasonable position to take, and the two days covering disclosure and the common bundle are allowed.

[14] The next issue raised by Cornish Truck was that there was no second directions conference and therefore no basis for a claim for preparation of a memorandum or for an appearance at a second directions conference. Mr Vinnicombe points to attendances being required prior to the Court minute being issued on 7 August 2018. I allow 0.4 days for preparation but not the 0.2 days for an appearance.

[15] Finally, there was disagreement between the parties as to the length of the hearing. The Court record has been checked, and the hearing concluded at approximately 3 pm on the second day. The 1.7 days claimed is allowed.

[16] Taking into account the adjustment for the claimed second directions conference, the total number of days allowed for costs is 10.6 days, payable at \$2,230 per day, totalling \$23,638. Mr Gildenhuis also seeks GST on that sum and as an individual, not GST-registered, he is entitled to recover that from Cornish Truck.⁶ That brings the total for the substantive challenge to \$27,183.70.

[17] As noted, Mr Gildenhuis also claimed costs for bringing the costs application. In his reply submissions, he increased the amount claimed for these costs to \$3,568 plus GST. Costs on a costs application are not usually awarded, but in some circumstances, where the application has been complex, the Court may award costs. In this case, given the need for Mr Gildenhuis to address Cornish Truck's first argument, I consider that a modest award of costs for the costs application is appropriate and award the sum of \$1,500 (inclusive of GST).

⁶ *Stormont v Peddle Thorp Aitken Ltd* [2017] NZEmpC 159 at [35]-[37].

[18] Accordingly, the total award payable to Mr Gildenhuis by Cornish Truck for the Court proceedings is \$28,683.70. That sum is to be paid within 10 working days of the date of this judgment.

J C Holden
Judge

Judgment signed at 10 am on 15 May 2019