IN THE EMPLOYMENT COURT OF NEW ZEALAND
WELLINGTON

I TE KŌTI TAKE MAHI O AOTEAROA
TE WHANGANUI-A-TARA

[2019] NZEmpC 58
EMPC 148/2018

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
AND IN THE MATTER OF	an application for costs
BETWEEN	NEW ZEALAND TRAMWAYS AND PUBLIC PASSENGER TRANSPORT EMPLOYEES' UNION (WELLINGTON BRANCH) Plaintiff
AND	CITYLINE (NZ) LIMITED Defendant

Hearing: On the papers

Appearances: T Kennedy, counsel for plaintiff
P Caisley, counsel for defendant

Judgment: 15 May 2019

COSTS JUDGMENT OF JUDGE J C HOLDEN

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[1] Having been wholly successful in its defence of the claim brought by the plaintiff (the Tramways Union), the defendant (Cityline) now applies for costs. For the purposes of calculation of costs, these proceedings were categorised as Category 2B under the Guideline Scale adopted by the Employment Court.[1]

[1] Employment Court Practice Directions, No 16 <www.employmentcourt.govt.nz/legislation-and-rules>.

[2] In its application, Cityline confirms that its actual costs exceeded those it was claiming using the Guideline Scale. It seeks $25,979.50 and attached its calculation to its application:

Steps		**Band B**	**Category 2 Costs Recoverable daily rate ($2230)**
2	Commencement of defence to challenge by defendant	1.5	3345
11	Preparation for first directions conference	0.4	892
13	Appearance at first or subsequent directions conference	0.2	446
22	Notice requiring disclosure	0.8	1784
23	List of documents on disclosure	2	4460
36	Defendant's preparation of briefs or affidavits	2	4460
38	Defendant's preparation of list of issues, agreed facts, authorities and common bundle	1	2230
39	Preparation for hearing	2	4460
40	Appearance at hearing for sole or principal representative *time occupied by the hearing measured in quarter days – 2 day hearing	0.25 x 7 (1.75)	3902.50
			Total: $25,979.50

[3] The Tramways Union opposes the application for costs. It submits:

(a) costs should lie where they fall, as this is essentially a test case;

(b) in the alternative, any award of costs ought to be modest for reasons including:

(i) the dispute arose in the context of both parties being impacted by significant changes imposed on both parties by an external third party;

(ii) the ongoing relationship between the parties;

(iii) the level of costs claimed by Cityline is unwarranted.

[4] Cityline says in response that the matter was not a test case or one where there was any wider benefit beyond resolving the immediate allegations made by the Tramways Union and that there is no basis to depart from the Guideline Scale.

Not a test case

[5] The Tramways Union asserts that it is generally the case that costs lie where they fall in a dispute over contractual interpretation. That overstates the position. There are test cases that resolve precedential issues, either between the parties or more widely, and which make the award of costs inappropriate. Some of those cases involve disputes as to the interpretation of a collective agreement. But there is no immutable rule that costs should lie where they fall in a case involving the interpretation, application and operation of collective agreements.[2] To the converse, as a general rule, they are treated in the same way as other cases.[3]

[6] The case mounted by the Tramways Union was fact specific. Four questions were identified for resolution by the Court, one of which involved the interpretation of the collective agreement. The issues were confined and arose in the particular circumstances faced by the parties. It was not a test case.

No basis for reduction

[7] Cityline submits that there is no basis for a reduction in the costs sought. It says the point of the costs scale is to provide a framework for resolution of costs issues; that means that actual costs are of no relevance (provided, of course, they exceed scale, which they do in this case). It says that once the correct category and band are determined, resolution of costs issues ought to be simple and straightforward and avoid detailed arguments of the nature being advanced by the Tramways Union.

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2 *E tū Inc v NZ Transport Agency* [2017] NZEmpC 80 at [19].
3 *The Postal Workers Union of Aotearoa v New Zealand Post Ltd* [2012] NZEmpC 68 at [8].

[8] I accept the general point made by Cityline. While the Guideline Scale does not replace the Court's ultimate discretion as to costs,[4] the intent behind it is that costs are predictable, expeditious and consistent.[5] While, in some cases, it will be necessary for the Court to examine whether particular steps warrant the time at the level suggested by the Guideline, that would not be commonplace. There is an element of give and take in the adoption of a guideline. If the time warranted for each step must be examined individually, that tends to defeat the purpose of having a guideline.

[9] In this case, I am not prepared to reduce the claimed time for pre-trial steps that were taken by Cityline.

[10] However, the Court record shows the hearing finishing before lunch on the second day, so I agree with the Tramways Union, that only 1.5 days should be allowed for step 40, rather than the claimed 1.75 days, reducing the costs by $557.50.

[11] The Tramways Union then says there was no list of documents on disclosure and therefore no claim could be made for step 23. Cityline responds that the Tramways Union sought, and was provided with, very extensive disclosure which involved substantially more than two days' work. Costs for that time are recoverable, even if no formal list was prepared.

[12] The Tramways Union also says that, for there to be a claim under step 38, there must be the preparation of a list of issues, agreed facts, authorities *and* a common bundle. That is to say, it says that the allowance is for doing all of the listed things, and where one or more of the matters in the list has not been attended to, no claim can be made. I do not accept that proposition. I consider a claim still can be made, even if a party does not do every item listed. However, in some cases, a reduction in the time allowed may be appropriate. Here, the Tramways Union says Cityline did not provide a list of issues, agreed facts or authorities. It says the parties were unable to reach agreement on a statement of facts or issues. Cityline's response is that it took more than the claimed time to attempt to reach an agreed list of issues and an agreed

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4 Employment Relations Act 2000, sch 3 cl 19.

5 Employment Court Practice Directions, No 16 <www.employmentcourt.govt.nz/legislation-and-rules> at [4].

statement of facts with the Tramways Union and to provide documentation for the bundle. The day claimed is allowed.

[13] Accordingly, taking into account the reduction in the hearing time, an award of $25,422.00 for costs is appropriate and is ordered.

[14] There is no order for costs on the application for costs.

J C Holden
Judge

Judgment signed at 11.15 am on 15 May 2019