

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

**I TE KŌTI TAKE MAHI O AOTEAROA
ŌTAUHAHI**

**[2020] NZEmpC 157
EMPC 139/2018**

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
AND IN THE MATTER OF	an application for costs
BETWEEN	GEORGE COWAN Plaintiff
AND	CHARLES KIDD IN PARTNERSHIP WITH GEOFFREY KIDD, TRADING AS KIDD PARTNERSHIP Defendant

Hearing: On the papers

Appearances: J R Copeland and K C Macdonald, counsel for plaintiff
M-J Thomas and S N McKenzie, counsel for defendant

Judgment: 30 September 2020

COSTS JUDGMENT OF JUDGE J C HOLDEN

[1] Regrettably the parties have been unable to agree costs on this proceeding.¹
Mr Cowan now seeks an order from the Court.

¹ *Cowan v Kidd* [2020] NZEmpC 110.

[2] Mr Cowan seeks an award of \$66,128.25 for the substantive proceeding, which represents scale costs, including for second counsel, together with an uplift of \$10,000 which Mr Cowan submits is warranted on the grounds that:

- (a) Kidd Partnership put Mr Cowan's employment status in issue having previously conceded that he was an employee;
- (b) the award of costs should reflect Mr Cowan's GST status and his inability to claim the GST component on legal costs back from Inland Revenue.

[3] Mr Cowan was granted legal aid in October 2019. He incurred fees of \$81,866.13 prior to the grant of legal aid and \$9,583.22 whilst legally aided. In addition, work was carried out for which Mr Cowan was not charged, to which he has given a value of \$26,646.14. All these figures exclude disbursements and GST.

[4] Kidd Partnership submits first that costs should not be awarded pending the outcome of its appeal to the Court of Appeal.²

[5] It then says, if costs are to be awarded now:

- (a) the amount payable after Mr Cowan received a legal aid grant should not exceed the amount paid for those legal services; and
- (b) no allowance should be made for second counsel.

[6] Kidd Partnership also says there should be no uplift as:

- (a) Mr Cowan had filed a de novo challenge, so all matters were at issue;
- (b) GST should not be payable because Mr Cowan achieved a slightly lower order in regard to the amount of wages payable than he received in the Employment Relations Authority (the Authority).

² Kidd Partnership has applied for leave to appeal some findings in the substantive judgment.

The Court exercises a discretion in awarding costs

[7] The Court has a discretion as to costs that must be exercised in the interests of justice and in accordance with established principles. It is assisted by a Guideline Scale³ intended to promote predictability, expedition and consistency.⁴

Costs are payable

[8] It is common ground that Mr Cowan received more in the Court than in the Authority. Although that may change depending on the outcome of Kidd Partnership's appeal, it is appropriate for a costs award to be made by the Court now, in the usual way.

[9] I accept that second counsel was appropriate. Both parties were represented by two counsel and the matters were factually and legally complex. There was considerable documentary evidence.

[10] Kidd Partnership has not raised any other issues with the calculation of scale costs. Mr Cowan's actual costs in the period prior to his award of legal aid were in excess of scale costs. Scale costs for that period, including an allowance for second counsel, comes to \$42,983.25 (exclusive of GST and disbursements).

[11] The challenge was a de novo challenge which meant it proceeded by way of a rehearing. Accordingly, no uplift is due for the issue of employment status.

[12] The legal aid grant was \$9,583.22 (excluding GST), covering preparation of submissions and hearing days in November 2019, and covered two counsel. That is less than scale costs for the work it covers, but Mr Cowan argues he should receive scale costs in recognition of the work for which he was not charged. I do not accept that. This was not pro bono work in the sense used in the recent decision *Innovative Landscapes (2015) Ltd v Popkin*.⁵ Rather, it represented discounts on the fees usually

³ "Employment Court of New Zealand Practice Directions" <www.employment.govt.nz> at No 16.

⁴ *Xtreme Dining Ltd (t/a Think Steel) v Dewar* [2017] NZEmpC 10, [2017] ERNZ 26 at [25].

⁵ *Innovative Landscapes (2015) Ltd v Popkin* [2020] NZEmpC 96.

charged for the time spent; a situation that is not uncommon. Further, the discounts applied to work for which invoices were rendered from May 2018 until April 2019, prior to the grant of legal aid. No uplift is warranted for this factor.

[13] I do, however, accept that, as Mr Cowan is not registered for GST he is entitled to an uplift to include GST on the costs award.

[14] That brings the award to \$60,451.44.

[15] Mr Cowan also seeks costs for his application for costs on the basis that Kidd Partnership did not engage with him to reach agreement in a timely way. The amount incurred was \$425 (being based on the time allocated by Legal Aid Services at a reduced hourly rate). That too is payable, bringing the costs award to \$60,876.44.

[16] Unless otherwise agreed between the parties, Kidd Partnership is to pay \$60,876.44 to Mr Cowan within 21 days of the date of this judgment.

J C Holden
Judge

Judgment signed at 12.50 pm on 30 September 2020