

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

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

**[2020] NZEmpC 92
EMPC 394/2018**

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|----------------------|---|
| IN THE MATTER OF | a challenge to a determination of the Employment Relations Authority |
| AND IN THE MATTER OF | an application for costs |
| BETWEEN | CHRISTOPHER DILLON Plaintiff |
| AND | TULLYCRINE LIMITED Defendant |

Hearing: On the papers

Appearances: S McKenna and M Dempster, counsel for plaintiff
A Twaddle and K Bell, counsel for defendant

Judgment: 29 June 2020

COSTS JUDGMENT OF JUDGE J C HOLDEN

[1] Tullycrine Ltd (Tullycrine) successfully defended Mr Dillon’s challenge to an Employment Relations Authority determination.¹ Mr Dillon was legally aided throughout the entirety of this matter. Tullycrine now seeks an order in terms of s 45(5) of the Legal Services Act 2011 as to the costs award that would have been made against Mr Dillon, but for the grant of legal aid. Such an order would entitle Tullycrine to apply to the Legal Services Commissioner for payment of a contribution to its costs.²

¹ *Dillon v Tullycrine Ltd* [2020] NZEmpC 52.

² Legal Services Act 2011, s 46.

[2] Tullycrine seeks an order reflecting its full costs. Initially Tullycrine was not legally represented; counsel was instructed towards the end of August 2019. The invoice attached to its application show its costs from then to the end of the hearing to be \$24,447.25,³ plus disbursements of \$306.08 for an AVL facilities booking.⁴ Tullycrine says the order also should cover its fees for the filing of its application for costs. These are \$3,000.00.⁵

[3] Tullycrine says that, based on the complexity of the case and the time required of counsel, the proceedings would appropriately be in Category 2B for costs purposes.⁶ It submits, however, that an uplift in the costs award would be justified given the unmeritorious nature of Mr Dillon’s claim and the additional legal expenses that Mr Dillon unnecessarily put Tullycrine to. Tullycrine also points to an offer of settlement it made on a Calderbank basis, being that it was without prejudice save as to costs.⁷ That offer, made on 4 September 2019, was to pay Mr Dillon \$15,000 pursuant to s 123(1)(c)(i) of the Employment Relations Act 2000.

[4] The amounts calculated by Tullycrine on a Category 2B basis comprise:

| Step | | Band B | Cost |
|------|---|--------|---------|
| 22 | Notice requiring disclosure – dated 23 September 2019 | 0.8 | \$1,912 |
| 25 | Notice of challenge to objection to disclosure | 0.2 | \$478 |
| 14 | Preparation for case management meeting | 0.4 | \$956 |

³ As Tullycrine will be GST registered, GST is not recoverable.

⁴ The booking was cancelled but Tullycrine incurred a 50 per cent cancellation fee.

⁵ GST not included, as not recoverable.

⁶ “Employment Court of New Zealand Practice Directions” <www.employmentcourt.govt.nz> at No 16.

⁷ *Calderbank v Calderbank* [1975] 3 WLR 586 (CA).

| Step | | Band B | Cost |
|--------------|--|---------------|--------------------|
| 15 | File memorandum for case management meeting – Memorandum in respect of evidence before the Court dated 23 September 2019 | 0.4 | \$956 |
| 15 | Filing memorandum for case management meeting – Memorandum regarding witnesses dated 24 September 2019 | 0.4 | \$956 |
| 16 | Appearance at case management meeting for principal representative | 0.25 | \$597.50 |
| 28 | Filing interlocutory application – application for non-publication order filed dated 25 September 2019 | 0.6 | \$1,434 |
| 28 | Filing interlocutory application – application for use of AVL dated 25 September 2019 | 0.6 | \$1,434 |
| 39 | Preparation for hearing | 2 | \$4,780 |
| 40 | Appearance at hearing for principal representative | 3 | \$7,170 |
| TOTAL | | | \$20,673.50 |

[5] Mr Dillon does not oppose an order being made under s 45(5) of the Legal Services Act but submits that the amount sought by Tullycrine is not reasonable. Mr Dillon says that the order should reflect scale costs on a Category 2B basis, with no uplift. Of the steps identified, Mr Dillon accepts as appropriate filing the application for a non-publication order, preparation for hearing and appearance at the hearing, but says that the other steps were either unnecessary or only incurred because of the late instruction of counsel.

What is the starting point for costs?

[6] The Court has a broad discretion in awarding costs, which it must exercise on a principled basis and in the interests of justice.⁸ In January 2016, the Court established its Guideline Scale with the objective that costs are predictable, expeditiously determined and consistent.

[7] While the parties agree on the appropriate cost categorisation for these proceedings, there are aspects that Mr Dillon says are overstated.

[8] The first covers the issues of disclosure.⁹ Mr Dillon says most documents were exchanged early in the proceedings so that there only were two outstanding issues, being an incomplete email thread and communications between Mr Dillon and WINZ. In the event, neither party was able to find the emails missing from the email thread and little if any further WINZ correspondence was uncovered. Absent any other considerations, a reasonable costs allocation for the disclosure issues would be \$600.

[9] The other principal aspect in contention covers the amounts claimed in respect of a directions conference. Counsel for Tullycrine appeared at one directions conference and Tullycrine's application to use AVL was dealt with at that directions conference. The costs figures for the steps involved with the directions conference total \$4,899.50.¹⁰ That amount is not warranted. Again, all things being equal, an appropriate amount for these matters would be \$2,868. The total costs on a conventional 2B basis, therefore, would be \$16,852.

Uplift warranted

[10] While Mr Dillon was unsuccessful, I do not accept his claim was unmeritorious. He was genuine, and he raised legitimate issues. I also do not accept there were any significant aspects of his conduct of the case that led to additional costs for Tullycrine.

⁸ Employment Relations Act 2000, sch 3 cl 19.

⁹ Steps 22 and 25.

¹⁰ Steps 14, 15 (twice), 16 and 28 (once).

[11] The Calderbank offer, however, is relevant. It is a matter that the Court may have regard to.¹¹ The Courts are generally to apply a “steely approach” to refusal to accept a reasonable Calderbank offer.¹² Here the Calderbank offer was reasonable in the circumstances and was made prior to Tullycrine incurring most of its legal costs. An uplift is justified.

[12] Taking all matters into account, I consider an appropriate award would be \$20,000 costs and disbursements of \$306.08.

No costs order for the costs application

[13] I am not prepared to award costs for the application for costs. The judgment on the challenge was issued on 28 April 2020 and costs were first raised by Tullycrine’s solicitors in an email dated Friday 22 May 2020. With any application for costs needing to be made by Tuesday 26 May 2020, very little time was left for any sensible discussion on the issue.

Order made

[14] Accordingly, an order is made pursuant to s 45(5) of the Legal Services Act 2011 that an order for costs of \$20,000 and disbursements of \$306.08 would have been made against Mr Dillon with respect to these proceedings had Mr Dillon not been legally aided.

J C Holden
Judge

Judgment signed at 4 pm on 29 June 2020

¹¹ Employment Court Regulations 2000, reg 68(2)(a).

¹² *Bluestar Print Group (NZ) Ltd v Mitchell* [2010] NZCA 385, [2010] ERNZ 446 at [20].