

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

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

**[2022] NZEmpC 108
EMPC 188/2018
EMPC 399/2018**

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
AND IN THE MATTER OF	an application for proceedings removed
AND IN THE MATTER OF	an application for costs on recall of judgment
BETWEEN	BRIAN SAIPE Plaintiff
AND	TRUDE JEAN BETHELL (ALSO KNOWN AS TRUDE JEAN BETHELL-PAICE) Defendant

Hearing: On the papers

Appearances: M Donovan, counsel for plaintiff
R Hooker, counsel for defendant

Judgment: 21 June 2022

**COSTS JUDGMENT OF JUDGE J C HOLDEN
(Recall of judgment)**

[1] Mr Saipe unsuccessfully applied for a recall of this Court's substantive judgment.¹ Ms Bethell now applies for costs.

¹ *Saipe v Bethell* [2022] NZEmpC 63.

[2] Her calculation of costs using the Court’s Guideline Scale is:²

Proceedings	Days
Notice of opposition 30 November 2021	0.6
Notice of opposition amended 18 March 2022	0.6
Case management preparation 8 December 2021	0.4
Attending case management conference	0.2
Memorandum to vacate conference and hearing 8 March 2022	0.6
Attendance at case management conference 14 March 2022	0.2
Submissions in support of opposition	1
Preparation of bundle	0.5
Supplementary submissions 18 March 2022	1
Appearance at hearing	0.5
TOTAL	5.6
Schedule 2B daily recovery rate \$2,390.00	\$13,384.00

[3] Ms Bethell applies for an uplift on those costs because of the Calderbank offer she made to settle the substantive proceedings. In determining costs on the substantive matter, the Court took account of that Calderbank offer and increased the costs award by one third for the portion of the proceedings that followed the making of the Calderbank offer.³ Ms Bethell seeks a similar uplift here, leading to a claim for \$17,800. Fifty dollars is also sought for disbursements.

[4] Mr Saipe notes that a costs award cannot exceed actual costs and that Ms Bethell has not identified her actual costs in respect of the application for a recall.

² “Employment Court of New Zealand Practice Directions” <www.employment.govt.nz> at No 16.

³ *Saipe v Bethell* [2021] NZEmpC 147 at [20]-[22].

[5] He also challenges a number of items Ms Bethell included in her calculation of scale costs:

- (a) 0.6 of a day for notice of opposition to the amended application: He says the work required was insubstantial and does not warrant allocation of a further 0.6 days.
- (b) 0.6 of a day for memorandum to vacate hearing and 0.2 for attendance at case management conference on 14 March 2022: Ms Bethell's application by way of memorandum to vacate the hearing was unsuccessful. Mr Saipe says Ms Bethell's counsel withdrew the application during the case management conference. He says, in those circumstances, Ms Bethell should not be awarded costs for the failed application.
- (c) 1 day for filing supplementary submissions dated 18 March 2022: Mr Saipe says the supplementary submissions were filed to correct a factual error made by Ms Bethell's counsel regarding the assertion that no opening submissions had been presented by Mr Saipe at the hearing of the substantive claim and were relatively brief. He submits that no costs should be awarded for this step. In any event, he says it would be disproportionate to allow a full day for this step.
- (d) 0.5 of a day for appearing at the hearing of the recall application: Mr Saipe submits 0.25 of a day is appropriate for this step and better reflects the hearing time for this matter.

[6] These adjustments lead to a calculation of \$7,050.50 on a Category 2B basis.

[7] Mr Saipe submits the Calderbank offer should not be taken into account in respect of the application for a recall. Finally, Mr Saipe seeks a reduction of 50 per cent of any costs award to take account of his limited financial means, detailed in an affidavit from him.

Costs are discretionary

[8] The Court has a broad discretion when it comes to considering costs.⁴ The Court also may take into account conduct that may increase or contain costs.⁵ The Court has adopted the Guideline Scale to assist it when exercising this discretion. The Guideline Scale is intended to support the policy objective that costs calculations should be predictable, expeditious and consistent. It does not, however, replace the Court's discretion.

Ms Bethell entitled to costs

[9] Having successfully defended the application for a recall, Ms Bethell is entitled to costs. Although clearly she would have incurred costs – she was legally represented – I would have expected to have had her actual costs identified by counsel, even in reply submissions after this issue was raised in Mr Saipe's submissions, but that has not happened. In those circumstances, I am not prepared to consider an uplift on scale costs.

[10] I also accept that scale costs have been overstated in Ms Bethell's application, although not to the extent claimed by Mr Saipe.

[11] I acknowledge Mr Saipe's financial circumstances, but also note that this was his application for a recall to which Ms Bethell had to respond, and that there were individuals on both sides; it was not a case where one party had significantly more resources than the other.

[12] In all the circumstances, I award Ms Bethell \$7,500 for costs, inclusive of disbursements. This sum reflects a reduction in Ms Bethell's calculation of scale costs and a further small reduction to recognise Mr Saipe's financial position. I anticipate the parties agreeing on a repayment schedule, but absent such agreement, this sum is to be paid within 35 days of the date of this judgment.

⁴ Employment Relations Act 2000, sch 3 cl 19.

⁵ Employment Court Regulations 2000, reg 68.

[13] There is no costs award for the application for costs.

J C Holden
Judge

Judgment signed at 4 pm on 21 June 2022