

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

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

**[2022] NZEmpC 143
EMPC 78/2021**

IN THE MATTER OF	proceedings removed in full from the Employment Relations Authority
AND IN THE MATTER OF	an application for costs
BETWEEN	REEGAN LAWTON Plaintiff
AND	STEEL PENCIL HOLDINGS LIMITED (IN LIQUIDATION) First Defendant
AND	ORMOND BRIAN STOCK Second Defendant
AND	MINISTRY OF BUSINESS, INNOVATION AND EMPLOYMENT Intervener

Hearing: On the papers

Appearances: P McBride, counsel for plaintiff
K Dalziel, counsel for second defendant

Judgment: 15 August 2022

COSTS JUDGMENT OF JUDGE J C HOLDEN

[1] Mr Stock, the second defendant in these proceedings, applies for costs.

[2] In relation to the Employment Court proceedings, he submits that the appropriate categorisation for costs in terms of the Practice Directions Guideline

Scale, is category 2B.¹ However, he seeks an uplift because a Calderbank offer was made to Mr Lawton, the plaintiff, in November 2020 which well exceeded the amount Mr Lawton recovered and which was rejected.

[3] Mr Stock has provided a calculation of Court costs in accordance with the guideline scale. After fixing some small errors that calculation is:

Item	Proceedings	Days
<i>Commencement</i>		
2	Commencement of defence by defendant	1.5
<i>Case Management</i>		
11	Preparation for first directions conference 12/03/21	0.4
12	Filing memorandum for first or subsequent directions conference	0.4
13	Appearance at first or subsequent directions conference 12/03/21	0.2
<i>Disclosure, inspections and interrogatories</i>		
27	Inspection of Documents	1.0
<i>Interlocutory applications (including applications for stay, security for costs)</i>		
12	Filing memorandum in response to application for costs	0.4
30	Preparation for submissions in respect to admissibility of Calderbank letter	1.0
<i>Trial preparation and appearance for other proceedings</i>		
36	Plaintiff's or defendant's preparation of briefs or affidavits	2
38	Defendant's preparation of list of issues, agreed facts, authorities and common bundle	1
39	Preparation for hearing	2
40	Appearance at hearing	3
TOTAL DAYS		12.90
12.90 days @ \$2,390 per day		\$30,831.00

[4] Mr Stock also seeks a small amount of costs for the Employment Relations Authority (the Authority) proceedings that removed the matter to the Employment Court.²

¹ "Employment Court of New Zealand Practice Directions" <www.employment.govt.nz> at No 16.

² *Lawton v Steel Pencil Holdings Ltd (in liq)* [2021] NZERA 92 (Member Loftus).

[5] Mr Lawton first says that he considers there was a basis for an award of costs to him. He formally makes that application for scale costs, “while recognising that, where there has been division of the Court’s findings, a different result is more likely to prevail”.

[6] He says:

- 1.1 The reason for removal from the Authority was an issue of law, which was contested by [Mr Stock] and upon which he was entirely unsuccessful;
- 1.2 [Mr Lawton] was successful before this Court, although not to the extent claimed;
- 1.3 [Mr Stock] has not shown that he *actually* let alone *reasonably* incurred the costs he claims;
- 1.4 The Calderbank offer ... cannot properly assist [Mr Stock].

The Employment Court has a discretion as to costs

[7] The Employment Court may order any party to a proceeding to pay any other party such costs and expenses as are considered reasonable.³

[8] Awarding costs is discretionary, but the Court must exercise that discretion on a principled basis and in the interest of justice. It also is to be exercised in light of the Court’s equity and good conscience jurisdiction.⁴

[9] The primary principle is that costs follow the event so that an unsuccessful party makes a reasonable contribution to the costs incurred by the successful party.⁵ In exercising its discretion, the Court may have regard to any offer made by either party to the other, a reasonable time before the hearing, to settle all or some of the matters at issue between the parties, including an offer expressed to be without prejudice except as to costs.⁶

³ Employment Relations Act 2000, sch 3 cl 19.

⁴ *Head v Chief Executive of the Inland Revenue Department* [2021] NZEmpC 198 at [71].

⁵ *Victoria University of Wellington v Alton-Lee* [2001] ERNZ 305 (CA) at [48].

⁶ Employment Court Regulations 2000, reg 68.

Issues that arise

[10] The issues that arise here are:

- (a) What costs, if any, should be awarded in respect of the Authority proceedings?
- (b) Which party is entitled to costs in the Court, and at what level should those costs be set in the first instance?
- (c) What is the effect of the Calderbank offer?

No order for costs in the Authority

[11] The Authority dealt with the issue of whether the matter should be removed. Mr Lawton initially applied for removal to the Court, but withdrew that application due to the Authority's ability to schedule a three day investigation meeting promptly.⁷ Later, after Steel Pencil Holdings Ltd went into liquidation, the Authority, of its own volition, raised the possibility of removal with the parties. Both advised they had no objection.⁸ The matter was then removed to the Court.

[12] Against that background, I consider that it is appropriate for costs in the Authority to lie where they fall.

Mr Stock entitled to costs in the Court

[13] Mr Lawton's claim that he is entitled to costs because of his small success in the Court is not accepted. The reality is that, on the substantive claims before the Court, Mr Stock was successful.⁹

[14] I do, however, accept that Mr Lawton also prevailed on the preliminary issue before the Court.¹⁰ In addition, there was an application for discovery from Mr Stock,

⁷ *Lawton v Steel Pencil Holdings Ltd (in liq)*, above n 2, at [5] and [6].

⁸ At [13].

⁹ *Lawton v Steel Pencil Holdings Ltd (in liq)* [2021] NZEmpC 199 at [127].

¹⁰ At [38].

which was not pursued. Finally, I agree with Mr McBride, for Mr Lawton, that the hearing did not last three full days.

[15] I take these matters, together with Mr Lawton's small success, into account to reach a starting point for costs payable by Mr Lawton to Mr Stock of \$25,000.

Uplift to costs justified

[16] As noted, Mr Stock seeks an uplift on costs. He points to the Calderbank offer made by Mr Stock in November 2020 covering both his liability and that of Steel Pencil Holdings Ltd.

[17] While Mr Lawton quibbles with some aspects of the offer, the effect was clear: Mr Stock offered to settle by paying Mr Lawton the sum of \$75,000 as gross salary spread over six equal monthly instalments of \$12,500, with the first payment being made on 20 February 2021. The offer was a reasonable one and it is regrettable that Mr Lawton did not accept it when it was made.

[18] Accordingly, I take it into account. The costs incurred by Mr Stock in the Court were \$55,100. He also seeks disbursements for travel and printing of \$1,254.91.

[19] On balance, taking all matters into account, I order Mr Lawton to pay Mr Stock \$45,000 in costs. Disbursements totalling \$200 inclusive of GST also are allowed, the reduction from the claimed amount reflects the point made by Mr McBride that airfares and accommodation are generally not recoverable where parties use out of town representatives.¹¹ Unless otherwise agreed between the parties, payment of these sums is to be made within one month of the date of this judgment.

[20] There is no costs order in respect of the application for costs.

J C Holden
Judge

Judgment signed at 3.45 pm on 15 August 2022

¹¹ *Hines v Eastland Port Ltd* [2018] NZEmpC 111 at [25]; *Gini v Literacy Training Ltd* [2013] NZEmpC 25 at [35].