

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

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

**[2023] NZEmpC 167
EMPC 432/2021**

IN THE MATTER OF a challenge to a determination of the
 Employment Relations Authority

AND IN THE MATTER OF an application for costs

BETWEEN LONGSHENG LING
 Plaintiff

AND SUPER CUISINE GROUP LIMITED
 Defendant

Hearing: On the papers

Appearances: P Young, advocate for plaintiff
 W Tan, advocate for defendant

Judgment: 3 October 2023

COSTS JUDGMENT OF JUDGE KATHRYN BECK

Background

[1] On 13 July 2023, Mr Ling was successful in proceedings against Super Cuisine Group Ltd on the issue of whether he was constructively dismissed.¹ Costs were reserved, but I indicated that Mr Ling was entitled to costs as the successful party.²

[2] The parties have not reached agreement as to costs. Mr Ling's advocate, Mr Young, seeks indemnity costs of \$19,637.30 on behalf of Mr Ling. Mr Young has not

¹ *Ling v Super Cuisine Group Ltd* [2023] NZEmpC 106.

² At [64].

provided submissions in support of indemnity costs and has not provided an assessment of scale costs.

[3] Super Cuisine Group's advocate, Mr Tan, opposes the application and submitted that costs should lie where they fall. He submitted that Mr Young failed to negotiate the issues of costs in good faith, that the invoices provided by Mr Young are not accurate, that Mr Ling did not incur any costs because Mr Young operates on a "No-win, No-fee" structure, and that Mr Ling was not entirely successful in his claims.

[4] In response, Mr Young submitted that he negotiated in good faith and that Mr Ling was successful on the central issue of whether he was constructively dismissed. Further, Mr Young submitted that his invoices reflect the breakdown of time that he spent on the matter and that whether or not they were paid by Mr Ling is irrelevant to the issue of costs. Finally, he claimed that Mr Tan delayed the hearing by denying receipt of documents and by failing to serve the bundle on time.

Issues

[5] In considering this matter, it is necessary to determine three issues:

- (a) Should costs be ordered?
- (b) What are scale costs?
- (c) Should costs be increased or decreased?

Should costs be ordered?

[6] The Employment Court has a discretionary power to make orders in relation to costs under cl 19 of sch 3 to the Employment Relations Act 2000.

[7] The Court of Appeal stated the starting point for decisions relating to costs in *Victoria University of Wellington v Alton-Lee*:³

³ *Victoria University of Wellington v Alton-Lee* [2001] ERNZ 305 (CA) at [48].

The primary principle is that costs follow the event. As to quantification, the principle is one of reasonable contribution to costs actually and reasonably incurred.

[8] Mr Tan has submitted that Mr Ling was not entirely successful in his challenge. However, that is incorrect. Mr Ling was entirely successful on the central issue of whether he was constructively dismissed. Costs ought therefore to follow.

[9] He also submitted that Mr Ling did not incur any costs because Mr Young charged on a conditional fee basis and received 50 per cent of the sum awarded to Mr Ling by the Court. He submitted that as a result, the Court's award already encompasses Mr Ling's costs.

[10] Although Mr Ling may have paid 50 per cent of the sum he received to Mr Young, I do not accept that the Court's award encompasses that fee arrangement. Rule 14.2(2) of the High Court Rules 2016 states a "conditional fee agreement" does not prevent an award of costs. I consider that the same principle applies when the Employment Court is considering the issue of costs.

[11] However, Mr Tan's submission may still have broader merit. As noted in the extract from the Court of Appeal above, the largest amount of costs a party can ever be awarded is the costs it actually incurred. Thus, if Mr Young's fees were in fact limited to 50 per cent of the amount awarded by the Court, then that sum would function as the upper limit of any costs award. On the other hand, if Mr Young's fees are limited to 50 per cent of the Court's award, *plus* any amount ordered by way of costs, then any costs reasonably arising from the representative's actions on behalf of the party would provide the upper limit.⁴

[12] Mr Young does not deny that he provides services under a conditional fee agreement, and he has not provided a copy of that agreement. However, I do not consider it to be necessary for him to provide a copy of the agreement. It is more likely than not that the fee arrangement includes reference to any amount ordered by way of costs. Mr Tan has not provided any evidence to the contrary, nor has he

⁴ See David Bullock and Tim Mullins *The Law of Costs in New Zealand* (LexisNexis, Wellington, 2022) at [2.29].

provided any evidence to suggest that any element of Mr Young's breakdown of the time he spent on these proceedings is unreasonable.

[13] Therefore, I find that costs should follow the event and that the upper limit of any award of costs is Mr Young's breakdown of the time and cost incurred in representing Mr Ling.

What are scale costs?

[14] I previously indicated that these proceedings can be classified as falling within category 2, band A under the Court's Guideline Scale for costs.⁵ The parties have not provided an estimate of scale costs, so a possible calculation is set out below.

Item	Step in proceedings	Time
1	Commencement of proceeding by way of challenge by plaintiff	1.5
11	Preparation for first directions conference	0.2
12	Filing memorandum for first directions conference	0.2
13	Appearance at first directions conference	0.2
11	Preparation for second directions conference	0.2
13	Appearance at second directions conference	0.2
11	Preparation for third directions conference	0.2
13	Appearance at third directions conference	0.2
35	Plaintiff's preparation of briefs or affidavits	1
36	Plaintiff's preparation of list of issues, agreed facts, authorities and common bundle	1
38	Preparation for hearing	1.5
39	Appearance at hearing for sole representative	1
	Total	7.4

[15] Applying the guideline scale in this manner leads to a total calculation of 7.4 days. However, in the circumstances, it is necessary to amend this in part. I consider that items 35 and 36 should be combined and reduced to 0.5 days. Mr Young only

⁵ *Ling v Super Cuisine Group Ltd* EmpC Auckland EMPC 432/2021, 29 September 2022 at [12].

prepared one brief of evidence which was three pages long including the cover page, and although a common bundle was prepared, Mr Young did not prepare a list of issues, agreed facts, and authorities. Further, although there were three directions conferences, I consider that costs are only appropriate in relation to the first conference in light of the brevity of the latter two conferences. Finally, 1.5 days are allowed in relation to preparation for the substantive hearing. However, it is apparent that one day is a fairer allowance in terms of time spent.

[16] Applying the changes set out above leads to a total calculation of 4.6 days. When this is multiplied by the daily recovery rate of \$2,390, the total figure is \$10,994.

[17] In Mr Young's breakdown of his time, he also identified disbursements of \$200 for an application fee and \$517.50 for an interpreter's fee. I find that those are reasonably recoverable.

[18] Therefore, the total of scale costs and disbursements is \$11,711.50.

Should scale costs be increased or decreased?

[19] When ordering costs, the Court may have regard to any conduct of the parties that is likely to increase or contain costs.⁶

[20] Both Mr Tan and Mr Young claim that the other delayed the Court's process. Mr Tan claims that Mr Ling's evidence was insufficient. Mr Young claims that Mr Tan delayed the hearing by denying receipt of documents and by failing to serve the bundle of documents on time. Neither party has supported these submissions with affidavit evidence. I find that the actions of both representatives caused some delay, and therefore I do not consider that any increase or decrease in scale costs (other than that already set out above) is necessary for that reason.

[21] Mr Tan also submitted that Mr Young did not negotiate the issue of costs in good faith because he used a threatening and punitive tone in his correspondence. He attached correspondence to his submissions which he said supported that submission.

⁶ Employment Court Regulations 2000, reg 68.

However, although the correspondence provided does betray a degree of uncertainty on Mr Young's part and combativeness on Mr Tan's part, there is nothing to suggest that Mr Young was not communicating in good faith.

Conclusion

[22] Super Cuisine Group Ltd is to pay Mr Ling the sum of \$11,711.50 within 28 days of the date of this judgment.

Kathryn Beck
Judge

Judgment issued at 12 pm on 3 October 2023