

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

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

**[2024] NZEmpC 14
EMPC 8/2023**

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
AND IN THE MATTER OF	an application for costs on applications for stay of execution, security for costs and stay of proceedings
BETWEEN	MARIKA PRETORIUS Plaintiff
AND	BOARD OF TRUSTEES OF TAUPO INTERMEDIATE SCHOOL Defendant

Hearing: On the papers

Appearances: E Whittome, advocate for plaintiff
K Harkess and O Floodsmith-Ryan, counsel for defendant

Judgment: 13 February 2024

**COSTS JUDGMENT OF JUDGE KATHRYN BECK
(Application for costs on applications for stay of execution,
security for costs and stay of proceedings)**

[1] On 3 November 2023, the defendant’s application for security for costs was granted, and the plaintiff’s application for a stay of execution was declined.¹ The interlocutory judgment indicated that the defendant was entitled to costs.² The parties have been unable to agree costs and have filed memoranda.

¹ *Pretorius v Board of Trustees of Taupo Intermediate School* [2023] NZEmpC 189.

² At [57].

[2] The defendant seeks scale costs of \$17,508. Most of the defendant's costs are calculated on a category 2, band B basis, but some are calculated on a category 2, band C basis as a result of delay caused by the plaintiff. The defendant has not indicated whether its actual legal costs incurred in the proceedings exceed the scale costs it is claiming.

[3] The plaintiff does not dispute the calculation of scale costs as submitted by the defendant. However, she submits that she is in an impecunious position and that a substantial costs award would undermine her right to access to justice. No additional affidavit evidence has been filed, but I note that in the security for costs application I found that it was probable that the plaintiff would not be able to comply with any significant adverse costs award.³ The plaintiff has also filed an application for leave to appeal the interlocutory judgment that underlies this application for costs.

[4] The Court has a discretion as to costs.⁴ As the defendant was successful in relation to the interlocutory issues, it is entitled to costs. The plaintiff raises a concern that, in light of her financial position, her right to access to justice will be stifled and suppressed by an adverse costs award. The right to access to justice is an important consideration when considering costs. The Court of Appeal has observed that: "Access to justice considerations point away from automatic full recovery of costs for the successful party."⁵ However, the Court went on to state:⁶

On the other hand, a monetary judgment will often be of little practical moment to a successful party unless the losing party is required to make a substantial contribution to the costs of obtaining it. Further, litigation is expensive, time-consuming and distracting and the requirement that a losing party not only pays his or her own costs but also makes a subsequent contribution to those of the successful party undoubtedly acts as a disincentive to unmeritorious claims or defences.

[5] In concluding its judgment, the Court observed:⁷

³ At [14].

⁴ Employment Relations Act 2000, sch 3 cl 19; and Employment Court Regulations 2000, reg 68.

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

⁶ At [48].

⁷ At [65].

The parties, and those who practise in this field ... might well reflect on the consequences of conducting litigation without proper focus on the issues and without tight control on the escalation of costs.

[6] In light of those principles, I do not consider that costs should lie where they fall. This is a proceeding where the plaintiff's focus on the substantive issue of whether the plaintiff raised her grievance within 90 days and on the nature of that grievance,⁸ was often diverted to a broader concern with the regulatory response to Covid, which was not helpful to determining the particular applications before the Court.

[7] However, while the defendant is entitled to costs, some reductions need to be made its calculations. I do not accept that costs are appropriate for second counsel. This was not a complicated matter, and I consider that the defendant could have been represented by one representative.

[8] Additionally, I do not accept that all of the uplifts, from band B to band C, claimed by the defendant are appropriate. Band C indicates an amount of time that would be appropriate if a comparatively large amount of time for the particular step is considered reasonable. Two of the claimed uplifts are in relation to items which are said to have been an unnecessary step – there is no indication that a comparatively large amount of time was taken on those steps.⁹

[9] Further, the directions conference on 4 April 2023 and related memoranda were partially related to the substantive matter as well as to the interlocutory matters resolved in these proceedings; the award of costs must take that fact into account.

[10] Finally, the award of costs must take into account the plaintiff's financial position.¹⁰ It ought also to reflect the fact that the amounts being disputed by the parties were relatively small: \$2,250 and \$10,000.¹¹

[11] In the circumstances, I consider that an award of \$9,000 is appropriate.

⁸ Which was unjustified disadvantage not, unjustified dismissal.

⁹ "Employment Court of New Zealand Practice Directions" <www.employmentcourt.govt.nz> at No 18.

¹⁰ High Court Rules 2016, r 14.7(g).

¹¹ Rule 14.7(b).

[12] Lastly, in light of the plaintiff's financial position and because the plaintiff has filed an application for leave to appeal the interlocutory judgment that underlies this costs application, I consider that costs should not be payable immediately unless by agreement.

[13] If the plaintiff's proceedings in the Court of Appeal are unsuccessful, by leave to appeal not being granted or by the appeal being declined on its merits, costs are to be paid by the plaintiff to the defendant within 30 days of the result from the Court of Appeal being advised to the parties. If the plaintiff succeeds in the Court of Appeal, costs will need to be revisited in any event.

Kathryn Beck
Judge

Judgment signed at 12.45 pm on 13 February 2024