

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

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

**[2024] NZEmpC 35
EMPC 446/2021**

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
AND IN THE MATTER OF	remedies and an application for costs
BETWEEN	MURRAY APPLETON Plaintiff
AND	TASMAN CARGO AIRLINES PTY LIMITED Defendant

Hearing:	On the papers
Appearances:	J Hall, counsel for the plaintiff K Dunn and K Creagh, counsel for the defendant
Judgment:	4 March 2024

**JUDGMENT OF JUDGE J C HOLDEN
(remedies and costs)**

[1] In the judgment on Mr Appleton’s challenge, Tasman Cargo Airlines PTY Ltd (Tasman Cargo) was ordered to pay Mr Appleton:¹

- (a) an award equivalent to 10 months’ lost remuneration from the date of dismissal (including holiday pay on salary and a sum equivalent to the employer superannuation contributions that would have been paid); and

¹ *Appleton v Tasman Cargo Airlines PTY Ltd* [2023] NZEmpC 191 at [95]–[100].

(b) interest on the award for remuneration.

[2] In addition, Tasman Cargo was required to pay Mr Appleton \$14,000 under s 123(1)(c)(i) of the Employment Relations Act 2000.

[3] Although I assumed that the calculation of lost remuneration could be agreed, the parties were able to apply for further orders if necessary.²

[4] The parties also were encouraged to agree on costs. Again, if that was not possible and an order was sought from the Court, then an application could be filed.³

[5] Unfortunately, the parties have not been able to agree on either lost remuneration or costs. This judgment resolves those two issues.

Mr Appleton to be paid 10 months' lost remuneration

[6] As noted, the award for lost remuneration was to be equivalent to 10 months' remuneration from the date of dismissal. When Mr Appleton was dismissed, he was on an individual employment agreement. Later that same month, however, Tasman Cargo entered into a collective agreement with the New Zealand Air Line Pilots' Association (NZALPA) which included increased salaries (the Collective Agreement). Mr Appleton was a member of NZALPA while he was employed by Tasman Cargo. As a result, he would have been covered by the Collective Agreement when it came into force in April 2020.

[7] Therefore, the amount Mr Appleton would have received by way of remuneration had he been employed for the 10 months following the date of his dismissal would have included the increase in salary from the date it applied. In such circumstances, the calculation of lost remuneration should reflect the salary provisions of the Collective Agreement for the portion of the 10 months following the termination of Mr Appleton's employment that followed the coming into force of the Collective Agreement.

² At [95].

³ At [103].

[8] A separate head of claim was for a bonus, which is payable under the Collective Agreement. The relevant clause of the Collective Agreement provides that a performance-based payment will be made to pilots, payable at the end of each subsequent 12-month period following ratification of the Collective Agreement, based on a maximum achievable amount equal to five per cent of the pilot's base salary for that period. Thus, the date of eligibility was April 2021. That is outside the 10-month period for which remuneration is payable. The claim for a bonus is not accepted.

[9] Mr Appleton then claims a sum of \$26,441.67, which he says represents superannuation contributions that were withheld by the superannuation fund provider on the termination of his employment. That claim was not made in the statement of claim and Tasman Cargo points out that no evidence has been provided of withheld or deducted contributions. It says it does not appear that it has withheld any contribution. In any event, such a remedy is not covered by the substantive judgment. Therefore, the amount is not now recoverable pursuant to these proceedings.

[10] In summary, the figure for lost remuneration is to take into account the increase in the salary Mr Appleton would have received following the settlement of the Collective Agreement in April 2020, which will have flow-on effects for the calculation of holiday pay, superannuation contributions and interest. The parties advised that they are able to work out the calculations, and that should now be done.

[11] No payment, however, is recoverable for a bonus or for the moneys said to have been withheld by the superannuation fund provider.

Costs payable

[12] These proceedings were provisionally assigned category 2B for costs purposes under the Court's guideline scale.⁴ Mr Appleton now seeks that provisional categorisation to be replaced by category 3C. Mr Appleton acknowledges that costs should be discounted at a rate of 20 per cent to allow for the lack of success on the reinstatement issue and to acknowledge that the Court found Mr Appleton contributed

⁴ "Employment Court of New Zealand Practice Directions" <www.employmentcourt.govt.nz> at No 18.

to the situation that gave rise to his personal grievance. He then says, however, that costs should be increased by 20 per cent because Tasman Cargo contributed unnecessarily to the time and expense of the proceedings. Mr Appleton also seeks an allowance for second counsel.

[13] Mr Appleton's calculation of costs is:

STEP	DESCRIPTION	ALLOCATED DAYS (BAND C)	TOTAL AMOUNT (\$3,530 AS CATEGORY 3 DAILY RECOVERY RATE)
1	Commencement of proceeding by way of challenge by plaintiff	4	14,120
11	Preparation for first directions Conference (30/09/2022)	0.5	1,765
13	Appearance at first directions conference (30/09/2022)	0.4	1,412
15	Filing memorandum for case management meeting (09/05/2023)	0.5	1,765
22	Notice requiring disclosure (28/02/2023)	1	3,530
27	Inspection of documents	2	7,060
35	Plaintiff's preparation of briefs	4	14,120
36	Plaintiff's preparation of common bundle (&c)	4	14,120
38	Preparation for hearing	4	14,120
39	Appearance at hearing for principal representative	5.75 (days)	20,297.50
40	Second representative	2.88 (5.75/2)	10,166.40
TOTAL		29.03	102,475.90⁵

[14] In contrast, Tasman Cargo's position is that the category 2B categorisation continues to be appropriate. It notes there was no directions conference; rather, a joint memorandum was filed, and there was no case management conference. It also says that a deduction is warranted because of Mr Appleton's unsuccessful application for

⁵ Figure corrected.

non-publication and a stay of proceedings.⁶ It says there should be no costs uplift, but rather, a 40 per cent reduction to recognise not only the contribution but also the other ways in which Mr Appleton was unsuccessful.

[15] Its calculation is:

STEP	DESCRIPTION	ALLOCATED DAYS (BAND B)	TOTAL AMOUNT (\$2,390 AS CATEGORY 2 DAILY RECOVERY RATE) ⁷
1	Challenge by plaintiff	2	\$4,780
22	Notice requiring disclosure	0.8	\$1,912
27	Inspection of documents	1	\$2,390
29	Filing opposition to interlocutory application (non-publication) (costs to defendant)	-0.6	-\$1,434
30	Preparation of written submissions (non-publication) (costs to defendant)	-1	-\$2,390
35	Plaintiff's briefs	2	\$4,780
37	Common bundle	2	\$4,780
38	Preparation for hearing	2	\$4,780
39	Appearance at hearing	5.75	\$13,742.50
Sub-total		13.95	\$33,340.50
Minus 40% reduction			-\$13,336.20
TOTAL			\$20,004.30

The Court has a discretion as to costs

[16] The Court's guideline scale was implemented to assist the Court. The Court is not, however, bound by the guideline scale.

⁶ *Appleton v Tasman Cargo Airlines PTY Ltd* (formerly *BAC v TRS*) [2022] NZEmpC 159.

⁷ Figures corrected.

[17] Having considered the file, I have reached the view that, while category 2B is the most appropriate of the categories outlined in the guideline scale, some of the steps in these proceedings merit an upward adjustment to the time allocations. I also agree that it was appropriate for both parties to have two representatives at the hearing.

[18] I otherwise agree with the steps identified by Tasman Cargo. The category 2B calculation comes to 16.83 days. Adjusting the time allocation, I use 20 days as a starting point. The \$2,390 recovery rate for category 2 cases leads to a starting figure for costs of \$47,800.

[19] I do not accept that either party conducted the case in a way that justifies an uplift. I also do not accept that a 40 per cent reduction is called for. Mr Appleton was successful in his claim, albeit that he did not obtain an order for reinstatement, and he was found to have contributed to the situation that gave rise to his personal grievance. I adopt the 20 per cent discount suggested by Mr Appleton.

[20] I therefore order that Tasman Cargo pay Mr Appleton \$38,240 as a contribution to his costs. That sum is to be paid within 28 days of the date of this judgment.

[21] There is no costs order in respect of this judgment.

J C Holden
Judge

Judgment signed at 10.45 on 4 March 2024