IN THE EMPLOYMENT COURT
AUCKLAND

[2012] NZEmpC 98
ARC 13/10

IN THE MATTER OF	de novo challenge to a determination of the Employment Relations Authority
AND IN THE MATTER OF	an application for costs
BETWEEN	TIARE KELLEHER Plaintiff
AND	WIRI PACIFIC LIMITED Defendant

Hearing: Submissions filed on 5 April, 7 May and 8 May 2012

Appearances: Mark Ryan, counsel for plaintiff
John Ropati, counsel for defendant

Judgment: 26 June 2012

COSTS JUDGMENT OF JUDGE CHRISTINA INGLIS

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[1] The plaintiff pursued an unsuccessful grievance in the Employment Relations Authority.[1] She applied for leave to challenge that determination out of time. The application was not opposed and was subsequently granted by the Court. The plaintiff then applied for a stay of the Authority's earlier costs determination.[2] The defendant opposed the application. In the event, a stay was granted on conditions and costs were reserved pending determination of the challenge.[3]

[2] A seven day hearing was set down in this Court, commencing 8 August 2011. Various timetabling orders were made, including that the plaintiff was to file and serve her briefs no later than 18 July 2011. This did not occur. On 19 July 2011, the

[1] AA 450/09, 14 December 2009.
[2] AA 35/10, 28 January 2010.
[3] AA 35A/10, 2 August 2010.

plaintiff applied to adjourn the hearing. Counsel acknowledged, in the course of advancing the application for an adjournment, that any additional prejudice to the defendant ought to be addressed by way of costs.

[3] In the event, the plaintiff's application was granted and a telephone conference was convened on 23 September 2011. A five day hearing was allocated, commencing 12 March 2012.

[4] One month prior to the commencement of the hearing, the plaintiff filed a notice of discontinuance of her claim. This occurred on 13 February 2012, only a few days before her briefs of evidence were due. The substantive proceedings were accordingly brought to an end. There was no agreement between the parties as to costs on the discontinuance.

[5] The defendant seeks a contribution to its costs in the sum of $7,500, which is claimed to be 66 percent of the actual costs incurred (totalling $10,348).[4] Mr Ryan (counsel for the plaintiff) submits that costs should lie where they fall.

[6] Clause 19, Schedule 3, of the Act confers a broad discretion as to costs. It provides that:

> The court in any proceedings may order any party to pay to any other party such costs and expenses ... as the court thinks reasonable.

[7] The discretion to award costs, while broad, is to be exercised in accordance with principle. The primary principle is that costs follow the event.[5] The usual starting point in ordinary cases is 66 percent of actual and reasonable costs. From that starting point, factors that justify either an increase or decrease are assessed.[6]

[8] Mr Ryan advanced the proposition that where a notice of discontinuance has been filed, different costs principles apply. He submitted that it cannot be said that the defendant was successful as the issues were not required to be resolved by the

[4] In fact, 66% of $10,348 is $6,830.
[5] *Victoria University of Wellington v Alton-Lee* [2001] ERNZ 305 (CA) at [48].
[6] *Binnie v Pacific Health Ltd* [2002] 1 ERNZ 438 (CA) at [14].

Court. I do not accept Mr Ryan's argument that a different approach to determining costs is required in circumstances where a plaintiff has discontinued a challenge.[7]

[9] While the circumstances surrounding the discontinuance may be relevant to an assessment of what a reasonable contribution may be, the ordinary rule in the courts of general jurisdiction is that, unless the defendant otherwise agrees or the court otherwise orders, a plaintiff who discontinues a proceeding against a defendant must pay costs to the defendant of and incidental to the proceeding up to and including the discontinuance.[8] I can discern no reason in principle why a different approach would apply in this jurisdiction.

[10] Ultimately the Court is required to assess what is reasonable in the circumstances. As the Court of Appeal observed in *Kroma Colour Prints Ltd v Tridonicatco NZ Ltd*,[9] the general rule that a discontinuing party is liable for costs on discontinuance (provided for in r 15.23) may be displaced "if there [are] just and equitable circumstances not to apply it." Such circumstances might arise where, for example, the discontinuing plaintiff can be regarded as the "winning" party or where discontinuance follows proper disclosure by the defendant.[10] While the court will not speculate on the merits of a case that has not been heard, the reasonableness of the stance of both parties has to be considered.[11]

[11] There is no information before the Court in the present case as to the circumstances surrounding the plaintiff's discontinuance such that might support a reduction in costs liability. The simple fact is that the defendant has been put to the expense of taking steps to defend a claim which the plaintiff has belatedly chosen not to pursue. In the absence of any information to the contrary, the inference is that she took this step because her claim lacked merit. While the plaintiff is entitled to discontinue her challenge,[12] the starting point cannot, as a matter of principle, be that

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[7] See *Metallic Sweeping (1998) Ltd v Ford* CC 11/07, 23 May 2007.
[8] High Court Rule 15.23.
[9] [2008] NZCA 150, (2008) 18 PRNZ 973 at [12].
[10] See, for example, *Small v A Judicial Committee* HC Christchurch CIV-2009-409-2622, 20 April 2010; *Coromandel Heritage Protection Society Inc v Thames-Coromandel District Council* HC Hamilton CIV-2007-419-1649, 11 February 2008.
[11] *Kroma Colour Prints* at [12].
[12] Clause 18, Schedule 3, Employment Relations Act 2000.

she can do so with immunity from costs. That would be inconsistent with the principle that costs generally follow the event.

[12] Mr Ropati submits that the defendant incurred actual costs directly related to the litigation of $10,348 (inclusive of GST). The costs incurred by the defendant include the costs associated with dealing with the plaintiff's application for leave to challenge (although not opposed); drafting and filing a statement of defence; drafting and filing submissions in opposition to the plaintiff's stay application (which was granted); attendance at a telephone conference on 12 August 2010; drafting and filing an amended statement of defence; drafting detailed briefs of evidence for seven witnesses, together with a draft common bundle of paginated documents; drafting and filing a memorandum regarding the plaintiff's application for an adjournment; and attendance at a telephone conference on 23 September 2011.

[13] I accept that the defendant incurred legal costs of $10,348 (inclusive of GST).

[14] Mr Ryan takes issue with the reasonableness of the costs incurred by the defendant having particular regard to the fact that the plaintiff discontinued her claim a month prior to the hearing and the fact that the challenge did not proceed.

[15] Reference was made to a number of communications between counsel during the month prior to the filing of the notice of discontinuance. Mr Ropati took issue with Mr Ryan's reference to these communications on the basis that they were expressed to be issued on a without prejudice basis. I accept that they are privileged, and put them to one side. In any event, according to the schedule of attendances, work relating to the drafting of briefs of evidence took place in January 2011, and all attendances in relation to which costs are sought occurred on or before 23 September 2011 (and accordingly well before the issue of a possible discontinuance arose).

[16] Mr Ryan makes the point that the work claimed by the defendant in relation to preparation of briefs of evidence and the common bundle must have been incomplete given that the plaintiff's briefs of evidence had not been filed and the common bundle not agreed. I accept that the draft briefs of evidence would have required some additional attendances once the plaintiff's briefs were received.

Similarly, the bundle of documents could not have been finalised in the absence of Mr Ryan's input. However, I do not consider that the attendances associated with drafting the briefs at an early stage, in the context of a relatively lengthy hearing and in light of the serious allegations levelled against the defendant, is unreasonable. Nor do I consider that early attendances in relation to the preparation of a bundle of relevant documents is unreasonable in the circumstances. The reality is that preparation of the briefs of evidence would have required the relevant documentation to be identified and compiled to ensure an orderly progress to hearing.

[17] I am not prepared to order costs in the defendant's favour in relation to the plaintiff's successful application for a stay. The application was filed on 23 April 2010. On 17 May 2010, the plaintiff paid $9,000 into her solicitor's trust account. The same day, counsel for the plaintiff wrote to counsel for the defendant advising that a bank cheque for $9,000 had been received, and undertaking to hold the money in trust pending the agreement of the parties or further order of the Court.[13] According to the Authority's determination, the defendant filed submissions in opposition some two months later, on 29 July 2010.[14] In the event, the Authority exercised its discretion to grant a stay, noting that there was no prejudice to the defendant.[15] I do not consider that the defendant is reasonably entitled to a contribution to its costs associated with its unsuccessful opposition to the stay application in the circumstances.

[18] I accept that the defendant was put to additional expense responding to an application for an adjournment advanced shortly before the initial hearing date.

[19] I am satisfied that the actual costs cited by counsel for the defendant are reasonable,[16] having regard to the lengthy (two year) history of the proceedings, the nature of the issues raised, the serious nature of the allegations levelled against the defendant, and the amount of documentation that had to be compiled and prepared for the challenge. While these costs were incurred at a relatively early stage, I do not consider that the defendant ought to be penalised for conducting itself in an

[13] AA 35A/10, 2 August 2010 at [6].
[14] At [7].
[15] At [12].
[16] With an appropriate reduction for costs claimed relating to the stay opposition.

organised manner to defend a challenge brought against it, adjourned and then discontinued at a relatively late stage.

[20] Counsel for the plaintiff has not identified any issues that might otherwise indicate that a discount from a 66 percent starting point is warranted. Likewise, and despite the plaintiff's application for adjournment and the proximity of the withdrawal notice to the hearing date, counsel for the defendant has not sought an increase to the starting point. Applying this calculation to costs of $9,748[17] reasonably incurred, a figure of $6,434 is awarded.

[21] The defendant has also sought costs in relation to its application for costs. No issue has been taken with this aspect of the application by counsel for the plaintiff. The defendant is entitled to costs on its application in the sum of $300.

[22] In the circumstances, and having regard to the factors identified, I consider that an award of $6,434 is appropriate by way of a contribution towards the defendant's legal costs. In addition, the defendant is awarded $300 costs on this application. No disbursements are sought and accordingly I do not order them.

Christina Inglis
Judge

[17] Which represents the actual costs claimed, minus an allowance for the costs associated with the defendant's unsuccessful opposition to the application for stay.