

**IN THE EMPLOYMENT COURT
CHRISTCHURCH REGISTRY**

**[2013] NZEmpC 123
CRC 28/12**

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

BETWEEN MARK GROCOTT trading as FLUFFY'S
 ROOF COATINGS
 Plaintiff

AND MILLAN JAMES PARRATT
 Defendant

Hearing: on the papers

Appearances: Philippa Tucker, counsel for the defendant

Judgment: 8 July 2013

COSTS JUDGMENT OF JUDGE A A COUCH

[1] In my judgment dated 22 February 2013,¹ I struck out the plaintiff's claim for want of prosecution. This followed a failure by the plaintiff to comply with a direction to file amended pleadings and a failure to respond to an application by the defendant for an order striking out the proceeding. I reserved costs and invited counsel for the defendant to file a memorandum. Ms Tucker has done that and, although provided with an opportunity to respond, the plaintiff has not done so.

[2] The defendant has been legally aided throughout the proceeding in the Court. Attached to Ms Tucker's memorandum are invoices rendered to the Legal Services Agency for the work done. These total \$3,0007.30 but Ms Tucker very properly acknowledges that parts of these invoices relate to enforcement action and ought not to be taken into account in fixing costs in this proceeding. Making appropriate

¹ [2013] NZEmpC 21.

deductions for that work, the costs incurred for work in this proceeding total \$2,734.34.

[3] I accept that those costs were reasonably incurred. This was a challenge by an unsuccessful employer to the determination of a personal grievance and a claim for arrears of wages. In such circumstances, the conventional form of pleading does not provide a clear picture of the parties' positions and the issues. Accordingly, I directed the defendant to file a "defendant's claim" to which the plaintiff was required to respond. On behalf of the defendant, Ms Tucker complied by filing a detailed and informative document. I also directed a hearing at relatively short notice with a timetable for the provision of briefs of evidence which resulted in significant preparation for hearing being done on behalf of the defendant before it became apparent that the plaintiff might not proceed. The defendant was also put to the trouble of preparing an application to strike out the proceeding with an affidavit and memorandum in support and, subsequently, an affidavit of service.

[4] On behalf of the defendant, Ms Tucker seeks indemnity costs. She relies on regulation 68 of the Employment Court Regulations 2000 and suggests that useful guidance is to be found in Rule 14.6 of the High Court Rules. I agree. Rule 14.6(4) provides:

- (4) The court may order a party to pay indemnity costs if –
 - (a) the party has acted vexatiously, frivolously, improperly or unnecessarily in commencing, continuing or defending a proceedings or a step in a proceeding; or
 - (b) the party has ignored or disobeyed an order or direction of the court or breached an undertaking given to the court or another party...

[5] In this case, Ms Tucker submits that the plaintiff's failure to comply with my direction to file an answer to the defendant's claim falls within paragraph (4)(b) above. I agree.

[6] Ms Tucker also submits that, by commencing this proceeding and then failing to prosecute it, the plaintiff has acted improperly and unnecessarily, bringing

paragraph (4)(a) into play. In the absence of any explanation by the plaintiff for ceasing his involvement with the proceeding he commenced, I accept that submission.

[7] Another factor Ms Tucker relies on is that the parties agreed terms of settlement subject only to the plaintiff placing the necessary funds into trust prior to signing. The plaintiff failed to provide the money and the agreement lapsed. As this conditional agreement was reached well after the application to strike out was made, the plaintiff's failure to complete it cannot have added significantly to the defendant's costs and I place little weight on this factor.

[8] I have also had regard to the apparent merits of the plaintiff's challenge. In its determination,² the Authority concluded that the Defendant had been unjustifiably dismissed and that he was owed arrears of wages. Of the total remedies of just over \$30,000 awarded, nearly \$23,000 was for arrears of wages. In the statement of claim originally filed by the plaintiff, he challenged the whole of the determination and sought a hearing de novo but made allegations of fact relating solely to the personal grievance. In the absence of any amended pleading of his claim disclosing a defence to the wages claim, the inference to be drawn is that the plaintiff's challenge to the Authority's order to pay the arrears of wages was vexatious.

[9] The starting point for an award of costs in this Court is usually two thirds of the costs actually and reasonably incurred but the Court has a discretion to increase or decrease that to reflect the circumstances of the particular case. The discretion to award indemnity costs is to be exercised sparingly and only in cases where it is truly appropriate. I think this is such a case.

[10] The plaintiff is ordered to pay the defendant \$2,734.34 for costs.

A A Couch
Judge

Signed at 11.10 am on 8 July 2013.

² [2012] NZERA Christchurch 127,