

**IN THE EMPLOYMENT COURT  
CHRISTCHURCH REGISTRY**

**[2013] NZEmpC 124  
CRC 37/12**

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

BETWEEN                      SUPERIOR MOTOR CYCLES LIMITED  
   Plaintiff

AND                                ROBERT STANLEY PATTERSON  
   Defendant

Hearing:                      on the papers - memorandum received 4 April 2013

Appearances:                Defendant in person.

Judgment:                    8 July 2013

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**COSTS JUDGMENT OF JUDGE A A COUCH**

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[1]      The defendant was employed by the plaintiff as a motor cycle salesman from October 2007 until he was dismissed on grounds of redundancy on 22 April 2011. He pursued personal grievances alleging that his dismissal was unjustifiable and that, prior to his dismissal, his employment had been affected to his disadvantage by the unjustifiable actions of the plaintiff. The Employment Relations Authority sustained the defendant's claims and awarded him remedies totalling \$18,750.<sup>1</sup>

[2]      The plaintiff challenged the whole of that determination and sought a hearing de novo. The plaintiff also sought a stay of execution of the orders made by the Authority. That was fully argued and the application dismissed in my interlocutory judgment dated 21 November 2012.<sup>2</sup> The matter was then set down for hearing on

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<sup>1</sup> [2012] NZERA Christchurch 199.

<sup>2</sup> [2012] NZEmpC 196.

13 March 2013 and a timetable order made for the provision on briefs of evidence and other pre-trial steps.

[3] On 1 February 2013, counsel for the plaintiff filed a notice of discontinuance. That was done unilaterally and was not accompanied by any agreement as to costs. The defendant subsequently filed an application for costs. When no response to this memorandum was received, I had the Registrar enquire of counsel for the plaintiff what its position was. The Registrar was told that the plaintiff did not intend to respond to the memorandum.

[4] The defendant was represented by counsel, Linda Ryder, throughout the proceeding until the notice of discontinuance was filed. He has provided an invoice showing that he was charged \$4,600, including GST, for Ms Ryder's work on his behalf.

[5] The conventional approach to assessing costs in this Court is to take a starting point of two thirds of the costs actually and reasonably incurred and to then adjust that up or down according to the circumstances of the case.

[6] I accept that the costs actually incurred by the defendant were \$4,600. The question then is the extent to which those costs were reasonable. Where an application for costs is made by counsel or a professional advocate, the Court expects to be provided with sufficient information to make that assessment. This case is unusual in that, although the defendant was represented throughout, the application for costs is made by him in person and, unsurprisingly, the information indicating how the costs were incurred is limited to the narration on the invoice from Ms Ryder's firm. Given the history of the matter and my involvement with it throughout, however, I am in a good position to assess the amount and quality of the work reasonably required to have been done on the defendant's behalf and can, on that basis, assess the reasonableness of the costs he has incurred. While it seems to me that the costs incurred were relatively high for the work involved, they were within the range of what is reasonable.

[7] Turning to the manner in which the litigation was conducted, the major factor must be the fact that the plaintiff discontinued the proceeding for no stated reason at a relatively late stage after causing the defendant to incur considerable cost in responding to it. In persisting with the matter as long as it did, the plaintiff failed to comply with my original direction to file and serve briefs of evidence by 14 December 2012 and then sought an extension of time. When an extension to 8 February 2013 was granted, the plaintiff discontinued the proceeding on 1 February without providing any evidence. This lack of documentation may be contrasted with the relatively extensive affidavit and submissions filed in support of the earlier application for a stay of execution. In his affidavit in support of the stay, the managing director of the plaintiff said that the company was in a precarious financial position. In the absence of any other explanation, the inference I draw from this is that the challenge was initiated more in the hope of delaying payment of the money ordered by the Authority than on the basis of a sound case on the merits.

[8] On this basis, it might be said that the proceeding as a whole was improper or even vexatious. Under the High Court Rules,<sup>3</sup> that would be grounds for ordering the payment of indemnity costs. The discretion to award indemnity costs is, however, to be exercised sparingly and only in cases where it is truly appropriate. I am not satisfied that this case quite merits such an award. Rather, I make an award based on 90 per cent of the costs incurred.

[9] The plaintiff is to pay the defendant \$4,140 for costs.

AA Couch  
Judge

Signed at 3.30 pm on 8 July 2013.

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<sup>3</sup> Rule 14.6(4).