IN THE EMPLOYMENT COURT
AUCKLAND

[2013] NZEmpC 45
ARC 58/12

IN THE MATTER OF	an application for special leave to remove proceedings
AND IN THE MATTER OF	an application for costs
BETWEEN	NISHA ALIM Plaintiff
AND	LSG SKY CHEFS NEW ZEALAND LIMITED Defendant

Hearing: Submissions filed on 14 December 2012 and 15 January 2013

Counsel: Anthony Drake, counsel for plaintiff
Joanne Douglas, counsel for defendant

Judgment: 25 March 2013

COSTS JUDGMENT OF JUDGE B S TRAVIS

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[1] On 31 August 2012 I issued a judgment[1] concerning the plaintiff's application for special leave to remove a matter to the Employment Court from the Employment Relations Authority (the Authority). That application was accompanied by an application for urgency.

[2] I declined the application for urgency for the reasons set out in that judgment and reserved costs.

[3] On 19 October 2012 the Court was advised by the solicitors for the plaintiff that the plaintiff would not be pursuing the application for special leave.

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[1] [2012] NZEmpC 147.

[4] On 14 December Ms Douglas, counsel for the defendant, filed a memorandum advising that the parties were unable to agree on costs and seeking a contribution towards its costs on the application in the sum of $500.

[5] Ms Douglas's memorandum refers to the three leading Court of Appeal cases *Victoria University of Wellington v Alton-Lee*,[2] *Binnie v Pacific Health Ltd*,[3] and *Health Waikato Ltd v Elmsly.*[4] She submitted that costs may be awarded in cases where a notice of discontinuance is filed prior to a substantive hearing, citing *Kelleher v Wiri Pacific Ltd*,[5] in which the Court stated, after accepting it had the jurisdiction to make an award:[6]

> … 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, the starting point cannot, as a matter of principle, be that she can do so with immunity from costs. That would be inconsistent with the principle that costs generally follow the event.

[6] Ms Douglas admitted that there was no reason to depart from the normal rule in this case, that costs should follow the event.

[7] Ms Douglas set out the costs incurred of $687.50 plus GST, which equates to 2.5 hours at $275 per hour, and submitted that these were reasonable in all the circumstances. Counsel for the defendant had filed a notice of opposition, a memorandum of counsel and then attended a telephone directions conference.

[8] Ms Douglas submitted that the 31 August judgment of the Court declined the application for urgency because it could not deal with the application for special leave until the Authority had determined the matter. She observed that the application had been filed by the plaintiff without supporting affidavits or sufficient relevant information to enable the Court to make a decision on the merits. The removal application was eventually declined by the Authority, that determination

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[2] [2001] ERNZ 305 (CA).
[3] [2002] 1 ERNZ 438 (CA).
[4] [2004] 1 ERNZ 172 (CA).
[5] [2012] NZEmpC 98.
[6] At [11].

was not challenged and the plaintiff indicated that a notice of discontinuance would be filed.

[9] In response Mr Drake, counsel for the plaintiff submitted that the defendant should not be awarded any costs. He submitted that costs are discretionary and not a punishment to be imposed on a losing party, but were compensatory. He relied on *New Zealand Airline Pilots' Association IUOW v Registrar of Unions*[7] where it was held that the Court can take into account whether the conduct of a party to the litigation has added or unnecessarily added to the costs incurred by the other party.

[10] Mr Drake submitted that the plaintiff had not unnecessarily or unreasonably added to the costs of the defendant and the application for removal was genuine and not frivolous or vexatious. He submitted that parties to a genuine dispute should not be discouraged or penalised from seeking a review by the Court in relation to the Authority's exercise of power. He submitted there were important questions of law that could have been involved. Mr Drake set out a chronology of the events leading to the application for removal and submitted, citing *Kroma Colour Prints Ltd v Tridonicatco NZ Ltd*[8] that a Court:

> … would not speculate on respective strengths and weaknesses of the parties' cases.

[11] Mr Drake then submitted that there were just and equitable circumstances not to apply the presumption regarding discontinued proceedings. He noted that the plaintiff had disclosed her reasons for discontinuing the proceedings rather than simply withdrawing her application and that was because she was not in a position to incur further costs. He also confirmed that she would not be pursuing the application for special leave to remove the matter before the hearing date had been set and before the defendant incurred the costs of preparing for the hearing. He submitted therefore that to award costs would be punitive rather than compensatory and it would be unfair in that she would incur costs because she discontinued proceedings to avoid incurring further costs.

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[7] [1989] ERNZ Sel Cas 304.
[8] [2008] NZCA 150; (2008) 18 PRNZ 973 at [12].

[12] Mr Drake noted that no hearing was convened for this matter and that it was dealt with by telephone conference and there was nothing therefore in the plaintiff's conduct that merited a costs award and costs should lie where they fall.

[13] I accept counsel for the defendant's submissions but I do not accept those for the plaintiff. The application brought by the plaintiff caused the defendant to incur costs which I find were reasonable and the plaintiff then discontinued the proceedings. Regardless of the ultimate merits of the matter, which cannot be determined because of the plaintiff's actions in discontinuing, the fact remains that the defendant was successful in opposing the application and costs should follow the event. There is no evidence that the plaintiff is unable to meet the level of costs sought in this case.

[14] The claim was modest, and, taking into account the costs of preparing the memorandum for costs, I award the defendant $500 as a contribution towards its costs in this matter.

B S Travis
Judge

Judgment signed at 4.15 pm on 25 March 2013