

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

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

**[2022] NZEmpC 224
EMPC 397/2019**

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

AND IN THE MATTER OF an application for costs

BETWEEN AHMED ALKAZAZ
 Plaintiff

AND ENTERPRISE IT LIMITED
 Defendant

Hearing: On the papers

Appearances: Plaintiff in person
 R Bryant, counsel for defendant

Judgment: 7 December 2022

COSTS JUDGMENT OF CHIEF JUDGE CHRISTINA INGLIS

[1] This judgment deals with an application for costs following the discontinuance of a costs challenge.

[2] A brief explanation of the background to the application is necessary. Mr AlKazaz filed a challenge to a substantive determination of the Authority declining an application to reopen an investigation.¹ That challenge was dismissed.² Mr AlKazaz also filed a challenge to the Authority's costs determination. That challenge has not

¹ *AlKazaz v Enterprise IT Ltd* [2017] NZERA Auckland 400 (Member Craig); *AlKazaz v Enterprise IT Ltd* [2019] NZERA 560.

² *AlKazaz v Enterprise IT Ltd* [2020] NZEmpC 171.

been finally disposed of. Mr AlKazaz filed what was said to be a conditional notice of discontinuance in respect of that challenge.

[3] I issued a minute on 11 October 2022 noting that Mr AlKazaz had stated that he wished to reserve the right to pursue his challenge to the costs determination if a perjury claim he is seeking to bring against witnesses in the original Authority investigation succeeds. The minute set out the applicable High Court Rules relating to discontinuance, including:

- Rule 15.21: discontinuance takes effect as soon as notice is given under Rule 15.19, but does not provide for a conditional discontinuance;
- Rule 15.23: unless the defendant agrees or the Court otherwise orders, a plaintiff who discontinues a proceeding must pay costs to the defendant of and incidental to the proceeding up to and including the discontinuance; and
- Rule 15.24: a plaintiff who discontinues a proceeding may not commence another proceeding against the defendant if the proceeding arises out of facts that are the same or substantially the same as the discontinued proceeding unless the plaintiff has paid any costs ordered to be paid on the discontinuance.

[4] The minute recorded that Mr AlKazaz would be able to bring the costs challenge back before the Court at a later date if he paid any costs ordered on the discontinuance. A period of time was given to the parties to be heard further on the issues raised in the minute and noted that, if they did not wish to be heard further, the challenge would be treated as having been discontinued and I would proceed to determine costs on the discontinuance. Neither party advised that they wished to be heard further on the matters raised in the minute of 11 October 2022. Both parties have filed submissions in respect of costs on the discontinuance; and this judgment resolves that issue.

[5] The defendant seeks a contribution to costs of \$13,746.52. That figure is calculated on a Category 2, Band B basis, with an uplift to reflect wasted costs said to

have been incurred on various interlocutory matters prior to the notice of discontinuance being filed. Mr AlKazaz submits that costs ought to be calculated on a Band A, Category 1 basis and that no uplift is appropriate in the circumstances. He submits that there are a number of matters (which I will come to) which ought to be weighed in any consideration of an appropriate quantum of costs.

[6] The proceedings were assigned a costs categorisation at the initial directions conference and following discussion with the parties.³ That categorisation was 2B. I do not exclude the possibility that there may be circumstances in which the original categorisation might appropriately be adjusted, but I am not satisfied that an adjustment is required in this case. I proceed on that basis.

[7] The defendant seeks costs on four interlocutory applications which it says related to the discontinued costs challenge, namely:

- (a) an application advanced by Mr AlKazaz for a stay of execution of the Authority's costs determination pending the costs challenge (the stay application);⁴
- (b) an application advanced by Mr AlKazaz to strike out counsel (the strike out application);⁵
- (c) an application advanced by the company for further security for costs (the application for security for costs);⁶ and
- (d) an application advanced by Mr AlKazaz to recall or rehear a number of earlier judgments (the recall/rehearing application).⁷

[8] The first issue is whether the claimed costs arose on the discontinued costs challenge. Mr AlKazaz submits that some of them did not, and ought to be discounted

³ *AlKazaz v Enterprise IT Ltd* EmpC Auckland, 14 May 2020 (Minute) at [15].

⁴ *AlKazaz v Enterprise IT Ltd (No 6)* [2020] NZEmpC 186.

⁵ *AlKazaz v Enterprise IT Ltd (No 8)* [2021] NZEmpC 43.

⁶ *AlKazaz v Enterprise IT Ltd (No 8)*, above n 5.

⁷ *AlKazaz v Enterprise IT Ltd (No 11)* [2022] NZEmpC 15.

on this basis. He specifically refers to the application for further security for costs and the application to recall, which he submits were related to the substantive proceedings (the challenge to the Authority's substantive determination). I agree with Mr AlKazaz that if some of the claimed costs were not incurred on the costs challenge they ought to be excluded from the current assessment. That is because the issue now before the Court is confined to costs on the discontinuance.

[9] As the recall/rehearing judgment records, Mr AlKazaz's application was multifaceted, and directed at both an interlocutory judgment issued in the context of the costs challenge (the stay of proceedings application) and the substantive judgment of the Court.⁸ Costs were reserved. In the particular circumstances I consider it appropriate to make an allowance to costs sought in respect of the recall application to reflect that fact.

[10] I do not accept that the application for further security for costs related to the substantive challenge. It is true that security for costs had been ordered on that challenge, but the further security sought by the company arose in the context of the costs challenge, was dealt with on that basis and costs on it should be factored into the determination of costs now before the Court.

[11] Mr AlKazaz's stay application was dealt with on the papers.⁹ The company opposed the application but submitted, by way of fall-back position, that if the stay was granted it should be on conditions. That appears to have been consistent with a position earlier agreed between the parties, although the information before the Court is not complete and I am unable to draw firm conclusions from it. In the event I considered that the parties' identified interests could best be met by ordering a stay of execution on the condition that Mr AlKazaz deposited the sum of \$7,000 into the Employment Court (reflective of the amount ordered by the Authority by way of costs), such sum to be paid out, with interest, on further order of the Court. Having regard to the overall circumstances, including the outcome, I consider that costs ought to lie where they fell on this application.

⁸ *AlKazaz v Enterprise IT Ltd (No 11)*, above n 7, at [1].

⁹ *AlKazaz v Enterprise IT Ltd (No 6)*, above n 4.

[12] The strike out application and the application for further security for costs were dealt with together. I declined Mr AlKazaz's strike out application, finding that there was no evidential basis for it. I accept that costs should follow the event.

[13] The application for further security for costs was granted. I agree that costs should follow the event.

[14] The final application relates to a judgment delivered on 8 February 2022, in which Mr AlKazaz's application for recall of my earlier interlocutory judgment (declining to stay the costs challenge pending the outcome of an appellate process) or a rehearing of that application was dismissed. I accept that costs should follow the event in respect of this unsuccessful application. I consider that a 50 per cent allowance should be made to reflect the costs which are relevant to the application now before the Court (as discussed above).

[15] Applying Guideline scale costs to each application leads to the following:

- Stay application – nil
- Strike out application - \$3,824.00
- Security for costs application - \$3,824.00
- Recall application - \$3,824.00 – 50 per cent = \$1912.00

[16] That leads to a starting point of \$9,560.00.

[17] As I have said, the defendant seeks an uplift from the starting point. I agree that an uplift is appropriate in respect of the application to strike out counsel. The application was wholly without merit and put the defendant to unnecessary wasted cost. The defendant incurred actual costs of \$4,117.76. In the particular circumstances I consider that an award of costs of \$4,100.00 (rounded down) is appropriate on this application.

[18] The company also seeks costs on a further application advanced by Mr AlKazaz, namely in respect of the company's identity. While the identity issue was referred to in the proceedings at issue in this judgment, it was formally advanced and dealt with in other proceedings.

[19] I accept that the way in which the proceedings were pursued prior to discontinuance was not entirely straightforward and involved a level of engagement that might otherwise not have been necessary. However, having reviewed the file I consider that scale costs represent a reasonable contribution to the defendant's costs on these applications and do not propose to adjust them in the manner sought.

[20] I turn to consider whether any further adjustment is appropriate. I accept Mr AlKazaz's submission, which is not controversial, that costs are not to be used as a punishment. I accept too that he has found aspects of the process confusing. Mr AlKazaz has not been represented throughout the proceedings and is not legally qualified. This has, I accept, contributed to additional costs being incurred which might otherwise have been avoided. I am not however persuaded that it is appropriate to reduce the costs I would otherwise have ordered having regard to such factors. The company's interests must also be considered, and it has been put to the time, trouble and expense of responding to the costs challenge to the point of discontinuance. It is entitled to a reasonable contribution to its costs, which I have assessed above.

[21] Mr AlKazaz has placed material before the Court in respect of various settlement discussions, including discussions which took place a number of years ago. I do not consider that the material assists in determining costs on the discontinuance of the costs challenge and put it to one side.

[22] That leads to an order of costs on the discontinuance of \$9,800.00 (rounded down).

[23] The parties are agreed that the amount of \$7,000.00 plus interest, held as security with the Court on the security for costs application, may be paid out. Mr AlKazaz asks that it be paid to the company in partial satisfaction of any costs order

made against him. That is appropriate. The Registrar is accordingly directed to make payment of the \$7,000.00 plus any interest accrued on that amount to the company; Mr AlKazaz is to make payment of the residual amount ordered against him to the company within 21 days of the date of this judgment.

[24] The defendant did not seek costs on its application for costs and none are ordered.

Christina Inglis
Chief Judge

Judgment signed at 11.00 am on 7 December 2022