IN THE EMPLOYMENT COURT OF NEW ZEALAND
AUCKLAND

I TE KŌTI TAKE MAHI O AOTEAROA
TĀMAKI MAKAURAU

[2019] NZEmpC 111
EMPC 82/2019

IN THE MATTER OF	an application for leave to extend time to file a challenge to a determination of the Employment Relations Authority
AND IN THE MATTER OF	an application for costs
BETWEEN	SAM WARD Applicant
AND	CONCRETE STRUCTURES (NZ) LIMITED First Respondent
AND	PERPETUAL GUARDIAN TRUST Second Respondent

Hearing: On the papers

Appearances: R Bryant, counsel for applicant
KA Badcock, counsel for respondents

Judgment: 27 August 2019

COSTS JUDGMENT OF CHIEF JUDGE CHRISTINA INGLIS

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[1] The issue now before the Court is an application for costs by the first respondent following Mr Ward's discontinued application for leave to extend time to file a challenge. I directed that costs on the discontinuance be determined at this stage, rather than reserved pending determination of the respondents' challenge. It was agreed that the application could be dealt with on the papers.

[2] The first respondent seeks full costs incurred in responding to the application for leave. I accept, having regard to the material before the Court, that the first

respondent has incurred actual costs of $4,140, based on $450 per hour plus GST. It is said that full costs, rather than the usual contribution, are appropriate because the applicant has a history of causing costs to be unnecessarily incurred and failing to meet the consequences of doing so.

[3] The applicant's primary submission is that no award of costs would be appropriate, because of the matters set out in an affidavit sworn by Mr Ward. The affidavit states that his previous representative filed the proceeding without Mr Ward's knowledge or instruction. It is submitted that a nil award would sit comfortably with the Court's broad discretion as to costs and principles of equity and good conscience. In the alternative, the applicant submits that the costs claimed by the first respondent are unreasonable and excessive. If costs are awarded in the first respondent's favour, a figure of no more than $370 is said to be appropriate.

[4] I am not drawn to the applicant's primary submission that costs should not be awarded against him because his advocate is said to have filed the application for leave to extend time to file a challenge without his knowledge or instructions. The fundamental purpose of a costs award is to contribute to the costs incurred by the successful party. Costs on a discontinuance usually follow the event. The first respondent was not at fault and it is not appropriate that it effectively be penalised for the difficulties said to have been associated with Mr Ward's previous representative. If the difficulties are as Mr Ward says, there may be other avenues of redress available to him.

[5] I am not drawn to the first respondent's submission that it should be entitled to actual costs because of previous alleged failings to meet costs awards and alleged actions and omissions unnecessarily increasing costs. While the Court may, in certain circumstances, award actual costs, that is not the usual course. I am not satisfied, on the basis of the information before the Court, that an award of actual or uplifted costs is appropriate and I decline to award them.

[6] The parties are at odds over the steps that were reasonably required in response to the application to extend time. Having reviewed matters, I am satisfied that the relevant steps are:

(a) The preparation, filing and service of a notice of opposition, together with an affidavit in support;

(b) the preparation of a memorandum of counsel for the telephone directions conference on 15 July 2019 at which (amongst other things) the application for leave was discussed; and

(c) the preparation, filing and service of two memoranda of counsel in respect of costs on the discontinuance.

[7] In determining an appropriate contribution to costs the Court often finds it helpful to apply the Court's costs guideline scale.[1] Applying the scale in this case would result in a higher figure than I consider is appropriate, having regard to what was reasonably required in terms of responding to the application for leave. It was a basic application and did not require a detailed response. The affidavit filed in support of the opposition was very brief (eight paragraphs long). The telephone conference was brief, and only a proportion of it related to the application for leave. Standing back, I consider that a contribution of $1,000 is appropriate in the particular circumstances.

[8] The applicant must pay this amount to the first respondent within 28 days of the date of this judgment.

Final comment

[9] Mr Ward has raised serious concerns about the alleged conduct of his previous representative in an affidavit filed in support of his position on costs. That representative has not had an opportunity to respond to the concerns and, in the event, I have not found it necessary to place any weight on them when settling on an appropriate quantum of costs.

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[1] Employment Court Practice Directions at 18 <www.employmentcourt.govt.nz/legislation-and-rules.

[10] I do, however, wish to make a general observation about concerns of this sort, which regrettably arise on a not infrequent basis and which highlight a broader issue in this jurisdiction.

[11] Advocates are entitled to appear on behalf of their clients in the Authority and the Court under the Employment Relations Act 2000.[2] No regulatory framework currently exists to address any issues of competence. Nor does a complaints mechanism exist. The New Zealand Law Society, which oversees such matters in respect of lawyers, has no role to play in relation to employment advocates.

[12] The short point is there is a limit to the extent to which the Court can appropriately address professional standards issues which arise in respect of the conduct of some (certainly not all) advocates and which impact on often vulnerable litigants, the opposing party and more generally in terms of the efficient and effective administration of justice. The alleged difficulties in this case neatly illustrate the point. All of this is, of course, a matter for Parliament if it so chooses, not the Court.

Christina Inglis
Chief Judge

Judgment signed at 2.30 pm on 27 August 2019

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2 Employment Relations Act 2000, sch 3, cl 2.