IN THE EMPLOYMENT COURT OF NEW ZEALAND
AUCKLAND

I TE KŌTI TAKE MAHI O AOTEAROA
TĀMAKI MAKAURAU

[2019] NZEmpC 29
EMPC 160/2018

IN THE MATTER OF	an application for an injunction and an interim injunction
AND IN THE MATTER OF	an application for costs
BETWEEN	WENDCO (NZ) LIMITED Plaintiff
AND	UNITE INC. Defendant

Hearing:	On the papers
Appearances:	T Oldfield, counsel for plaintiff P Cranney, counsel for defendant
Judgment:	21 March 2019

COSTS JUDGMENT OF CHIEF JUDGE CHRISTINA INGLIS

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[1] These proceedings first came before the Court by way of an application for interim orders. That was dealt with in a judgment dated 12 June 2018.[1] Costs on the application were reserved. The matter then progressed towards a substantive hearing. The hearing never eventuated because the parties resolved matters following facilitation. The plaintiff subsequently filed a notice of discontinuance. While it is not uncommon for parties to agree costs on a discontinuance, that did not occur in this case. The defendant now seeks costs against the plaintiff; the plaintiff seeks costs against the defendant. It is the issue of costs following the plaintiff's discontinuance that is now before the Court.

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1 *Wendco (NZ) Ltd v Unite Inc* [2018] NZEmpC 65 (oral); [2018] NZEmpC 67 (reasons).

[2] These proceedings were provisionally assigned category 2B for costs purposes according to the guideline scale the Court has developed to assist it in exercising its discretion.[2] As the guidelines make clear, they are not designed as a straightjacket. The Court has a broad discretion to award costs as it thinks reasonable.[3] The discretion must be exercised on a principled basis.

[3] I accept that the defendant incurred costs up to the date of discontinuance in defending the plaintiff's claim. Applying the guideline scale, those costs amounted to $26,091 (a total which excludes the costs associated with the interim injunction, for which no claim is made by the defendant).

[4] No specific procedure has been provided for in relation to costs on a discontinuance under either the Employment Relations Act 2000 or the Employment Court Regulations 2000. That means that the Court must look to dispose of the case as nearly as may be practicable in accordance with the provisions of the High Court Rules 2016.[4] High Court r 15.23 provides that, unless the defendant otherwise agrees or the Court otherwise orders, a plaintiff who discontinues a proceeding against a defendant must pay costs to the defendant of and incidental to the proceeding up to and including the discontinuance. While there remains a discretion under r 15.23, the onus is on the discontinuing plaintiff to persuade the Court to exercise the discretion in its favour.[5] The Court of Appeal has made it clear that the presumption that costs are to be paid is not lightly displaced.[6]

[5] The nub of the plaintiff's submission is that the onus has been displaced for two reasons – first because it ought to be regarded as the "winning" party, and second because of its conduct in actively seeking to resolve matters. In this regard it is said that it applied for facilitated bargaining, and it was the facilitated bargaining process which led to the conclusion of collective bargaining and a new collective agreement.[7]

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2 Employment Court Practice Directions at 18 <www.employmentcourt.govt.nz/legislation-and-rules>.
3 Employment Relations Act 2000, sch 3, cl 19.
4 Employment Court Regulations 2000, reg 6(2).
5 *Powell v Hally Labels Ltd* [2014] NZCA 572 at [21].
6 *Yarrall v Earthquake Commission* [2016] NZCA 517, [2016] 23 PRNZ 765 at [12], confirmed in *Taranaki Galvanisers Ltd v Udderfield Ltd* [2018] NZCA 297 at [16].
7 *Wendco v Unite Inc* [2018] NZERA Auckland 197 (determination referring the parties to facilitation).

It was this successful conclusion, which the plaintiff says it was instrumental in achieving, that prompted discontinuance of the claim. The plaintiff draws a contrast with the defendant's conduct, which is characterised as obstructive and unhelpful. Particular reference is made to the defendant's refusal to give undertakings that it would not picket on the plaintiff's property. Wendco submits that this was unreasonable and ought to be taken into account in fixing costs in its favour. In the alternative, it should at least be entitled to costs on the interim injunction application, where it was the successful party, and that costs should lie where they fall on the substantive proceedings. The plaintiff refers to *Small v A Judicial Committee*[8] and *Coromandel Heritage Protection Society Inc v Thames Coromandel District Council* in support of this submission. The latter case can be put to one side, as the costs judgment was reversed on appeal.[9]

[6] I start with costs on the application for interim orders. Because the notice of discontinuance does not deal with costs in these proceedings at all, I consider it appropriate that costs on this interlocutory step be resolved. I see no reason why the plaintiff ought not to be awarded costs and I did not understand Mr Cranney, counsel for the defendant, to put forward any argument to the contrary. Indeed, his calculations as to costs expressly excluded the costs associated with the interim orders, which were reserved by this Court. Mr Oldfield, counsel for the plaintiff, identified the costs sought in respect of the interim orders application calculated in accordance with the guideline scale. Those costs amount to $5,200 (rounded down). I accept that this is a reasonable contribution for the defendant to make towards the plaintiff's costs on the interim orders application.

[7] Costs on the discontinuance of the substantive claim fall into a different category. While I accept that there are cases in which it may be appropriate for a discontinuing plaintiff nevertheless to be awarded a contribution to its costs, I do not accept that this case is one of them, based on the material before the Court. I am unable to discern the basis for the characterisation of the outcome of these proceedings

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8 *Small v A Judicial Committee*, HC Christchurch CIV-2009-409-2622, 20 April 2010.

9 The High Court judgment referred to is *Coromandel Heritage Protection Society Inc v Thames Coromandel District Council*, HC Hamilton CIV-2007-419-1649, 11 February 2008. But see the subsequent Court of Appeal judgment: *Thames-Coromandel District Council v Coromandel Heritage Protection Society Inc* [2009] NZCA 204, (2009) 19 PRNZ 365.

(other than the outcome of the interim orders application which I have already dealt with) as a 'win' for the plaintiff and a 'loss' for the defendant. *Small* arose in a very different factual context, and I do not accept that it casts any real light on the approach that ought to be adopted in this case. Nor am I prepared to infer, based on limited information, that the defendant acted in an unreasonable and objectionable manner by refusing to give the undertakings sought. In any event, costs are not a mechanism for punishing a party for its conduct outside the proceeding.[10] The plaintiff has not done enough to persuade me that it should be entitled to costs on its discontinuance.

[8] Should the defendant be awarded costs? The presumption contained in HCR 15.23, that the discontinuing party pay the costs of the other party up to the date of discontinuance, is not easily displaced.[11] However, case law establishes that there are circumstances where it is just and equitable that the defendant should not receive an award of costs.[12] One of those is the circumstances in which the plaintiff elects to discontinue the proceedings, specifically where "a change in circumstances may render the proceeding irrelevant or unnecessary."[13]

[9] It appears (from the Authority's determination) that both parties sought the assistance of the Authority in resolving the difficulties they were having in concluding a new collective employment agreement, and both agreed to a referral to facilitation.[14] The reality is that discontinuance became an inevitability given the outcome of that mutually agreed process. Having regard to all of the surrounding circumstances, I consider it appropriate that costs lie where they fall. An order that each party bears its own costs, in this particular case, appears to me also to sit comfortably with the underlying objects of the Act and the Court's role in supporting successful employment relationships.

[10] Finally, I endorse an earlier observation made by Judge Shaw in *Swales v AFFCO New Zealand Ltd*, namely that where parties to an employment relationship

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10 *Thames-Coromandel District Council* (CA), at [13].
11 *Yarrall v The Earthquake Commission* [2016] NZCA 517, (2016) 23 PRNZ 765 .
12 *Kroma Colour Prints Ltd v Tridonicatco NZ Ltd* [2008] NZCA 150, (2008) 18 PRNZ 973 at [12]. At [12] The Court of Appeal also recognised that the Court's general discretion as to costs could override the general principles relating to discontinuance.
13 *Walker v Henderson* [2018] NZHC 59 at [5].
14 *Wendco v Unite Inc,* above n 7, at [1].

seek resolution of their differences through settlement processes, they might usefully consider costs on discontinuance as part of that settlement.[15]

[11] I make the following orders:

(a) The defendant is ordered to pay a contribution to the plaintiff's costs on the interim injunction proceedings in the sum of $5,200.

(b) Costs on the substantive matter are to lie where they fall.

[12] I make no order for costs on the application for costs.

Christina Inglis
Chief Judge

Judgment signed at 12.30 pm on 21 March 2019

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[15] *Swales v AFFCO New Zealand Ltd* EmpC Auckland AC90/99, 15 November 1999; see also *Emslie v Buchanan* (1907) 26 NZLR 1308 (SC) at 1310, where the litigation was settled on a basis requiring discontinuance, and the Court inferred the existence of an agreement that no costs would be paid.