IN THE EMPLOYMENT COURT OF NEW ZEALAND
AUCKLAND

I TE KŌTI TAKE MAHI O AOTEAROA
TĀMAKI MAKAURAU

[2019] NZEmpC 44
EMPC 154/2017
EMPC 207/2017

IN THE MATTER OF	proceedings removed from the Employment Relations Authority
AND IN THE MATTER OF	an application for costs
BETWEEN	KIERON CLARKE First Plaintiff
AND	SCOTT CLARKE Second Plaintiff
AND	GEA PROCESS ENGINEERING LIMITED Defendant

Hearing:	On the papers
Appearances:	S Hornsby-Geluk, counsel for first and second plaintiffs S Langton, counsel for defendant
Judgment:	12 April 2019

COSTS JUDGMENT OF JUDGE M E PERKINS

Introduction

[1] These proceedings, which arose from complicated procedural issues, have been removed to the Court by way of a determination of the Employment Relations Authority (the Authority) dated 27 June 2017.[1] The proceedings are collateral to a substantive claim between GEA Process Engineering Ltd (GEA) and Tony Schicker. At the same time as the Authority removed this collateral dispute between Kieron and

[1] *GEA Process Engineering Ltd v Schicker* [2017] NZERA Auckland 183 (first determination).

Scott Clarke (the Clarkes) and GEA, it also dismissed the substantive proceedings between GEA and Mr Schicker. Both decisions were contained in one determination of the Authority.

[2] That part of the determination which dismissed the proceedings between GEA and Mr Schicker is now the subject of a challenge. A further challenge has been filed against two further determinations of the Authority. The first of these later determinations (the second determination) related to an unsuccessful attempt at recusal of the Authority Member dealing with the disputes.[2] The second of these later determinations (the third determination) declined an application by GEA to reopen the investigation meeting after the proceedings had been dismissed.[3]

[3] The challenges against the Authority's dismissal of the recusal application and the refusal to reopen the investigation are set down for a formal proof hearing on 15 April 2019. Those challenges are not defended by Mr Schicker, he notifying that he will abide the decision of the Court. He will defend the substantive claims against him by GEA when they finally proceed. There is no need to go into the intricacies of the challenges in this judgment. Depending upon the outcome of the formal proof hearing, the substantive proceedings between GEA and Mr Schicker will need to proceed either by hearing in the Court or by being referred to the Authority.

[4] While the proceedings between GEA and Mr Schicker were progressing in the Authority, an issue arose as to disclosure of documents. This issue initially appeared to be resolved by the Authority treating the request for disclosure as a request for disclosure of documents from non-parties, namely the plaintiffs in the present proceedings, the Clarkes. The process which the Authority adopted to deal with the disclosure request against the non-parties was described by the Authority to be a process like that for discovery by non-parties prescribed in the High Court Rules 2016.

[5] As a result of the disclosure request against the Clarkes, and before the substantive proceedings before GEA and Mr Schicker were dismissed, the Clarkes claim to have incurred substantial legal costs totalling $159,037.34 (including GST)

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2 *GEA Process Engineering Ltd v Schicker* [2017] NZERA Auckland 380 (second determination).
3 *GEA Process Engineering Ltd v Schicker* [2018] NZERA Auckland 185 (third determination).

in carrying out the request for non-party disclosure against them. The Clarkes made a claim in the Authority for reimbursement by GEA of these substantial legal costs incurred. It was this dispute which was then removed to the Court at the time of the substantive proceedings between GEA and Mr Schicker being dismissed.

[6] Once the claims by the Clarkes against GEA for reimbursement of the legal costs were removed to the Court, directions were given requiring the Clarkes to file a formal statement of claim. A statement of defence by GEA was then filed. At a directions conference on 1 October 2018, the proceedings were set down for a hearing. Timetabling directions were made to enable the matter to proceed to a hearing in the Court. A fixture lasting three days commencing on 3 April 2019 was allocated. The timetabling directions required the preparation of briefs of evidence and a common bundle of documents. Since an issue would arise as to whether the legal costs incurred were fair and reasonable if liability was found in favour of the plaintiffs, it was clear that independent expert evidence would be required at the hearing. As a result of discussions with counsel at the directions conference, it was apparent the plaintiff had not procured the assistance of an expert prior to issuing their proceedings or by the time the proceedings were set down for hearing.

[7] On 13 February 2019, the plaintiffs filed and served a notice of discontinuance. The matter of costs on the discontinuance had not been resolved and remains in issue. The defendant then indicated that it would be seeking costs on the discontinuance, and that is opposed by the plaintiffs. It is that application for costs on the discontinuance which is the subject of this judgment. Counsel for both Clarkes and GEA have filed submissions in respect of the claim for costs by GEA.

The defendant's submissions on costs

[8] GEA now seeks four categories of costs on the discontinuance. These are as follows:

(a) Costs in the Employment Court based on the Employment Court Practice Direction Costs Guideline Scale (Guideline Scale) up to 13 February 2019. The sum which is calculated under the scale is $9,143.

(b) Increased costs (as an uplift to fixed scale costs) in respect of inspection of documents. The sum claimed is $1,115, being a 50 per cent uplift to the costs under the Guideline Scale.

(c) Increased costs (as a proportion of the irrecoverable fixed scale costs) in respect of the preparation of briefs which took place following the timetabling directions and prior to the notice of discontinuance being filed. The sum claimed under this head is $1,784.

(d) Costs for preparing and filing submissions in respect of the application for costs on the discontinuance. The sum claimed under this category is $2,000.

[9] The defendant accordingly seeks a total costs award of $14,042 in respect of the discontinued claim. GST is not sought.

[10] In respect of the claim for scale costs, the defendant relies upon r 15.23 of the High Court Rules (which applies by reg 6 of the Employment Court Regulations 2000). That rule 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.

[11] As the claim was brought and discontinued in the Employment Court, it is submitted on behalf of the defendant that the Guideline Scale applies.

[12] As part of the directions conference held on 1 October 2018, counsel reached agreement that Category 2B of the Guideline Scale would apply. The defendant has accordingly carried out a calculation pursuant to the Guideline Scale to arrive at the figure claimed of $9,143.

[13] Insofar as the increased costs are concerned, it is submitted that the Court's practice direction dealing with the Guideline Scale states that the Scale does not replace the Court's ultimate discretion provided under the statute when fixing an award

of costs. In addition, reg 68 of the Employment Court Regulations 2000 provides that, in the exercise of its discretion, "the Court may have regard to any conduct of the parties tending to increase or contain costs".

[14] In the present case, the defendant alleges that the plaintiffs created difficulties in the provision of documents. It is apparent that the plaintiffs were unable to provide full time records, and there was some delay in providing invoices to justify the claims which the plaintiffs were making. The defendants submit that, because of the inadequate disclosure, their counsel was required to undertake extensive forensic audit of the invoices and of such of the time records as were provided. Discrepancies were ascertained between the invoices and the time records.

[15] This part of the claim relates to the difference between the scale costs and the actual costs incurred as a result of the failure of the plaintiffs to properly and promptly provide adequate disclosure. The claim is not for the full additional expenses incurred, simply an uplift of 50 per cent of the Guideline Scale Category 2B Costs Award for the inspection of documents. This amounts to $1,115.

[16] In respect of the claim for increased costs for preparation of briefs after the timetabling directions were given, the defendant submits that the plaintiffs discontinued their claim at a stage late in the proceedings and in fact only one week prior to the deadline for exchanging briefs of evidence. One of the witnesses involved, who would have given evidence for the defendant, now resides in the United Kingdom. The defendants submit that it was not unreasonable for the defendants to have commenced preparation for the hearing of this matter at an early stage. The defendant further submits that the plaintiffs must have known at an earlier stage than the actual date of discontinuance that they were not going to proceed with the claim, and the late filing of the discontinuance meant that the extra costs of preparation were incurred. In addition, it was clear from the difficulties which the plaintiffs were facing in the provision of documents that their own preparation and prosecution of the claim was facing difficulties.

[17] In the circumstances, the defendant seeks an amount of $1,784, which represents 40 per cent of the Guideline Scale Category 2B costs that would have been

awarded to the defendant if it had completed preparation of briefs prior to the plaintiffs discontinuing the claim.

[18] As to the costs relating to preparation of submissions, it appears that there was some prior discussion to try and reach agreement on costs on the discontinuance. No agreement could be reached even though a Calderbank offer on costs had been made prior to the actual discontinuance being filed, and it remained open for acceptance for two days following the filing of the discontinuance. In the circumstances, the defendant seeks the sum of $2,000 in respect of preparing and filing its memorandum on costs.

The plaintiffs' submissions on costs

[19] In response to the submissions of the defendant, counsel for the plaintiffs submits that the just outcome on costs is that they should lie where they fall. The grounds upon which this is submitted are that the plaintiffs' companies are a family business with modest means. In addition, it is submitted that the plaintiffs have already incurred a large amount in costs in complying with the non-party disclosure obligations.

[20] Secondly, the plaintiffs submit that GEA is pursuing Mr Schicker for ulterior motives and used the non-party disclosure process as a means of obtaining information against the plaintiffs and their companies unrelated to the claims against Mr Schicker. It is alleged on behalf of the plaintiffs that the risk of future claims against them led to their election to discontinue the proceedings.

[21] Thirdly, it is submitted that the plaintiffs made genuine attempts to settle the matter and should be given credit for that. Insofar as the claim for scale costs is concerned, if costs are not to lie where they fall, the plaintiffs submit that there are areas in the scale costs claim of the defendant which are excessive. Certain deductions are proposed, which reduce the calculation of costs under the scale to $5,463.50.

[22] In respect of the claim for increased costs, again, there is an attempt to excuse the plaintiffs' inadequate response in relation to the claims for disclosure of documents.

[23] As to the claim for preparation of briefs, the submission of the plaintiffs is that work undertaken in preparation of briefs by the defendant was unnecessary particularly as that work took place when there were negotiations taking place in an effort to settle the matter.

[24] Finally, the plaintiffs oppose costs being awarded in respect of the preparation of submissions in support of costs following the discontinuance. Whereas the defendant is claiming the sum of $2,000 in respect of such costs, counsel for the plaintiff points to other authorities, where only $1,000 was ordered. Some attempt is made using these authorities to align the present case involving costs on a discontinuance to a situation where costs were being considered following judgments in the substantive proceedings.

Principles applying

[25] Reference has already been made to r 15.23 of the High Court Rules 2016. The application of the rule has been the subject of numerous decisions of Courts exercising civil jurisdiction, including the Employment Court. Two examples involving employment cases were *Powell v Hally Labels Ltd*,[4] a decision of the Court of Appeal, and *Wendco (NZ) Ltd v Unite Inc*[5].

[26] In *Powell*, the Court of Appeal made several pertinent comments on the application of the rule in the following paragraphs:[6]

> [19] Costs are in the court's discretion, but r 15.23 of the High Court Rules provides that, absent agreement or order, a plaintiff who discontinues must pay the defendant's costs of the proceeding to that point. The rule's rationale is that discontinuance is ordinarily tantamount to judgment for the defendant. It elevates to a presumption the principle that costs follow the result.

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4 *Powell v Hally Labels Ltd* [2014] NZCA 572.
5 *Wendco (NZ) Ltd v Unite Inc* [2019] NZEmpC 29.
6 (Footnotes omitted).

> [20] The Court guards its discretion over costs, but as a matter of practice it does not lightly allow a plaintiff to displace the presumption that costs follow discontinuance. We make three points.
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> [21] First, the Court does permit a plaintiff to show that its discontinuance should not be interpreted as failure; the proceeding having ended unilaterally rather than by judgment, the Court is prepared, in a clear case, to recognise that the plaintiff may have achieved its end by other means or otherwise discontinued for reasons not connected to the merits. That is consistent with the principle that costs follow the result.
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> [22] Second, the Court may consider, in a clear case, why the parties brought and defended the proceeding, and whether steps taken in it were reasonable. For example, a governmental or third party decision may have intervened, rendering the proceeding redundant. But this is merely to recognise that the interests of justice occasionally may require that such matters be taken into account. It is not to invite a general inquiry into the reasonableness of the parties' conduct.
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> [23] Third, and consistent with what we have just said, a plaintiff may not displace the presumption merely by showing that it had some merit on its side. Indeed, the Court need not consider the merits and ordinarily refuses to do so unless they are immediately apparent.
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> [24] The Court's reluctance to embark on inquiries into merits or conduct reflects the objectives of the rules, which allow a plaintiff by discontinuance to end its proceeding unilaterally and fix its liability for costs at that point, and further contemplate that the liability should be predictable and the quantum readily calculable. To conduct a post-discontinuance inquiry into the merits or the reasonableness of the parties' conduct is ordinarily contrary to these objectives; the inquiry causes the litigation to linger on its deathbed and puts the parties to further expense in pursuit of an uncertain award, all of which discourages discontinuance in other cases. Faced with the prospect of such an inquiry, Lord Denning MR said:
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> > It is plain that neither side wishes to go on with the action so as to get his own costs. But neither side wishes to pay the other side's costs. Each will fight rather than pay the other side's costs. So what is to be done? Is this case to go on simply about costs? I think not.

[27] *Powell*, along with other applicable authorities, was relied upon in *Wendco*. In that judgment, Chief Judge Inglis made the following statement:[7]

> [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. 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

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7 (Footnotes omitted).

> 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. The Court of Appeal has made it clear that the presumption that costs are to be paid is not lightly displaced.

[28] These comments have application to the present case, where the plaintiffs are endeavouring to re-traverse the merits and reasonableness of their conduct by way of a post-discontinuance inquiry.

Conclusions

[29] This is not a case where the defendant should be deprived of costs on the discontinuance of the proceedings by the plaintiffs. Without going into the appropriateness of the method by which the Authority endeavoured to reasonably deal with the disclosure of documents by non-parties, the costs then incurred by the plaintiffs in carrying out the disclosure obligations upon them resulted in the incurring of very substantial legal costs. What can be said about that is that it must have become apparent at some stage in the process that the imposition on the plaintiffs was unreasonable and disproportionate in the context of the proceedings before the Authority, and an attempt could have been made to apply back to the Authority to review its decision. Having proceeded to a conclusion, however, and embarking on proceedings to recover legal costs, the plaintiffs failed to collate all the documentary evidence which would be necessary to prove the claim before the proceedings were commenced. Additionally, it must have been apparent, because of the quantum of the claim, that independent professional evidence would be necessary from an expert in the legal profession to assist the Court with the quantification process if that liability was proved. Again, evidence from such an expert witness does not appear to have been procured before the proceedings were commenced. In preparation for the hearing, these evidential difficulties would have needed to be faced by the plaintiffs.

[30] In the circumstances, and applying those clear statements from the Court of Appeal in *Powell* and Chief Judge Inglis in *Wendco*, the defendant is entitled to costs on the discontinuance. Insofar as quantification is concerned, it is entirely reasonable for the defendant to rely upon the Guideline Scale of Costs adopted in this Court. Faced with the difficulties of the disclosure of documents, the defendant undertook its

own inquiry in preparation for the hearing of the matter, and it is not unreasonable that there be some uplift under that heading as claimed. It is also not unreasonable, when preparation for the hearing needed to be well underway, for the defendant to have gone a considerable way towards completing a briefing of its own evidence, and its claim for costs in this regard is not unreasonable. Indeed, a modest percentage has been applied under this head.

[31] Finally, when there was clearly a failure in the negotiations to settle costs on the discontinuance, the defendant had to apply to the Court to have costs fixed. Applying for costs for preparing substantial submissions is not unreasonable. Nevertheless, under that heading, I consider that a contribution towards costs of $1,000 rather than the $2,000 claimed would be appropriate.

Disposition

[32] The plaintiffs are, accordingly, ordered to pay the defendant costs on the discontinuance of $13,042.

M E Perkins
Judge

Judgment signed at 2.45 pm on 12 April 2019