

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

**I TE KŌTI TAKE MAHI O AOTEAROA
TE WHANGANUI-A-TARA**

**[2019] NZEmpC 61
EMPC 68/2019**

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

AND IN THE MATTER of an application for costs

BETWEEN REBORN HOLDINGS LIMITED
 Plaintiff

AND AMIT SHARAN
 Defendant

Hearing: On the papers

Appearances: P Renshaw, agent for the plaintiff
 P McKenzie-Bridle, counsel for defendant

Judgment: 20 May 2019

COSTS JUDGMENT OF JUDGE B A CORKILL

[1] On 6 May 2019, the plaintiff filed a notice of discontinuance. That notice stated there were no known issues of costs between the parties.

[2] However, counsel for the defendant, Mr McKenzie-Bridle, stated in a memorandum filed and served that day that there are.

[3] He said that it had become apparent during the proceedings that the plaintiff was insolvent when the appeal was filed. Nonetheless, steps had to be taken by the defendant to deal with the proceeding, which included filing and serving a statement of defence, and a notice of opposition to an interlocutory application for a stay; as well there were attendances in connection with a telephone directions conference.

[4] He said the defendant was granted legal aid for the proceeding, gave notice to the plaintiff in the Court of this fact, and that legal aid costs for the above steps were \$1,293.20.

[5] The defendant accordingly sought an order that the plaintiff pay these costs, following the filing of its notice of discontinuance.

[6] At an earlier stage I was advised that liquidation proceedings had been brought against the plaintiff by the defendant, the first call of which is to be in the Wellington High Court on 21 May 2019.

[7] In response to Mr McKenzie-Bridle's memorandum, Mr Renshaw, an accountant representing the plaintiff, stated the company could not pay any money, and accepted that an order for costs would be made.

[8] In a further submission, Mr McKenzie-Bridle invited the Court to consider the Court of Appeal's decision in *Curtis v Commonwealth of Australia*, a costs case following failed extradition proceedings where the appellant received legal aid.¹ The Court of Appeal said:²

The quantum [of costs] shall be according to the Court of Appeal scale. Costs should be scale costs or the amount paid out by the [Legal Services] Commissioner for the appeal, whichever is the lesser figure. Thus costs should not exceed scale, or (if they are less), the amount paid for legal services.

[9] In light of this dicta, Mr McKenzie-Bridle seeks an order on a 2B basis, but limited to the amount paid out by the Legal Services Commissioner under the defendant's grant of aid.

[10] Where a notice of discontinuance is filed, the Court may order costs, as has been determined in many judgments of the Court. A recent example is *Direct Auto Importers (NZ) Ltd v A Labour Inspector*.³ Such cases emphasise that where a defendant has been put to the expense of taking steps to defend a claim which a

¹ *Curtis v Commonwealth of Australia* [2019] NZCA 126.

² At [22].

³ *Direct Auto Importers (NZ) Ltd v A Labour Inspector* [2018] NZEmpC 39.

plaintiff has belatedly chosen not to pursue, and whilst that party is entitled to discontinue a challenge, the starting point must be that as a matter of principle that party cannot do so with immunity from costs. Such an immunity would be inconsistent with the principle that costs generally follow the event.

[11] In this particular case, there is no opposition to the making of an order.

[12] I have considered Mr McKenzie-Bridle's submission. On a 2B basis, the costs are 2.3 days at \$2,230 per day, amounting to \$5,129.⁴ Such a calculation is clearly in excess of the actual legal aid costs incurred. The formulation advanced by counsel is not therefore necessary.

[13] In addition to the legal aid costs already mentioned, the defendant will have costs with regard to the issues arising from the filing of the notice of discontinuance. I will not therefore limit the Court's order of costs to 66 per cent of those actually incurred, a possibility which is frequently considered where the Court does not utilise the scale.

[14] The plaintiff is ordered to pay to the defendant costs in the sum of \$1,293.20.

B A Corkill
Judge

Judgment signed at 12.20 pm on 20 May 2019

⁴ Employment Court Practice Directions at 18: Items 2, 13 and 29:
<www.employment.govt.nz/legislation-and-rules>.