IN THE EMPLOYMENT COURT OF NEW ZEALAND
AUCKLAND

I TE KŌTI TAKE MAHI O AOTEAROA
TĀMAKI MAKAURAU

[2022] NZEmpC 100
EMPC 390/2021

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
AND IN THE MATTER OF	an application for costs
BETWEEN	KOWHAI INTERMEDIATE SCHOOL BOARD OF TRUSTEES Plaintiff
AND	SHANE WEST Defendant

Hearing: On the papers

Appearances: SR Mitchell, counsel for plaintiff
K Crossland and T Sung, counsel for defendant

Judgment: 9 June 2022

COSTS JUDGMENT OF JUDGE K G SMITH

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[1] In an Employment Relations Authority investigation late last year, an issue arose during cross-examination about the admissibility of certain evidence. It was whether counsel for Shane West was able to cross-examine a witness for the School Board about advice provided to it by the New Zealand School Trustees Association.

[2] The person who provided the advice is not a lawyer within the meaning of the Lawyers and Conveyancers Act 2006. The Authority considered whether the circumstances in which the advice was given created legal professional privilege

precluding the anticipated cross-examination. In a determination released on 1 November 2021, the Authority concluded that the advice was not privileged.[1]

[3] The Board was dissatisfied with that determination and challenged it. The challenge was filed during a break in the investigation meeting and the Board applied for urgency in having the challenge resolved because it was about to resume.[2]

[4] Counsel for Mr West, Mr Crossland, responded promptly to the application for urgency. An objection to the Court's jurisdiction was filed, on grounds including that the Authority enjoyed the power to issue a summons for the person who provided the advice and was free to follow its own procedure. The conclusion invited was that the challenge was precluded by s 179(5) of the Employment Relations Act 2000.

[5] The application for urgency was resolved during a telephone conference with counsel. During the conference Mr Crossland offered as a solution an undertaking not to cross-examine the Board's witnesses about the advice.[3] Mr Crossland's undertaking was accepted by counsel for the Board, Mr Mitchell. Consequently, the application for urgency was dismissed.[4] Eventually the challenge was discontinued. The subject of costs arising from the application for urgency was, however, reserved.

[6] Mr West has now sought costs from the Board. The basis of his claim is that the Board discontinued its challenge without prior notice or agreement. By applying r 15.23 of the High Court Rules 2016, that unilateral decision was relied on to mean that the Board is now required to pay the costs of, and incidental to, the proceeding to Mr West.[5]

[7] The amount claimed from the Board is $7,618.75. It was calculated in counsel's submissions by reference to the Court's Guideline Scale which produced an amount claimed of $6,095, calculated on a 2B basis.[6] An uplift of a further 25 per cent from that scale was sought.

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1 *West v Kowhai Intermediate School Board of Trustees* [2021] NZERA 484 (Member E Robinson).
2 *West v Kowhai Intermediate School Board of Trustees* [2021] NZERA 549 (Member E Robinson).
3 *Kowhai Intermediate School Board of Trustees v West* [2021] NZEmpC 188.
4 At [11].
5 The rule applies by virtue of the Employment Court Regulations 2000, reg 6(2)(a)(ii).
6 "Employment Court of New Zealand Practice Directions" <www.employmentcourt.govt.nz> at No 16.

[8] An uplift was claimed because the challenge was said to be unreasonable and unwarranted causing an increase in costs incurred by Mr West. The Board was accused of knowingly pursuing an unmeritorious challenge because the law is settled and it eventually accepted that Mr West's dismissal was unjustified.

[9] Mr Crossland submitted that the undertaking he gave was the same as one he had offered during the Authority investigation. The decision to give that undertaking was characterised as pragmatic because, while Mr West abandoned a potentially constructive line of cross-examination for his case, that had to be measured against the risk of delaying the investigation meeting if the challenge was to proceed.

[10] Mr Mitchell did not accept the contention that the issue of privilege is settled law or that there was any validity in criticisms made about the decision to challenge the Authority's determination on that subject. He submitted that Mr Crossland's undertaking was provided only after vigorous opposition until it was raised during the telephone conference, convened urgently given the pending resumption of the investigation meeting.

[11] While the application for urgency was declined, Mr Mitchell noted that the Court had offered urgent hearing dates to resolve the challenge prior to the undertaking being provided and accepted.

[12] Mr Mitchell's main point was that given how the claim for urgency was resolved, with flow on consequences for the challenge, there was no clear winner or loser. He sought to rely on the Supreme Court decision in *Shirley v Wairarapa District Health Board* in relation to r 47(a) of the former High Court Rules, reflecting a long-standing principle that unless there are exceptional reasons costs should follow the result. That is, only the loser pays.[7]

[13] For completeness it is appropriate to add that Mr Mitchell strongly objected to submissions that the challenge was filed for unmeritorious reasons.

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7 *Shirley v Wairarapa District Health Board* [2006] NZSC 63, [2003] 3 NZLR 523.

Analysis

[14] I accept Mr Crossland's submission that r 15.23 applies where a plaintiff has unilaterally discontinued a proceeding. That is not, however, the end of the assessment. The rule provides for the plaintiff to be liable for costs in such a situation unless the Court otherwise orders. As the commentary in McGechan mentions, the presumption created by the rule obviates any requirement for the defendant to demonstrate that the plaintiff acted unreasonably in starting the proceeding.[8] However, the presumption can be displaced if there are circumstances which make that outcome just.

[15] I do not agree that this case falls into the ambit of the presumption in r 15.23. Mr Crossland was correct to submit that the challenge was discontinued without any agreement on costs but concentrating only on that action would be a narrow view of what took place.

[16] The undertaking and the concession it involved had the collateral effect of removing the need for the challenge. Viewed in that light, both parties enjoyed success. The Board succeeded to the extent that it nullified the effect of the Authority's determination. Mr West succeeded in that he avoided the risk of continuing litigation in the Court and a potential delay in resuming the investigation meeting.

Outcome

[17] I am not persuaded that this is a case where r 15.23 should apply. Instead, I consider that since both parties were successful costs should lie where they fall.

K G Smith
Judge

Judgment signed at 10.50 am on 9 June 2022

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[8] Andrew Beck and others *McGechan on Procedure* (online ed, Brookers) at [HR15.23.01].