

**ORDER PROHIBITING PUBLICATION OF NAMES OR IDENTIFYING
PARTICULARS OF THE PARTIES AND WITNESSES**

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

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

**[2023] NZEmpC 200
EMPC 157/2023**

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
AND IN THE MATTER OF	an application for costs
BETWEEN	ACF Plaintiff
AND	IEN Defendant

Hearing: On the papers

Appearances: P Mani, counsel for plaintiff
A Hall, counsel for defendant

Judgment: 17 November 2023

COSTS JUDGMENT OF CHIEF JUDGE CHRISTINA INGLIS

[1] The plaintiff filed a notice of discontinuance just prior to the hearing. This came after numerous failures to comply, without explanation, with timetabling orders made by the Court which led to an unless order.

[2] As is well-established, a plaintiff may discontinue their proceedings at any stage before judgment is given but is, absent agreement, liable to costs on the discontinuance.¹ The defendant filed an application for costs following service of the

¹ See High Court Rules 2016, rr 15.19 and 15.23.

notice of discontinuance, and I made timetabling orders to progress the application. The defendant filed further submissions in support of its application; the plaintiff has chosen not to file anything. I proceed on the basis of the material before the Court.

[3] At the outset the proceedings were assigned Category 2B for costs purposes, under the Court's Practice Direction Guideline scale.² The Guidelines are just that – guidelines, not a straight-jacket for the exercise of the Court's discretion as to costs. As the Guidelines make clear, the principles applying to awards of increased and indemnity costs apply in appropriate cases.

[4] The defendant seeks increased costs on the plaintiff's discontinuance.

[5] There are, as counsel for the defendant (Mr Hall) points out, a range of circumstances in which increased costs may be allowed, the most common of which are non-compliance with the directions of the Court, the pursuit of unmeritorious arguments, and the failure to accept a settlement offer. The prerequisite is unreasonable conduct on the part of the party paying costs in relation to the proceedings. The conduct must have impacted on the costs of the other party, by way of increased cost, to warrant an uplift. The uplift should be proportionate to the impact. A 50 per cent uplift is regarded as unusual.

[6] A contribution to costs calculated according to the Guideline scale would amount to \$8,843.00. The defendant seeks an increase of 25 per cent. That is said to be appropriate having regard to the plaintiff's conduct to the point of discontinuance, including the continued failure to comply with the timetabling orders made by the Court which (I accept) unnecessarily added to the defendant's costs and, more generally, the fact that the defendant was put to the cost of defending a challenge which was abandoned at the last minute. While the defendant suggests that an inference should be drawn about the merits of the challenge by its discontinuance, I do not consider it appropriate to do so.³

² "Employment Court of New Zealand Practice Directions" <www.employmentcourt.govt.nz> at No 18.

³ *Powell v Hally Labels Ltd* [2014] NZCA 572 at [23]-[24].

[7] Nevertheless, I have no difficulty accepting that an award of increased costs in this case is warranted. The defendant was put to unnecessary expense as a direct result of the plaintiff's actions and this should be reflected in the contribution to costs the plaintiff should be ordered to make, consistently with the Court's equity and good conscience jurisdiction. I regard the 25 per cent uplift sought by the defendant as very fair – it could be described as relatively modest having regard to the circumstances.

[8] The defendant is also entitled to costs on the application for costs, which I set at \$500.00.

[9] The plaintiff is accordingly ordered to pay to the defendant the sum of \$11,555.00 by way of contribution to costs within 21 days of the date of this judgment.

Christina Inglis
Chief Judge

Judgment signed at 3.30 pm on 17 November 2023