

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

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

**[2024] NZEmpC 45
EMPC 265/2023**

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
AND IN THE MATTER OF	an application for leave to withdraw as solicitor and counsel
BETWEEN	MAH ENTERPRISES (FIJI) LIMITED First Plaintiff
AND	MALCOLM HERBERT Second Plaintiff
AND	A LABOUR INSPECTOR Defendant

Hearing:	On the papers
Appearances:	M Mitchell, counsel for plaintiffs J Ellison, counsel for defendant
Judgment:	14 March 2024

**INTERLOCUTORY JUDGMENT OF CHIEF JUDGE CHRISTINA INGLIS
(Application for leave to withdraw as solicitor and counsel)**

[1] Ms Mitchell has filed an application seeking leave to withdraw as the plaintiffs' solicitor on the record and counsel. The application has been served on the plaintiffs, who have taken no steps in relation to it. There is no opposition to the application.

[2] While there is no express statutory power relating to the withdrawal of a party's solicitor or counsel, the Employment Court enjoys all of the powers inherent in a court

of record,¹ including the power to control its own processes and to prevent any abuse of process.² Such inherent powers “arise as necessary to enable a court to function effectively as a court of judicature”.³ Courts have exercised their inherent powers in a broad range of situations, including to control solicitors.⁴ The current application seems to me to fall squarely within the inherent powers of this Court.⁵

[3] As the Employment Relations Act 2000 and the Employment Court Regulations 2000 do not provide any form of procedure for applications of this sort, the Court applies the procedure set out in r 5.41 of the High Court Rules.⁶ Rule 5.41 requires that every application for withdrawal must be made by interlocutory application and must be supported by an affidavit giving the grounds of the application.⁷ Additionally, unless the Court directs otherwise, notice of the application and any relevant documents must be served on the party for whom the applicant acted; that notice must also inform the party of the effect that r 5.42 will have on their address for service if the applicant is permitted to withdraw as representative.⁸ These steps have been taken.

[4] The Court must be satisfied that an adequate basis has been established before making an order. That is to ensure that the rights of the affected party are adequately protected and reflects counsel’s obligations as an officer of the Court.⁹ As the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 provide, a lawyer has a duty to complete a retainer unless the client discharges them from the engagement, the lawyer and client have agreed that the lawyer will no longer act, or

¹ Employment Relations Act 2000, s 186(1).

² See *Hynds Pipe Systems Ltd v Forsyth* [2017] NZEmpC 89, [2017] ERNZ 484 at [9]–[17]; and Philip A Joseph *Joseph on Constitutional and Administrative Law* (5th ed, Thomson Reuters, Wellington, 2021) at 901–905.

³ *District Court at Christchurch v McDonald* [2021] NZCA 353, [2021] 3 NZLR 585 at [27].

⁴ Joseph, above n 2, at 902.

⁵ The same conclusion was reached by the District Court within its accident compensation appellate jurisdiction in *MS v Accident Compensation Corp* [2020] NZACC 126 in respect of an advocate who was not a lawyer.

⁶ Applied via reg 6 of the Employment Court Regulations 2000. Note that while r 5.41 of the High Court Rules 2016 is expressed to relate to solicitors, the High Court has indicated that it can permit the withdrawal of counsel by drawing on its inherent jurisdiction: *Burgess v Monk* [2017] NZHC 2618, (2017) 24 PRNZ 712 at [17]–[20]; and *Criffel Deer Ltd v ANZ Bank New Zealand Ltd* [2022] NZHC 2175, at [7] and [10]–[11].

⁷ High Court Rules, r 5.41(4).

⁸ Rule 5.41(5).

⁹ *Burgess v Monk*, above n 6, at [19]–[20]; and *Criffel Deer Ltd v ANZ Bank New Zealand Ltd*, above n 6, at [7].

the lawyer terminates the arrangement for good cause.¹⁰ Good cause includes the inability or failure of the client to pay a fee on the agreed basis.¹¹ In the present case there has been ongoing issues with the non-payment of fees, as detailed in the affidavit filed in support of the application.

[5] The proceedings are, as the applicant points out, at an early stage, and the plaintiffs will not be unduly prejudiced if leave is granted.

[6] In the circumstances I am satisfied that the application should be granted. There is accordingly an order allowing Ms Mitchell to withdraw as counsel and solicitor on the record. The order will come into effect once Ms Mitchell has served a copy of this order on every party to this proceeding, including MAH Enterprises (Fiji) Ltd and Mr Herbert, and has filed an affidavit of service with the Court.¹²

[7] No issue of costs arises.

Christina Inglis
Chief Judge

Judgment signed at 8.30 am on 14 March 2024

¹⁰ Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, r 4.2.

¹¹ Rule 4.2.1(b).

¹² High Court Rules, r 5.41(3).