

**IN THE EMPLOYMENT COURT  
AUCKLAND**

**AC 29/07  
ARC 55/06**

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

AND IN THE MATTER OF an application to strike out proceedings

BETWEEN                      646 VICTORIA (HAMILTON) LTD  
   Plaintiff

AND                              KATHRYN ANNE PHILLIPS  
   Defendant

Hearing:            Hearing by telephone at 10am on 23 May 2007  
   (Heard at Auckland)

Appearances: No appearance for the plaintiff  
   Simon Scott, counsel for the defendant

Judgment:        23 May 2007

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**JUDGMENT OF JUDGE M E PERKINS**

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[1]        The plaintiff 646 Victoria (Hamilton) Ltd, filed a challenge in this Court on 2 August 2006. The challenge was against the whole of the determination of the Employment Relations Authority between the same parties on 6 July 2006. The plaintiff sought a hearing de novo.

[2]        Under the determination the Authority Member decided that Ms Phillips had been unjustifiably dismissed by 646 Victoria (Hamilton) Ltd. She was awarded the sum of \$2,800 gross to reimburse her for lost remuneration and in addition was awarded the sum of \$5,000 by way of compensation. Costs were reserved but in a subsequent determination of the Authority, Ms Phillips received a costs award of \$1,500.

[3] In response to the challenge by the plaintiff, Ms Phillips filed a statement of defence and counter claim by way of cross-challenge. The counter claim effectively sought the same remedies as had been awarded by the Authority. A statement of defence was filed by the plaintiff to the cross-challenge on 14 September 2006.

[4] In order that the plaintiff could stop the defendant from enforcing the determination against it, an application for stay of proceedings was filed by the plaintiff on 24 August 2006. His Honour Judge Travis dealt with the stay application in a minute dated 7 November 2006. The application for stay was not opposed and was therefore granted on the condition that the amounts of the remedies awarded by the Authority, which then totalled \$7,800, were to be paid into Court and held in an interest bearing account. The subsequent cost determination of the Authority had by that time been paid by the plaintiff to the defendant. In addition to the order for stay Judge Travis set timetabling so that the challenges could proceed to a hearing on the earliest possible date.

[5] By 21 December 2006 the plaintiff had not complied with the direction as to the payment into Court. Accordingly, His Honour Judge Travis made a direction that the plaintiff's challenge was to be stayed until that sum was paid into Court or until there was a further order of the Court.

[6] By 15 January 2007, it was apparent that the plaintiff did not intend to comply with the directions. A letter was received by the Court dated 15 January 2007 from the advocate acting for the plaintiff indicating that he was seeking leave to withdraw. The Court then endeavoured to advance matters by convening a telephone conference. However, the managing director of the plaintiff, Mr G Hunt, failed to cooperate in the convening of such conference. On 22 March 2007, the defendant, Ms Phillips, filed an interlocutory application to strike out the plaintiff's challenge. That applicant was supported by an affidavit sworn by the defendant Ms Phillips on 22 March 2007, in which she set out the brief history of the matter and indicated the efforts that had been made to find Mr Hunt.

[7] In February 2007 it appeared that the plaintiff company had instructed an employment relations consultant, Ms Agyepong, of the Employers and

Manufacturers Association (Northern) Inc to act for it. The Court received a letter from that advocate indicating that the plaintiff wished to discontinue its proceedings against Ms Phillips subject to her withdrawing her counter claim and there being an agreement between the parties as to costs. No such settlement appeared to have been reached and on 3 April 2007 the Court received a further letter from Ms Agyepong indicating that the Employers and Manufacturers Association was no longer representing the plaintiff or Mr Hunt. Ms Agyepong sought leave to withdraw.

[8] On 3 May 2007, Chief Judge Colgan gave directions setting down the application to strike out for a hearing at 10am on 23 May 2007. There was a direction that the notice of the fixture was to be served on the registered office of the plaintiff, at its address for service and also by fax to the office of the Employers and Manufacturers Association (Waikato). The plaintiff was then to have until 4pm on Friday 18 May 2007 to file and serve notice of any opposition to the application to strike out and any affidavit evidence in support. No such notice of opposition or affidavit evidence was filed. The matter proceeded before me unopposed by way of a telephone hearing at 10am on 23 May 2007.

[9] It is clear that the plaintiff has no intention of proceeding with its challenge to the determination of the Authority. The delay occasioned by the application and order for stay and the subsequent failure of the plaintiff to comply with the directions of the Court has clearly caused substantial prejudice to Ms Phillips, particularly in respect of her ability to enforce the determination. The failure to prosecute the challenge provides the defendant with grounds for an order striking out. Accordingly, there will be an order striking out the challenge by the plaintiff.

[10] Mr Scott, who appeared for Ms Phillips at the telephone hearing of the application to strike out indicated that Ms Phillips does not intend to proceed with her cross-challenge in the circumstances. She will instead rely upon the determination of the Authority, which she is now free to enforce. In addition Mr Scott sought an order for costs of \$3,000 in respect of the entire proceedings in the Employment Court, which have now been brought to an end. In view of the attendances that Ms Phillips has been required to make in respect of the Employment Court proceedings, it is appropriate that she be given an award of costs in her favour.

In all the circumstances, having regard to the entire history of the matter, an award of \$3,000 would be a moderate award of costs. Accordingly, there will be an order in favour of the defendant for costs of \$3,000. I note that Ms Phillips was earlier in receipt of a grant of legal aid in respect of the proceedings and I am presuming that that grant still subsists.

[11] For the sake of clarity I also direct that the defendant's cross-challenge be dismissed. She is now free to take steps to enforce the determination of the Authority.

M E Perkins  
Judge

Judgment signed at 2.45pm on Wednesday 23 May 2007