IN THE EMPLOYMENT COURT
AUCKLAND

[2018] NZEmpC 39
EMPC 181/2017
EMPC 305/2017

IN THE MATTER OF	a challenge to determinations of the Employment Relations Authority
AND IN THE MATTER	of costs on discontinuance
BETWEEN	DIRECT AUTO IMPORTERS (NZ) LIMITED Plaintiff
AND	A LABOUR INSPECTOR OF THE MINISTRY OF BUSINESS, INNOVATION AND EMPLOYMENT Defendant

EMPC 182/2017
EMPC 306/2017

IN THE MATTER OF	a challenge to determinations of the Employment Relations Authority
AND IN THE MATTER	of costs on discontinuance
AND BETWEEN	CHEAP DEALS ON WHEELS LIMITED First Plaintiff
AND	DIRECT AUTO IMPORTERS (NZ) LIMITED Second Plaintiff
AND	A LABOUR INSPECTOR OF THE MINISTRY OF BUSINESS, INNOVATION AND EMPLOYMENT Defendant

Hearing: By memorandum of counsel for the defendant dated 2 March 2018 and memorandum of advocate for plaintiffs dated 7 March 2018

Appearances: W Harris, advocate for plantiffs
S Blick, counsel for defendant

Judgment: 3 May 2018

JUDGMENT OF JUDGE M E PERKINS
AS TO COSTS ON DISCONTINUANCE

Introduction

[1] By determinations dated 4 July 2017[1] and 28 July 2017,[2] the Employment Relations Authority (the Authority) made findings that the abovenamed plaintiffs had breached employment obligations towards their employees. Substantial remedies and penalties were awarded in the determinations. The 28 July 2017 determinations dealt with costs.

[2] Challenges were filed by each of the plaintiffs. In each case, de novo hearings were sought. In the challenges commenced by Cheap Deals on Wheels Ltd (CDW), an application was made and consented to by the Labour Inspector to join Direct Auto Importers (NZ) Ltd (DAI) as a second plaintiff. Amended pleadings were necessary to deal with the challenges following this joinder.

[3] A hearing date was set for the challenges. A short time prior to the commencement date for that hearing, the plaintiffs discontinued their challenges. Costs remained an issue. The Labour Inspector sought costs on the discontinuances against both CDW and DAI. Submissions have been received from both counsel for the Labour Inspector and the advocate for CDW and DAI.

Costs in the Authority proceedings

[4] As the challenge to the costs awarded by the Authority in each case has been discontinued, the costs determinations stand. The costs remain owing by CDW and DAI if they have not been paid. The substantive awards of the Authority similarly

---

1 *Labour Inspector of the Ministry of Business, Innovation and Employment v Direct Auto Importers (NZ) Ltd* [2017] NZERA Auckland 195 (substantive); and *Labour Inspector of the Ministry of Business, Innovation and Employment v Cheap Deals on Wheels Ltd* [2017] NZERA Auckland 196 (substantive).

2 *Labour Inspector of the Ministry of Business, Innovation and Employment v Direct Auto Importers (NZ) Ltd* [2017] NZERA Auckland 223 (costs); and *Labour Inspector of the Ministry of Business, Innovation and Employment v Cheap Deals on Wheels Ltd* [2017] NZERA Auckland 224 (costs).

remain owing if not paid. The Labour Inspector is entitled to take enforcement proceedings if necessary.

Costs in the Court proceedings on the discontinuances

[5] The starting point in deciding whether costs should be payable on the discontinuances is cl 19 of sch 3 of the Employment Relations Act 2000, which confers a broad discretion as to costs. It provides as follows:

> **19 Power to award costs**
>
> (1) The court in any proceedings may order any party to pay to any other party such costs and expenses (including expenses of witnesses) as the court thinks reasonable.
>
> (2) The court may apportion any such costs and expenses between the parties or any of them as it thinks fit, and may at any time vary or alter any such order in such manner as it thinks reasonable.

[6] Regulation 68(1) of the Employment Court Regulations 2000 also deals with costs. It provides that in exercising the Court's discretion under the Act to make an order as to costs, the Court may have regard to "...any conduct of the parties tending to increase or contain costs...".

[7] The discretion to award costs, whilst broad, is to be exercised judicially in accordance with principle. The primary principle is that costs follow the event.[3] It is well established that a discontinuing plaintiff is generally liable to pay costs to the defendant up to the date of the discontinuance. However, that practice is not invariable.

[8] There are numerous authorities across all civil jurisdictions dealing with costs on a discontinuance. In this Court, the issue came to be decided in *Kelleher v Wiri Pacific Ltd.*[4] In that case, the Employment Court stated:[5]

> ... The simple fact is that the defendant has been put to the expense of taking steps to defend a claim which the plaintiff has belatedly chosen not to pursue. In the absence of any information to the contrary, the inference is that she took

---

3 *Victoria University of Wellington v Alton-Lee* [2001] ERNZ 305 (CA) at [48].
4 *Kelleher v Wiri Pacific Ltd* [2012] NZEmpC 98, [2012] ERNZ 406.
5 At [11] (footnotes omitted).

> this step because her claim lacked merit. While the plaintiff is entitled to discontinue her challenge, the starting point cannot, as a matter of principle, be that she can do so with immunity from costs. That would be inconsistent with the principle that costs generally follow the event.

[9] In this case, the discontinuances occurred at a particularly late stage in the proceedings, being 12 days before the fixture was due to commence. It was a time when briefs of evidence had been prepared and counsel for the Labour Inspector would have undertaken much of the preparatory work for the hearing.

Submissions of counsel and advocate

[10] Ms Blick, counsel for the Labour Inspector, in her brief submissions, referred to cl 15.23 of the High Court Rules 2016 as a useful guidance to the Court. That rule states:

> Unless the defendant otherwise agrees or the court otherwise orders, a plaintiff who discontinues a proceeding against a defendant must pay costs to the defendant of and incidental to the proceeding up to and including the discontinuance.

[11] That High Court Rule has of course been encapsulated in the authorities of this Court dealing with the issue.

[12] Ms Blick submitted that given that the challenges have now been discontinued, the determinations of the Authority stand. The defendant accordingly remains the "winning" party. She further submitted that the Ministry of Business, Innovation and Employment (MBIE) has been put to unnecessary trouble and expense in defending the challenges and as a matter of public policy, some recompense should be made to MBIE, funded, as it is, by the State.

[13] Ms Blick has helpfully carried out a calculation pursuant to the Court's Costs Guideline scale. This has arrived at a total figure of $13,157 which, as Ms Blick has submitted, represents a conservative estimate of the time spent by counsel in preparation for the proceedings.

[14] Mr Harris, advocate for the plaintiffs, accepted that costs must follow the event and that the defendant is entitled to costs on the discontinuance. He correctly referred

to the principles which have been earlier set out in this judgment. He submitted that an award of costs will cause financial hardship to the plaintiffs in this case. He also pointed to the fact that in this case Ms Blick is in-house counsel for MBIE. Accordingly, he submitted, her services should not be assessed on the same basis as would be the case for a lawyer engaged in private practice.

[15] Mr Harris referred to financial statements for both plaintiffs included in the bundle of documents which has been filed in this matter. The accounts are not up-to-date, but there is no suggestion that either company is insolvent. Both continue to trade although DAI apparently only on a limited basis.

Conclusion and disposition

[16] There is no dispute in this case as to the liability of the plaintiffs on the discontinuance. This is a case where there were serious breaches by the plaintiffs of employment standards. Reasonably substantial awards have been made by the Authority to remedy the breaches, including the imposition of penalties designed to have a deterrent effect.

[17] Having regard to the time when the plaintiffs discontinued their challenges, the calculation of the costs under the Court's Costs Guideline scale by Ms Blick would represent a moderate award of costs. It must be remembered also that the amount set out under the Court's Costs Guideline scale, based as it is on the High Court scale, already includes a discount of one third from what is considered to be average costs currently charged in the private sector. In all the circumstances, I consider that an appropriate award of costs in this case is the sum of $13,157 as calculated by Ms Blick. No claim has been made for reimbursement of any disbursements.

[18] Mr Harris, in his submissions, has asked the Court to consider an apportionment of any costs award between the two plaintiffs. He suggests that DAI be ordered to pay two thirds of any such costs award with the remaining third to be paid by CDW. I do not consider it appropriate to make such an apportionment between the two plaintiffs, having regard to the fact that the challenges were being run together, and indeed, DAI was subsequently joined to the challenge by CDW. Both companies

operate from the same car yard premises and have the same sole director and shareholder. Both plaintiffs should be jointly and severally liable for the costs award in its entirety. Accordingly, the plaintiffs are jointly and severally ordered to pay costs to the defendant in the sum of $13,157.

M E Perkins
Judge

Judgment signed at 4.20 pm on 3 May 2018