IN THE EMPLOYMENT COURT OF NEW ZEALAND
CHRISTCHURCH

I TE KŌTI TAKE MAHI O AOTEAROA
ŌTAUTAHI

[2021] NZEmpC 104
EMPC 344/2019

IN THE MATTER OF	an application for a sanctions order
AND IN THE MATTER	of an application for costs
BETWEEN	DARREN VINCENT OLIVER Plaintiff
AND	STUART DALE BIGGS Defendant

Hearing: (on the papers)

Appearances: S Zindel, counsel for plaintiff
C Fisher, counsel for defendant

Judgment: 8 July 2021

COSTS JUDGMENT OF JUDGE B A CORKILL

Introduction

[1] This judgment resolves an issue as to costs, following the filing of a notice of discontinuance by the plaintiff.

[2] A summary of the position with regard to costs on a discontinuance was conveniently summarised by Chief Judge Inglis in *Wendco (NZ) Ltd v Unite Inc*:[1]

> [4] No specific procedure has been provided for in relation to costs on a discontinuance under either the Employment Relations Act 2000 or the Employment Court Regulations 2000. That means that the Court must look to dispose of the case as nearly as may be practicable in accordance with the

[1] *Wendco (NZ) Ltd v Unite Inc* [2019] NZEmpC 29.

> provisions of the High Court Rules 2016.[2] High Court r 15.23 provides that, 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. While there remains a discretion under r 15.23, the onus is on the discontinuing plaintiff to persuade the Court to exercise the discretion in its favour.[3] The Court of Appeal has made it clear that the presumption that costs are to be paid is not lightly displaced.[4]

[3] The issue in this case is whether the presumption referred to by the Court of Appeal should be displaced by the particular circumstances which have arisen in this proceeding and, if so, to what extent.

Chronology

[4] The proceeding has had a somewhat checkered career. It was commenced on 26 September 2019, against the defendant, a director of a company which had been the plaintiff's employer, and which had failed to comply with multiple determinations of the Employment Relations Authority.[5] No compliance order had been made against the defendant, to that point.

[5] In the first instance, the plaintiff requested the Court to exercise its powers under s 140(6) of the Employment Relations Act 2000 (the Act) to sequester property of the defendant, fine him, or impose a term of imprisonment for up to three months.

[6] I interpolate that these sanctions apply to a party who has breached a compliance order.

[7] On 20 December 2019, a statement of defence was filed by counsel then acting for the defendant, in which it was pleaded that the defendant was not a person against whom the Court could exercise powers under s 140(6) of the Act.

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2 Employment Court Regulations 2000, reg 6(2).

3 *Powell v Hally Labels Ltd* [2014] NZCA 572 at [21].

4 *Yarrall v Earthquake Commission* [2016] NZCA 517, [2016] 23 PRNZ 765 at [12], confirmed in *Taranaki Galvanisers Ltd v Udderfield Ltd* [2018] NZCA 297 at [16].

5 *Oliver v Star Moving Ltd* [2016] NZERA Christchurch 70; *Oliver v Star Moving Ltd (No 2)* [2016] NZERA Christchurch 101; *Oliver v Scott Haulage 2010 Ltd* [2016] NZERA Christchurch 141; *Oliver v Scott Haulage 2010 Ltd* [2018] NZERA Christchurch 183; and *Oliver v Scott Haulage 2010 Ltd* [2019] NZERA 36.

[8] At the first telephone directions conference which I held with counsel on 20 February 2020, I was advised the defendant intended to file an application for strikeout. There was discussion as to the jurisdictional basis of the plaintiff's claim and to whether the plaintiff needed to take a prior step before seeking a sanctions order, namely the obtaining of a compliance order against the defendant in the Authority.

[9] Counsel for the defendant subsequently advised that an application for strikeout would not in fact be brought, and sought leave to withdraw. This led to two telephone directions conferences on 2 and 28 April 2020 to ensure the correct procedure for such a step was adopted, since the defendant had not appointed another representative or filed an address for service. Ultimately, leave to withdraw was granted.

[10] On 6 July 2020, the Court was advised that the plaintiff was now seeking compliance orders in the Authority against the defendant, under principles discussed in *Northern Clerical IUOW v Lawrence Publishing Co of NZ Ltd* [6] and *Allen Chambers Ltd v Pelabon*.[7] Mr Zindel, counsel for the plaintiff, proposed that the setting down of the proceeding be deferred, pending the issuing of a determination by the Authority.

[11] Reviews of the proceeding took place on 7 October and 23 November 2020. In each instance, the case was adjourned for further review without the necessity of an appearance.

[12] On 12 January 2021, the Authority made a compliance order against the defendant.[8]

[13] On 24 February 2021, Mr Zindel filed a memorandum seeking a further but short adjournment, because negotiations had commenced with the defendant as to payment of the sum due to the plaintiff.

[14] On 4 March 2021, the Court was advised that a payment had been made, but there remained an unpaid balance.

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6 *Northern Clerical IUOW v Lawrence Publishing Co of NZ Ltd* [1990] 1 NZILR 717 (LC).
7 *Allen Chambers Ltd v Pelabon* [2019] NZEmpC 45, [2019] ERNZ 64.
8 *Oliver v Scott Haulage 2010 Ltd* [2021] NZERA 7.

[15] On 5 March 2021, a telephone directions conference was convened; a date of hearing was scheduled for 22 April 2021.

[16] On 9 March 2021, an amended statement of claim was filed. On 26 March 2021, a statement of defence to the amended statement of claim was filed by Ms Fisher, who had recently been instructed for the defendant.

[17] The plaintiff's brief of evidence for the hearing was filed on 1 April 2021; this was the due date for doing so. No brief was filed for the defendant on the due date for doing so, 8 April 2021.

[18] I understand that from February 2021 to April 2021, there were negotiations as to the precise amount due, which was ultimately agreed. I was invited to critique the steps taken during the negotiations, but it is not necessary to do so for present purposes.

[19] It was against this background that the plaintiff then filed a memorandum indicating the case could be discontinued. This was confirmed for the defendant on 16 April 2021. That meant the hearing set down for 22 April 2021 could be vacated.

[20] The parties were not, however, able to agree costs. They requested the Court to resolve this issue.

Submissions

[21] Mr Zindel described in some detail the plaintiff's legal aid circumstances, confirming that a total of $10,298.13 had been invoiced to the Legal Services Agency.

[22] For comparative purposes, he submitted that if costs were to be assessed on a 2B basis, the plaintiff's claim would be for 11.35 days, and thus $27,127. He noted that a contribution to costs should not exceed actual costs.

[23] Mr Zindel emphasised the protracted nature of the proceeding in that various determinations had been made by the Authority from 2016 onwards against the company, Scott Haulage 2010 Ltd. Despite these steps, which included the making of a compliance order against the company in January 2019, payment had not been

forthcoming. He said that against that background it had been necessary to issue proceedings against its director, the defendant.

[24] Mr Zindel argued that, in exercising its discretion, the Court should take into account the fact that a legal aid rate had been charged to the plaintiff and that, in all the circumstances, there should be a full indemnity.

[25] Ms Fisher submitted that the high threshold for indemnity costs was not met in this case; and that, in *Goodfellow v Building Connexion Ltd t/a ITM Building Centre*, the Court rejected a submission that an award of costs in favour of an aided person should be at, or close to, an indemnity level in reflection of legal aid rates being low compared to market rates for legal services.[9]

[26] Ms Fisher went on to discuss the various procedural steps taken by the plaintiff, submitting that the defendant should not be liable for costs in respect of the claim as it was originally pleaded. She said the plaintiff effectively abandoned the claim, as framed at the outset, returning to the Authority for a compliance order. It was only once that step was taken that there was a live issue for resolution, and it was resolved in negotiations earlier this year.

[27] Ms Fisher submitted there should be no award of costs.

Analysis

[28] I am satisfied that the approach often taken with regard to costs following the filing of a discontinuance is not appropriate in this particular case. The plaintiff should receive a contribution to his costs, given the lengths that he has had to go to in order to obtain a recovery of awards made by the Authority.

[29] It is correct that, in the first instance, the premise on which the claim was brought against the defendant under s 140(6) of the Act was misconceived, a point which the defendant was entitled to take. Given the pragmatic approach which was adopted subsequently, where the defendant accepted the plaintiff was owed monies in

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9 *Goodfellow v Building Connexion Ltd t/a ITM Building Centre* [2010] NZEmpC 153.

respect of his former employment, it is perhaps surprising that the plaintiff was forced to return to the Authority to obtain a compliance order against the employing company's director. It was only when the jurisdictional issue was sorted out and the case was set down for hearing, that a more sensible approach was adopted albeit with the Court having scheduled a fixture.

[30] That all said, I am not persuaded the defendant should meet all the costs that were involved in bringing the case at the outset. In the end, the mis-start cannot be overlooked. For this reason, indemnity costs are not appropriate.

[31] Turning to quantum, I start with the 2B assessment undertaken by Mr Zindel.

[32] The claim made for commencing the proceeding, two days, is excessive; it should be reduced to one.

[33] Turning to the telephone directions conferences, 0.8 of a day is claimed for the preparation of memoranda for either the telephone directions conferences that did proceed or requests for adjournments which were dealt with on the papers. That claim is excessive. Nor do I agree with a claim for seven appearances at telephone directions conferences, since there were only four. Standing back, I would allow one day for all attendances in connection with the conferences.

[34] Finally, a claim for two days' preparation in respect of one brief of evidence that focused on the procedural history only, is also excessive. It should be reduced to one day.

[35] In my view, the correct application of scale factors produces a figure of three days. At $2,390 per day, that is a total of $7,170, which I round to $7,200. This figure is a little more than two-thirds of the plaintiff's actual legal aid costs.

[36] I acknowledge that the rates charged to the plaintiff may well have been considerably lower than market rates, but I also take into account the fact that attendances were included in the legal aid invoices for steps not included in the

Guideline Scale, such as those relating to the negotiations between the parties. Accordingly, the amended 2B assessment provides a fair basis for a costs order.

Result

[37] The defendant is to pay a contribution to the plaintiff's costs of $7,200.

[38] This is not a suitable case for the award of costs with regard to the costs application.

B A Corkill
Judge

Judgment signed at 9.45 am on 8 July 2021