

**IN THE DISTRICT COURT
AT WELLINGTON**

**I TE KŌTI-Ā-ROHE
KI TE WHANGANUI-A-TARA**

**[2023] NZACC 108 ACR 68/22 and
ACR 69/22**

UNDER	THE ACCIDENT COMPENSATION ACT 2001
IN THE MATTER OF	AN APPEAL UNDER SECTION 149 OF THE ACT
BETWEEN	GAYE STEWART Appellant
AND	ACCIDENT COMPENSATION CORPORATION Respondent

Hearing: On the papers

Held at: Wellington by AVL

Appearances: K Koloni for the Appellant
 P McBride for the Accident Compensation Corporation (“the
 Corporation”)

Judgment: 3 July 2023

**RESERVED JUDGMENT OF JUDGE P R SPILLER
[Claim for costs on discontinuance of appeal]**

Introduction

[1] The claim for costs in this matter relates to two appeals:

- (a) ACR 68/22, from the decision of the Corporation dated 9 March 2022 declining Ms Stewart’s requests for costs; and
- (b) ACR 69/22, from the decision of a Reviewer dated 23 February 2022 declining jurisdiction regarding alleged unreasonable delay in reference

to Dr Kanji for assessment “as per conciliation agreement”, and awarding only partial review costs.

[2] On 11 May 2023, at the beginning of the convened hearing of the above appeals, Ms Koloni, advocate for Ms Stewart, handed to the Court a Notice of Discontinuance of the appeal. Counsel for the Corporation did not oppose the Notice, but asked for the issue of costs to be reserved and memoranda provided. The Court subsequently received a memorandum from Mr McBride for the Corporation and an email from Ms Koloni for Ms Stewart.

Submissions from the Corporation

[3] Mr McBride submits that the appeals were not properly prosecuted for the following reasons:

- (a) The appeals were filed out of time (on 22 April 2022).¹
- (b) For the initial case management conference, the Corporation sought a joint memorandum. However, counsel for the Corporation was obliged to file a unilateral memorandum of counsel dated 6 July 2022. A memorandum was then filed by Ms Koloni dated 14 July 2022 indicating that, although the issue was one of costs, new evidence, including affidavits, was proposed to be called.
- (c) By email dated 11 August 2022, an affidavit of the appellant was filed, and this document appeared to be irregular and of no apparent relevance.
- (d) By Minute dated 25 August 2022, the Court directed (by consent) that the appellant’s submissions be filed and served by 23 November 2022. No submissions were filed or served by the appellant. After follow-up by the Registry on 27 September 2022, Ms Koloni stated that the affidavit from the appellant formed the presentation of this appeal. Submissions were then filed by the Corporation, including noting that Ms Koloni, by that point, was already in receipt of judgments of this Court identifying absence of jurisdiction.

¹ *Stewart v Accident Compensation Corporation* [2022] NZACC 101.

- (e) In February 2023, the matter was set down for hearing to occur on 11 May 2023. A Minute dated 24 February 2023 was issued.
- (f) In accordance with the Practice Guidelines, it was for the appellant to prepare the required bundle of documents. The Corporation sought to engage with Ms Koloni about that from late February 2023 onwards, without any substantive response. On 18 April 2023, absent any response from Ms Koloni, a copy of a bundle prepared by the Corporation was filed and served, without response from Ms Koloni.
- (g) By email dated 1 May 2023, the Court sought the agreed statement of facts and issues for the appeal. Counsel sought to engage with Ms Koloni about that. The only response was that she was unwell. On 5 May 2023, counsel for the Corporation filed and served a unilateral statement of facts and issues.
- (h) On 9 May 2023, counsel checked with the Registry as to any further developments that might impact on the hearing, including its potential conduct by AVL. Counsel for the Corporation fully prepared for and attended the hearing on 11 May 2023.
- (i) At 2.13 pm, shortly after arrival at Court, Ms Koloni proffered a document described as a discontinuance, and sought Corporation counsel's signature to that. That was declined, absent instructions. When the Court sat, Ms Koloni advised discontinuance of the appeal on the stated basis of the appellant not being able to be present. In exchange with the Court, Ms Koloni indicated that, after discussion on 10 May 2023, she had prepared a notice of discontinuance for the appellant's signature; and, at a meeting that morning (11 May 2023), the notice had been signed.

[4] Mr McBride submits as follows. The appellant's wholesale disregard of the numerous timetabling and other unequivocal requirements on the appellant, by her advocate, establishes abuse of the process of the court. Particularly where the sole issues before the Court were ones of any entitlement of Ms Koloni to costs, the

withdrawal of the appeal because of the absence of the appellant was an explanation without merit. Ms Koloni has been previously warned by the Court as to the possibility of costs being awarded against her.²

[5] Mr McBride, for the Corporation, seeks:

- (a) A declaration that the proceedings and/or their manner of prosecution comprised an abuse of the process of the Court; and
- (b) A declaration that an award, including as to the wasted costs, by reason of the conduct of this case is appropriate in the circumstances of the case; and
- (c) An order by way of costs as against the advocate, Ms Koloni, personally.

Submissions from Ms Koloni

[6] Ms Koloni submits as follows. Mr McBride is just being spiteful by seeking costs from her. This is especially when he knows Mrs Stewart's physical injuries and limitations, including her major depression and anxiety mental injuries that the Corporation has granted her cover for; the levels of pain she is in on a daily basis due to causalgia and CRPS; and her husband being terminally ill with cancer and his time of life is coming to an end. Mr McBride gets paid very well for every appeal, even if he loses. He also claims all travel costs in his invoices, paid by the Corporation under contract. So his claim is a nonsense. Mr McBride knows that, even though Judge Spiller has made an earlier determination on costs in the appeal she won last year for Mrs Stewart, yet the Corporation have still not paid her. Mr McBride clearly does not like losing and has taken a dislike of her personally, and now seeks revenge.

Relevant law

[7] Rule 14.1(1) of the District Court Rules 2014 provides that the award of costs is at the discretion of the Court if they relate to costs of a proceeding, or incidental to

² *Foster and Beauchamp v Accident Compensation Corporation* [2023] NZACC 74, at [17].

a proceeding, or a step in a proceeding. Rule 14.2(1)(a) provides that the party who fails with respect to a proceeding should pay costs to the party who succeeds.

[8] In *Howard*,³ Judge Powell stated:

[16] The Corporation seeks costs on the appeal. Although generally the Corporation does not seek costs nor is it the position of this Court in general terms to award costs against unsuccessful claimants the Court retains an overall discretion to do so in appropriate cases. In this case it is apparent for the reasons set out above that the issues sought to be raised on behalf of Mrs Howard have all been conclusively determined and the continued challenge to the suspension decision itself as well as the continued pursuit of the claims for treatment costs can only be categorised as an abuse of process. In those circumstances the Corporation is entitled to costs and reasonable disbursements.

[9] In *Bligh v Earthquake Commission*,⁴ Justice Osborne stated:

[9] The determination of any award in relation to costs which have been wasted is, as with all costs matters, at the discretion of the Court. Jurisdiction to make a wasted costs order where a party's default causes a trial to be vacated or adjourned is usually an exception to the usual rule that costs follow the event because there has usually been no "event".

...

[11] Wasted costs awards have a two-fold purpose:

- (a) to compensate parties not in default who have truly wasted costs (including disbursements); and
- (b) to impose a sanction on a defaulting party in an effort to avoid future wastage of costs and of judicial and Court resources and disadvantage to other parties yet to be allocated trials.

[10] In *Commissioner of Inland Revenue v Livingspace Properties Limited*,⁵ Justice Osborne stated:

[14] While Mr Ho emphasises that any wasting of costs was not intended by Mr Walker, the Court's focus in this regard is not on intention but on consequence. The Court seeks to protect from the burden of wasted costs the party who is not in default.

³ *Howard v Accident Compensation Corporation* [2017] NZACC 76

⁴ *Bligh v Earthquake Commission* [2017] NZHC 3179.

⁵ *Commissioner of Inland Revenue v Livingspace Properties Limited* [2019] NZHC 3208.

[11] In *Brown*,⁶ Judge Powell stated:

[3] Taking these matters into consideration in the absence of any legitimate explanation on the part of Mr Gibson, I find Mr Gibson's behaviour unacceptable; being a gross discourtesy to the Court, to counsel for the respondent and to the appellants to whom he represents. He simply is not fulfilling his functions as he should. If Mr Gibson was a barrister and solicitor he would be subject to the disciplinary processes available under the Lawyers and Conveyancers Act but as an advocate those obviously do not apply.

[4] On the other hand as an advocate I am satisfied that pursuant to the decision of *JCP v SS* [2012] NZFC 10236, which applied the decision of *Mark Winter Waikato Limited Tracy International Limited* [1999] 13 PRNZ 259 I have jurisdiction to award costs against Mr Gibson personally.

Discussion

[12] The issue in this case is whether the conduct of these proceedings by Ms Stewart's advocate, Ms Koloni, amounts to an abuse of the process of the Court such that there should be a declaration to this effect and costs awarded against Ms Koloni personally.

[13] This Court affirms its discretion to award costs relating to a District Court proceeding, particularly in favour of a party who succeeds.⁷ This Court also affirms its jurisdiction to award costs against a party and against an advocate, where circumstances such as an abuse of process of the Court warrants such an award.⁸ Every court has an interest in ensuring that those who appear before it maintain an appropriate level of competence and do not abuse the court's processes. Particularly in a case such as the present, where the appellant herself was undergoing challenging health and domestic circumstances, the Court could expect her representative to discharge her duties with professionalism, competence and diligence.

[14] In exercising its jurisdiction under the Accident Compensation Act, this Court is required to ensure that appeal proceedings are disposed of in a just, expeditious, and economical way.⁹ This Court acknowledges the concerns that Mr McBride has presented in relation to the conduct of these proceedings by Ms Stewart's advocate, Ms Koloni. The details of these concerns have not been disputed by Ms Koloni in

⁶ *Brown v Accident Compensation Corporation* [2014] NZACC 65.

⁷ District Court Rules 2014, Rules 14.1-2.

⁸ *Howard*, above note 3, at [16], and *Brown*, above note 6, at [4].

her reply. Mr McBride has documented the ways in which the disposal of these proceedings has been hampered by lateness, lack of cooperation, and failure to meet the Court-directed deadline for submissions. The Court also acknowledges the concern that the likely discontinuance of the present proceedings was known to Ms Koloni the day before the hearing, and no later than the morning of the hearing. The professional and courteous course of action would have been to alert the Court and counsel for the Corporation, as early as possible before the hearing, that there was (at least probably) no need for the Court and its staff to convene, or for the Corporation's counsel to travel from Wellington to Hamilton for the hearing.

[15] However, this Court finds that the appellant Ms Stewart, herself, cannot be held responsible for the above failings of her advocate, Ms Koloni. Further, the Court finds that the justifiable concerns noted by the Corporation's counsel as to the conduct of Ms Koloni do not (quite) reach the level of an abuse of process of the Court. The Court bears in mind that the hazards and uncertainties of litigation proceedings, such as "settlement at the doors of the Court", are part of the realities of the Court process. Thus, by a very narrow margin, this Court determines that the above failings of Ms Koloni do not warrant an award of costs and disbursements against her. The Court hopes that these failings do not re-occur, as there will otherwise be the real prospect of a costs award against Ms Koloni herself.

Conclusion

[16] This Court records its concern as to the conduct of the proceedings in this matter, by the advocate concerned. However, the Court exercises its discretion not to award costs against the advocate on this occasion.



P R Spiller
District Court Judge

Solicitors for the Respondent: McBride Davenport James

⁹ Regulation 10(2), Accident Compensation Regulations 2002.