

[5] Mr Goldstein, on behalf of the Respondent, Mr Vinnie Ueese, citing actual costs of \$15,032.70 plus GST, is seeking a contribution to those costs in the sum of \$7,500.00 plus GST, or in the alternative on a notional daily tariff basis of \$2,225.00.

[6] Mr Patterson and Ms Grice, on behalf of the Applicant, submits that costs should be allowed to lie where they fall. In the alternative, if the Authority is not inclined to do so, that it applies costs on a tariff basis.

Submissions of the Respondent

[7] It is submitted on behalf of Mr Ueese, citing *Kelleher v Wiri Pacific Limited*, that it is usual in circumstances in which a Notice of Discontinuance has been filed, for costs to be awarded to the Respondent.¹ Further that in such circumstances the onus is on the Applicant to disprove the rule.²

[8] It is further submitted that that the costs awarded should reflect the following:

(a) *The Conduct of the parties:*

It is submitted that the Applicant's conduct was egregious. The commencement of proceedings while the Respondent was still employed by the Applicant, together with an unrealistic timeframe to provide a response, was unfair to the Respondent and not demonstrative of good faith. The Applicant could have attempted to resolve the matter with the Respondent before resorting to litigation.

(b) *The importance of the case to the parties:*

The case was of monumental significance to the Respondent given that his livelihood was at risk and the proceedings were filed on an urgent basis.

(c) *The amount of time required for effective preparation:*

The Respondent's preparation time was in proportion to the hearing time and the complexity of the matter.

(d) *Whether arguments lacking substance were advanced:*

The Applicant advanced arguments lacking substance, acknowledged by the fact that they filed a Notice of Discontinuance.

¹ *Kelleher v Wiri Pacific Limited* [2012] NZEmpC 98 at [9]

² *Vector Gas Ltd v Todd Petroleum Mining co ltd* HC Wellington CIV – 2004 – 485-1753 at [18]

(e) *Whether unduly technical or legalistic points were needlessly taken:*

It was not necessary for the matter to come before the Authority. The Applicant could have sought to discuss the matter with the Respondent and/or given him more time to respond before launching into litigation.

[9] It is submitted that in summary that the Authority ought to find in these circumstances that the Respondent's costs were reasonable and should make an order that the Applicant pay a contribution to all costs incurred up to the Notice of Discontinuance.

[10] In consideration of the above submissions and the actual costs incurred by the Respondent, it is submitted that the Authority should award the Respondent costs in the sum of \$7,500.00 plus GST, or in the alternative, should the Authority so decide, on the basis of the Authority's tariff approach.

Submissions of the Applicant

[11] It is submitted on behalf of Davis Trading that the general rule that a discontinuing party is liable for costs on the discontinuance should be displaced in the present case on just and equitable grounds, namely where the Applicant's claims have not been heard in the Authority in order to determine their merit.³

[12] It is submitted that the matters to be taken into account when determining whether or not the presumption is displaced include the reasonableness of the stance of the parties, and for example, the reason for withdrawing.⁴

[13] The basis for the submission that the presumption is displaced in this case is that:

- (a) The Applicant believed it needed to act urgently in circumstances in which Mr Ueese had accepted an offer of employment with a direct competitor of the Applicant. In these circumstances Davis Trading viewed its confidential information to be at risk and acted on an urgent basis to protect that information; and
- (b) The Applicant discontinued proceedings as the period of restraint would have been due to expire on or about the same time, if not after, the substantive hearing was to be heard. This would have resulted in there being nothing left for the Applicant to try to protect its position via an application for compliance.

³ *Kroma Colour Prints Ltd v Tridnicatco NZ Ltd* [2008]NZCA 150, at [12]

⁴ *The Star Trust v Hamilton City Council* [2016] NZHC 821

[14] It is further submitted that the Applicant gave the Respondent ample opportunities to discuss the matter in December 2019, and filed the submission only when it felt the Respondent was not responding to its correspondence or offers of mediation. The Applicant in this context notes that the Respondent only advised he was available to attend mediation on 17 January 2020 which was the last day for compliance with the Authority's direction.

Principles

[15] The power of the Authority to award costs arises from Section 15 of Schedule 2 of the Employment Relations Act 2000 (the Act) which states:

15 Power to award costs

- (1) The Authority may order any party to a matter to pay to any other party such costs and expenses (including expenses of witnesses) as the Authority thinks reasonable.
- (2) The Authority 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.

[16] The principles and the approach adopted by the Authority on which an award of costs is made are well settled and outlined in *PBO Limited (formerly Rush Security Ltd) v Da Cruz*⁵ as confirmed in *Fagotti v Acme & Co Ltd*.⁶

[17] It is a principle set out in *PBO Limited (formerly Rush Security Ltd) v Da Cruz*⁷ that costs are modest. Costs are also reasonable as observed by the Court of Appeal in *Victoria University of Wellington v Alton-Lee*⁸ at para [48] "As to quantification, the principle is one of reasonable contribution to costs actually and reasonably incurred."

[18] It is also a principle that costs are not to be used as a punishment or expression of disapproval of the unsuccessful party's conduct.

Costs Award

[19] A tariff based approach is that usually adopted by the Authority, which has the discretion to raise or lower the tariff, depending upon the circumstances. For a half day investigation meeting the tariff would normally equate to \$2,250.00.

⁵ [2005] 1 ERNZ 808

⁶ [2015] NZEmpC 135 at [114]

⁷ [2005] 1 ERNZ 808

⁸ [2001] ERNZ 305

[20] Costs normally follow the event and Mr Ueese was the successful party.

[21] I have considered the submissions made on the basis of a Notice of Discontinuance. I accept that given the timeframes involved, there would have been no merit in the Applicant pursuing its substantive claim. As such I accept that the Notice of Discontinuance was made on a pragmatic basis rather than on the basis of a view on the merits of its substantive application by the Applicant.

[22] I observe that Mr Ueese did comply with the timeframe in the Authority's direction notice by indicating his availability to attend mediation within the compliance dates ordered by the Authority.

[23] Having regard to the submissions, and the applicable costs principles, I find that Mr Ueese is entitled to costs and determine it is appropriate that these should be on the basis of the usual daily tariff in the Authority for a half day investigation meeting.

[24] I order that Davis Trading pay to Mr Ueese the sum of \$2,250.00 costs, pursuant to clause 15 of Schedule 2 of the Act.

Eleanor Robinson
Member of the Employment Relations Authority