

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2023] NZERA 176
3171524

BETWEEN MACDONALD INDUSTRIES
 LIMITED
 Applicant

AND SIMON BESWICK
 Respondent

Member of Authority: Philip Cheyne

Representatives: Richard Upton, counsel for the Applicant
 Ian Hunt, counsel for the Respondent

Submissions Received: 10 March 2023 from the Applicant
 23 February 2023 from the Respondent

Date of Determination: 13 April 2023

SECOND COSTS DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] MacDonald Industries Limited (MIL) applied to the Authority for various orders, including permanent and interim injunctions. As is standard, I accorded urgency to the interim injunction application and investigated that aspect first.

[2] In my determination dated 15 July 2022 I dismissed the claim for an interim injunction and reserved costs.¹ Later, I determined costs on the interim injunction investigation.² I formed the view that the circumstances meant that the Authority's usual approach of not determining costs until after a substantive determination should be departed from.

[3] Arrangements were then made for a substantive investigation meeting. It did not proceed, as MIL first withdrew the permanent injunction application and on 7 December 2022 withdrew the remainder of its application.

[4] This determination resolves Mr Beswick's claim for costs following the withdrawal.

Costs on withdrawal

[5] For Mr Beswick, counsel relies on the legal position applicable in the civil jurisdiction that when proceedings are discontinued by a plaintiff, it is tantamount to judgment for the defendant, but subject to the court's discretion to order otherwise. The defendant's entitlement to costs is seen as a rebuttable presumption. I am referred to several Court of Appeal cases.³ It is submitted that the same approach should be applied in the Authority.

[6] The two Court of Appeal cases both concerned the proper application of specific provisions in the High Court Rules then in force. These and their successor provisions do not apply to the Employment Relations Authority. The proper starting point is to have regard to the Authority's power and practice, in the context of the Employment Relations Act 2000.

[7] The object of the Act includes recognition that judicial intervention at the lowest level needs to be that of a specialist decision-making body not inhibited by strict procedural requirements. The Authority is established as an investigative body, whose role is to resolve employment relationship problems by establishing the facts and making a determination

¹ *MacDonald Industries Limited v Simon Beswick* [2022] NZERA 327.

² *MacDonald Industries Limited v Simon Beswick* [2022] NZERA 545.

³ *Krima Colour Prints v Tridonicato NZ Limited* [2008] NZCA 150 and *Yarrell v The Earthquake Commission* [2016] NZCA 517.

according to the substantial merits of a case. In exercising its powers, the Authority must comply with the principles of natural justice and act in a manner that is reasonable, having regard to its investigative role.

[8] A person may commence proceedings before the Authority if they have an employment relationship problem. Schedule 2 to the Employment Relations Act 2000 then permits an applicant to withdraw a matter before the Authority at any time.

[9] The Authority is empowered to order a party to the matter to pay such costs and expenses as the Authority thinks is reasonable. The exercise of the power to withdraw by an applicant does not prevent the Authority from considering costs.

The circumstances of this matter

[10] MIL had an employment relationship problem and commenced proceedings before the Authority.

[11] After the Authority's preliminary determination in July 2022, there was a case management conference and directions were made to advance the investigation of MIL's substantive claims. An amended statement of problem was lodged. As required, Mr Beswick lodged an amended reply. A further case management conference was required and directions were made.

[12] MIL withdrew its claim for a permanent injunction, and later withdrew its application on 7 December 2022.

[13] The investigation meeting had been set for 21 and 22 February 2023, with statements of evidence from MIL by 20 January 2023 and for Mr Beswick by 3 February 2023.

[14] Correspondence between counsel has been produced. To a limited extent, it involved some follow up for Mr Beswick of steps required to be taken by MIL to advance the Authority's investigation. For the most part however, the correspondence is a robust

exchange between counsel of views on their clients' behalf about the substance of the employment relationship problem as initially lodged and as amended (or foreshadowed) and prospects for resolution of the problem. The robust exchange added little to the Authority's investigative process.

[15] I mean no criticism of counsel. It was a significant problem and the parties through counsel were entitled to engage as they did. However, the point currently is what (if anything) would be reasonable for costs.

[16] That leaves some attendance by Mr Beswick's counsel to the substantive claims at the outset not yet addressed in costs, followed by participation in two case management conferences (including follow-up on directions not complied with) and preparation of an amended statement in reply as steps taken by Mr Beswick to advance the Authority's investigation into MIL's employment relationship problem, before the application was withdrawn.

[17] As Mr Beswick took steps in accordance with directions made to advance the Authority's investigation and incurred legal costs to do so prior to the withdrawal, he is entitled to a further award of costs.

[18] Mr Beswick seeks costs of \$6,750.00. Attendances (excluding in relation to the interim proceedings) exceeded that amount. Counsel characterises the claim as 1.5 times the daily tariff. For MIL, there is a submission that an award of \$750.00 would be appropriate, if any award was made at all.

[19] I do not consider that the daily tariff assists here, even by way of approximation. Two days had been set for the substantive investigation meeting, but the application was withdrawn before statements of evidence were due.

[20] I agree that an order at the level indicated by counsel for MIL reflects an appropriate contribution to the steps required to advance the Authority's investigation. It is consistent with the general principle that costs in the Authority should be modest.

[21] There is no reason to defer the date for payment.

Order

[22] MacDonald Industries Limited is to pay Simon Beswick costs of \$750.00.

Philip Cheyne
Member of the Employment Relations Authority