

surgery and asked for any teleconference to be rescheduled for the week beginning 10 August 2015. A date for that week was then confirmed for a case management conference. Ms Evans asked for a further extension. The Authority officer corresponded further with Ms Evans but as at 20 October 2015, there was no response from her about a date for a teleconference.

[2] By letter dated 5 November 2015, the Authority officer wrote to Ms Evans and advised that, given attempts to communicate which were set out; the matter would be placed on hold awaiting the applicant's intentions. Ms Evans was asked to contact the Authority by 3pm on 30 November 2015 or the file would be closed and archived. Ms Evans was also advised that if she did not wish to proceed further in the Authority, notification of withdrawal should be provided in writing. There was no response received to that letter.

[3] On or about 14 December 2015, Ms Ryder, on behalf of the respondent, lodged a memorandum seeking costs for defending the application in the sum of \$1,050 plus GST. The memorandum was forwarded to Ms Evans but no response has been received.

The issues

[4] The issue for the Authority to determine with respect to this application is whether an order for costs should be made in all the circumstances in favour of the respondent.

Are the circumstances such that an order for costs should be made?

[5] Clause 14 of the Second Schedule of the Employment Relations Act 2000 (the Act) provides as follows:

14 Withdrawal of matter

(1) Where any matter is before the Authority, it may at any time be withdrawn by the applicant or appellant.

(2) For the purposes of subclause (1), a matter before the Authority must be treated as having been withdrawn if no action on the matter has been taken by a party or the Authority for at least 3 years.

[6] The applicant has not withdrawn the application in terms of clause 14 (1) of the second schedule.

[7] Costs appear to have been sought on the basis that there has been no contact from the applicant by the date specified by the Authority officer of 30 November 2015 and the proceeding was in effect deemed to have been withdrawn by the Authority.

[8] The Court of Appeal in *Employment Relations Authority v. Rawlings*¹ considered whether the Authority can deem a matter to be withdrawn if there has been a failure to comply with a procedural direction issued by the Authority. Although the Court of Appeal did not decide the point, it stated at [21]:

....Further the concept of a deemed withdrawal may be inconsistent with cl 14 of the Second Schedule.

[9] At [17] the Court of Appeal stated *Although the deemed withdrawal was probably of limited intended effect, it is doubtful whether it was within the powers of the Authority* and more strongly at [47], the Court described the Authority's *unless order* which provided the basis upon which the claim was deemed to have been withdrawn as *wrongful*.

[10] I accept that the words closed and archived in the letter to the applicant of 5 November 2015 are stronger than the initial statement in the letter that the matter would be put on hold and may have caused confusion. The final sentence does however set out that for the matter to be withdrawn there must be some action on the part of the applicant in that it provides - *If you do not wish to proceed further in the Authority, notification of withdrawal must be provided in writing.*

[11] I do not find that the failure by the applicant to respond to the Authority officer by 30 November 2015 means that the Authority can deem this matter to be withdrawn and to do so would be inconsistent with clause 14 of the second schedule.

[12] Although the Authority's power to award costs under clause 15 is a broad one, costs generally follow an event. It may be appropriate in some circumstances for an award of costs to be made where a proceeding has been withdrawn. This matter has not been withdrawn. For reasons explained above the Authority cannot deem it to have been withdrawn. The Authority has not made any orders or given any directions about this matter. It has not been given a date for an investigation meeting. The only

¹ [2008] NZCA 15, [2008] ERNZ 26

steps taken since the statement of problem was lodged are the lodging of a statement in reply and an attempt to set the matter down for a telephone conference.

Determination

[13] I do not find that it is appropriate to make an order for costs at this point.

Helen Doyle
Member of the Employment Relations Authority