



# Employment Court of New Zealand

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## Te Whanau O Waipareira Trust v Yao [2017] NZEmpC 17 (23 February 2017)

Last Updated: 27 February 2017

### IN THE EMPLOYMENT COURT AUCKLAND

#### [\[2017\] NZEmpC 17](#)

EMPC 207/2016

IN THE MATTER OF a challenge to a determination of the  
Employment Relations Authority

BETWEEN TE WHANAU O WAIPAREIRA TRUST  
Plaintiff

AND ANDREW YAO Defendant

Hearing: On the papers on 16 and 20 December  
2016

Appearances: M Ryan, counsel for plaintiff  
S Greening, counsel for defendant

Judgment: 23 February 2017

### JUDGMENT AS TO COSTS ON DISCONTINUANCE OF JUDGE M E PERKINS

[1] These proceedings commenced as a non-de novo challenge to a determination of the Employment Relations Authority (the Authority) dated 22 July

2016.1 The challenge related to that part of the determination under which the plaintiff was ordered to pay costs to the defendant, Andrew Yao, in the sum of

\$7,071.56. The investigation meeting before the Authority had proceeded over two days. In addition to awarding the notional tariff of \$3,500 per day as costs, the plaintiff was also ordered to reimburse Mr Yao for his filing fee of \$71.56.

[2] The parties agreed that the non-de novo challenge could be dealt with on the papers. However, in the preparation and drafting of a judgment it became apparent

that there were difficulties between the parties relating to two material factual

<sup>1</sup> *Yao v Te Whanau O Waipareira Trust* [2016] NZERA Auckland 247.

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disputes. These arose from the written submissions which had been filed pursuant to timetabling orders issued earlier by the Court.

[3] In order to progress the matter and in the hope that a judgment could still be delivered on the papers rather than following a hearing, I directed counsel to discuss the disputed factual issues to see whether a consensus could be reached. If no agreement could be reached then counsel were to file further memoranda within seven days. Following that direction Mr Greening, counsel for the defendant, filed further submissions. However, Mr Ryan, counsel for the plaintiff, did not file submissions within the time directed, but at a later date indicated to the Court that the plaintiff had instructed him to discontinue the appeal. An appropriate Notice of Discontinuance was then filed on 9 December 2016 following prompting by the Court. The Notice of Discontinuance indicated that costs

on the discontinuance remained an issue.

[4] Even though the plaintiff challenged the costs determination of the Authority, Mr Yao has remained entitled throughout to take steps to enforce the determination. The challenge did not operate as a stay and no stay of enforcement was applied for by the plaintiff. The fact that the challenge has now been discontinued does not alter the fact that Mr Yao was always entitled to take steps to enforce the determination and that still continues.

[5] Having received the Notice of Discontinuance which reserved the issue of costs, the Court needed to consider whether costs should be awarded against the plaintiff in respect of the discontinuance. Further timetabling directions were given requiring counsel to file submissions in respect of costs on the discontinuance. Such submissions have now been filed.

[6] Now that a discontinuance of the challenge has been filed, the earlier costs award of the Authority, in the sum of \$7,071.56, remains owing to Mr Yao if it has not already been paid.

[7] In the submissions of Mr Greening on behalf of Mr Yao dealing with costs on

the discontinuance, he refers to this Court's decision in *Kelleher v Wiri Pacific Ltd*.<sup>2</sup>

There are, of course, numerous authorities across all civil jurisdictions dealing with costs on a discontinuance. In *Kelleher* the Employment Court stated:<sup>3</sup>

... The simple fact is that the defendant has been put to the expense of taking steps to defend a claim which the plaintiff has belatedly chosen not to pursue. In the absence of any information to the contrary, the inference is that she took this step because her claim lacked merit. While the plaintiff is entitled to discontinue her challenge, the starting point cannot, as a matter of principle, be that she can do so with immunity from costs. That would be inconsistent with the principle that costs generally follow the event.

[8] Mr Greening submitted that there is no reason to depart from that principle in the present case and that costs should follow the event.

[9] In order to arrive at a satisfactory level of costs, Mr Greening has carried out a calculation under this Court's Guideline Scale and has appropriately calculated such costs on a Category 1 basis. Applying the appropriate time allocations, the calculation under the scale amounts to \$2,072. That is the sum which Mr Yao seeks as a contribution towards his costs on the discontinuance.

[10] In his submissions on behalf of the plaintiff, Mr Ryan indicates that the plaintiff regards the amount sought under Mr Greening's calculation as not reasonable in the circumstances. While not indicating the charges made to the plaintiff as legal fees in these proceedings, the plaintiff submits that an appropriate award of costs would be \$1,500. Mr Ryan submits that an offer for that amount was made prior to the discontinuance actually being filed and since then Mr Greening has incurred further costs on behalf of his client by having to file submissions on the present costs application.

[11] Any costs calculated under the Guideline Scale are, of course, designed to be merely a contribution towards costs on a party-to-party basis not as reimbursement

of actual costs incurred.

<sup>2</sup> *Kelleher v Wiri Pacific Ltd*, [2012] NZEmpC 98, [2012] ERNZ 406.

<sup>3</sup> At [11]. Footnotes omitted.

[12] The plaintiff chose to challenge what was clearly a reasonable award of costs contained in the Authority's determination. The challenge never really had merit and may have been an attempt to keep Mr Yao from his full entitlement in this matter. Having said that, however, no stay of enforcement application was made by the plaintiff. Nevertheless, the level of costs now sought by Mr Yao as a contribution towards his legal costs on the entire matter could only be described as modest and certainly not excessive as appears to be submitted by Mr Ryan.

[13] Accordingly there will be an award of costs on the discontinuance against the plaintiff in the sum of \$2,072.

M E Perkins

Judge

Judgment signed at 9.45 am on 23 February 2017