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Wade v Hume Pack-N-Cool Limited [2011] NZEmpC 57 (27 May 2011)

Last Updated: 15 June 2011

IN THE EMPLOYMENT COURT AUCKLAND

[\[2011\] NZEmpC 57](#)

ARC 74/07

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

BETWEEN ERROL WADE Applicant

AND HUME PACK-N-COOL LIMITED Respondent

Hearing: By memoranda of submissions filed on 20 July, 12 August, 15 and 22

October 2010

Counsel: Mark Donovan, counsel for applicant

Kim Stretton, counsel for respondent

Judgment: 27 May 2011

JUDGMENT OF JUDGE B S TRAVIS

[1] The applicant seeks an order that he be permitted to pursue his challenge to a determination^[1] of the Employment Relations Authority, issued on 16 October 2007, after his previous counsel (who I shall call “Mr A”) filed a purported notice of discontinuance on 6 August 2008. This application has been opposed by the respondent. The parties agreed to have the matter determined on the basis of the papers filed in Court. These include submissions and affidavits.

Factual background

[2] From this material the following facts emerge. The applicant challenged the

Authority’s determination on 8 November 2007 and elected to have a hearing de

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novo. The respondent failed to file its statement of defence in time and applied for leave to file out of time. That application was not opposed and Chief Judge Colgan granted leave to extend the time for filing the statement of defence. The matter was called over before me on Monday 19 May 2008. Mr A appeared as counsel for the applicant and Ms Kim Stretton as advocate for the respondent. I issued a minute recording the matters agreed, namely that the applicant should go first, there were no outstanding interlocutories and the matter would require two full days for a hearing, which should take place in Tauranga. I found that further mediation was unlikely to assist. I directed the parties to liaise with the Registrar to obtain an appropriate hearing date if a venue in Tauranga could be obtained. The parties also agreed that the applicant would file and serve his briefs of evidence 14 days before the fixture and the respondent 7 days before the fixture. The applicant also undertook the obligation of preparing an agreed bundle of documents. The registry arranged a hearing in liaison with the parties, in Tauranga, to occur on 14 and 15 August 2008. Mr A obtained an extension of time to file the applicant’s briefs of evidence. Ms Stretton was given a consequential extension of time to file the respondent’s briefs.

[3] On 6 August 2008, under cover of a facsimile cover sheet from Mr A stating “I attach notice of discontinuance in the above

matter”, a document described as a “notice of discontinuance” (the notice) was filed. It was signed by Mr A as counsel for the applicant and Ms Stretton on behalf of the respondent on 6 August 2008. This document was addressed to the respondent and to the Registrar of the Employment Court and stated:

1. These proceedings are hereby discontinued.
2. There is no issue as to costs in this Court.

[4] The notice was sent to Judge Shaw that day, as she was rostered to hear the matter and she advised that she was happy for the fixture set down for 14 and 15

August to be vacated. The registry wrote to the parties on 6 August advising that on receipt of the notice, as there was no issue as to costs, the Court was treating the matter as withdrawn and had vacated the hearing.

[5] On 12 August 2008, a telephone message was left on the registry’s answer

phone from the applicant personally stating that there had been a miscommunication

with his lawyer and that he would like to continue with his challenge. The registry contacted Mr A, who replied on 12 August 2008 in the following terms, with a copy sent to Ms Stretton:

As discussed, I have received further instructions from Mr Wade. He now seeks to continue with this claim.

As a result of that decision and discussions between myself and him, I find myself in a position of conflict and I have advised him that he will need to instruct new counsel who will take whatever steps are necessary in order for these proceedings to continue.

Until he instructs new counsel, Mr Wade’s contact details are as follows:

... (details omitted)

[6] The registry responded by a letter dated 22 August 2008 to the applicant in the following terms:

I am writing to you in regards to advice received from Mr [A] on

12 August 2008 that you wish to continue the above matter.

This proceeding was withdrawn on 6 August 2008 following receipt of a

Notice of Discontinuance signed by counsel for both parties.

Please find attached a copy of the letter sent to counsel advising that the matter has been withdrawn.

As the matter is no longer before the Court, I cannot be of any more assistance.

I encourage you to seek legal advice in relation to this letter.

[7] The next communication from the applicant occurred on 24 November 2009 when he telephoned the Court to make an enquiry as to whether he could apply to reinstate the proceedings. He told the Court that he had lodged a complaint with the New Zealand Law Society against his former counsel and that he had been advised that he could apply to the Employment Court to continue the proceedings. It was suggested to the applicant that he file an application with a supporting affidavit.

[8] On 3 December 2009 the applicant applied to have his case reinstated on the grounds that it was cancelled without his permission, that the evidence showed he

could win his case and that the Law Society believed that he had not lost the opportunity to have his case reinstated. This was accompanied by an affidavit in which the applicant deposed that he visited Mr A’s office on 4 August 2008 and had a conversation about a receipt, which the applicant claimed had been forged. He deposes that Mr A stated there was no way that they could get their hands on the original to confirm this and recommended that “we dropped the case”. He then deposes that Mr A cancelled his case but he had left Mr A’s office with the belief that the case was continuing.

[9] On 20 January 2010, Ms Stretton filed submissions opposing the reinstatement of the challenge with an affidavit from Mark Hume, a director of the respondent. It is claimed in this material that a few days before the hearing, Mr A said that the applicant would drop his case on condition that the respondent did not make a claim for costs. At that stage the Employment Relations Authority had awarded \$1,500 costs against the applicant. This sum had not been paid. Mr Hume’s affidavit complains about the way the applicant has pursued his claims, and in particular the delays and the additional costs that were being incurred.

[10] On 28 April 2010, a notice of change of representation and address for service on behalf of the applicant was filed stating

that his counsel was now Mark Donovan.

[11] On 21 May 2010, the new solicitors acting for the applicant filed a substantial affidavit from the applicant, sworn on 19 May 2010. In that affidavit the applicant deposes that he attended an appointment at Mr A's office on 31 July 2008, but was told by Mr A's secretary that he was out and was unavailable to meet with him. Another appointment was made by the secretary to meet with Mr A on 4 August

2008. He claims that he was not aware at that time that the Court had directed him to file his evidence 14 days prior to the hearing date of 14 August 2008. This, he deposed, could not be achieved as he was unable to meet with Mr A on 31 July. He also claims that he was unaware that Mr A had requested an extension of time for the filing of the evidence and only became aware of this after his new counsel searched the Court file.

[12] The applicant deposes that he met with Mr A on 4 August 2008 and at that meeting Mr A told him that, after giving it due consideration, Mr A was recommending that the applicant drop his case. He claims that after the discussions of the merits of the case he was left with the impression that Mr A was trying to bully him into agreeing to drop the case but that despite that pressure, the applicant insisted that he wanted to carry on. He claims that Mr A said that he would send the respondent an unsigned letter to gauge the respondent's reaction to the applicant's proposal that he drop his case on the basis that the respondent would not raise any issue as to costs. Mr A said he would do that in case the applicant changed his mind and later wanted to drop the case as they were now getting very close to the hearing date. The applicant deposes that he reluctantly agreed to that approach, because, while he did not want to withdraw his case at that stage, he believed that Mr A would not be able to withdraw his case without his authorisation, even if Mr A did send a draft letter as he had suggested. He claims that he left Mr A's office with the belief that his case was still going ahead. He deposes that on 6 August, he rang Mr A to inform him that he had not changed his mind and wanted to continue with the case, but as Mr A was not available, he left a message with Mr A's secretary. The applicant deposes that on 7 August, having not heard from Mr A, he rang again and again was told that Mr A was not available. He claims to have left a message with Mr A's secretary, telling him that he had not changed his mind and wanted to continue with his case. He deposes that he was unaware that the purported notice of discontinuance had been filed in the Court the previous day.

[13] The applicant deposes that on Friday 8 August 2008, he received a letter from

Mr A, dated the previous day, stating:

As discussed, I have filed a Notice of Discontinuance with the Employment Court. Having reflected on this matter as you are aware, my view was firmly that this was extremely risky litigation from your perspective with a high probability that the you would not succeed.

That would have rendered you liable for costs in the Employment Court in the region of \$5,000.00 which is in addition to the costs which were ordered in the Employment Relations Authority.

With regard to the costs in the Authority, I note that whilst the Authority made a determination that you were to pay the sum of \$1,500.00, that has not been paid. Humes through their representative have not raised that as an issue. I have not reminded them of the matter and accordingly, unless

they seek payment of those costs, this matter is now at an end. I thank you for your instructions.

[14] The applicant deposes that as soon as he received that letter, he rang Mr A's office but could not get hold of Mr A and left urgent instructions for Mr A to get in touch with him. He rang the Employment Court on Saturday 9 August and left the message on the answering machine saying that he wanted his case to go ahead, and rang again on 11 August and was told that he needed to get legal advice. He deposes that he rang Mr A's office many times on the Monday but received no answer until Tuesday, 12 August. He deposes that Mr A then told him that Mr A could not represent him any more because the applicant had gone to the Court of his own accord and Mr A recommended another lawyer based in Tauranga.

[15] Upon receipt of the letter from the Court dated 22 August 2008, the applicant deposed that he decided he needed to obtain fuel statements from the respondent to support his position that he had not stolen fuel from the respondent and went to see his local lawyer. The chain of correspondence between his local lawyer and Ms Stretton is annexed to his affidavit. The information he requested was not provided, the respondent's response being that the matter had settled some years before by the payment to the applicant of \$40,000 and that his current claims were frivolous and vexatious.

[16] The applicant deposed that on 4 November 2008 he obtained legal advice which was to the effect that he would not have any success in getting his case reinstated. He then contacted his local Member of Parliament who advised him to contact the Ombudsman. The Ombudsman wrote to him on 23 January 2009, stating that he could not help and recommending the New Zealand Law Society. The applicant took his concerns to the Law Society which investigated the matter and its Standards Committee issued a notice of determination dated 20 November 2009 which concluded:

The Standards Committee has considered the complaint and has decided to take no action on it, for the following reasons:

1. The complainant alleged that the practitioner should have continued the appeal proceedings but the practitioner maintains, and this is supported by a perusal of his file, that the complainant clearly instructed he wished to discontinue the appeal proceedings on the basis that costs would not be

sought against him by the other party. This has been confirmed by the practitioner. Instructions were sought and provided on two separate occasions confirming the complainant's desire to discontinue.

2. The complainant believes he lost his opportunity to make the appeal but the Committee believes the Employment Court has jurisdiction to allow an application to reinstate a grievance even when significant delays exist. The complainant appears to have had a change of heart after the Court had already been advised of the discontinuance.

3. The complainant believed he had an excellent chance of success despite the view of the practitioner and the independent view of a second opinion sought by the complainant. Both the original opinion and the second opinion confirmed the chances of success were low. The complainant appears to have taken no further steps to instruct another lawyer.

4. For these reasons, the Standards Committee is of the opinion that Section 138(2) LCA applies and that no further action is necessary or appropriate.

[17] The applicant claimed that, as a result of the opinion of the Standards Committee, the Court still had the jurisdiction to reinstate his case. He filed his application for the reinstatement of his proceedings on 3 December 2009.

[18] The applicant requested the Legal Complaints Review Officer review the

Standards Committee's determination. The Review Officer's decision was issued on

3 June 2010. It contains a detailed analysis of the submission received and the

determination which it described as "well-founded".

[19] The decision upheld the Standards Committee's view that Mr A had acted with instructions to discontinue the claim if costs were not sought and these instructions were supported by the contemporary file note Mr A made. It found that Mr A's advice and actions gave the applicant the best realistic outcome and when the applicant later changed his mind, Mr A immediately referred him to another lawyer. It observes that the applicant took 10 days to seek other legal advice and that the delay would have made it even more difficult to get leave to appeal. It notes that the applicant received good sensible advice, not only from Mr A, but also from the second lawyer and notes the Committee's observation that the applicant appeared to have taken no further steps to instruct another lawyer. Both lawyers had discussed the substantive merits of the applicant's case and had concluded that he was "highly unlikely" to have established his claim. For these reasons it found the applicant was

well served by both lawyers and endorsed the Committee's decision that no further action was necessary or appropriate.

[20] The applicant's second affidavit also deals with the merits of the Authority's determination. The applicant states that the subject of his challenge in the Court was that he had an agreement with the respondent that he would be paid \$70,000 nett to settle various claims that he had in relation to his employment. He states that his various claims, dating from as early as 1992, were settled in 2004 for \$70,000 but that he has only been paid \$40,000. He claims that on 5 January 2004, he was wrongly accused of stealing petrol from the respondent for himself and his daughter. He claims that in his defence he told the respondent's directors that he only used petrol as necessary to further the respondent's interests.

[21] Nowhere in his affidavit does he then suggest that the accusations were taken any further in the sense of a disciplinary investigation. It is therefore difficult at first sight to see what, if any, was the relevance of his claims to Mr A that a document relating to the petrol was a forgery.

[22] He deposes that at the meeting on 5 January 2004, he was asked for a job description as he did not have a written employment agreement outlining his role for the respondent. The following day he claims he gave the respondent a written job description and a letter outlining what he claimed to be owed by the respondent. It addressed events from 1989 and claimed a total of \$1,080,960. He claims then to have negotiated a deal with Mark Hume for him to be paid \$70,000 nett. He claims that at the end of March 2004, Mark Hume told him that he had \$40,000 for him and he signed a receipt which he claimed was as part payment towards the settlement sum. This document, which is not annexed to his affidavit, was, he claims, altered by the respondent in the form that it was presented to the Employment Relations Authority. He claims that 11 months later, he wrote an undated letter to Gavin Hume claiming that Mark Hume had broken the verbal agreement in not paying him the balance and he reinstated his original claim. He claims that in June 2004, Jim Hume stopped paying the applicant's child support without telling the applicant and this led to a bill of \$16,000 over the year. He claims that payments of \$450 were still being put into his account by the respondent.

[23] The applicant further claims that in 2005 he was "ostensibly made redundant" but was told to leave the respondent quietly in order to get a reference and he believes that he was forced out. In 2006, he instructed Mr A to take the claim against

the respondent for the remainder of the settlement funds that had not been paid.

[24] The applicant deposes that the Authority wrongly decided his claim in at least the following respects:

(a) In finding that the invoice he signed for the \$40,000, although not expressed as being in full and final settlement, was intended to be the end of the matter; and

(b) in finding that the respondent's evidence was more believable than

his.

[25] The applicant claims that subsequent to the Authority's investigation, he was able to obtain evidence that the accusations made about him stealing fuel were untrue. He annexed copies of a fuel card statement for January to March 2003 and a sample credit card statement for October until November 2003 to his affidavit. He claims these show that the majority of purchases on the fuel card were for petrol not diesel which his vehicle required, that there were no further fuel transactions after March 2003 and support his evidence that his daughter took her car with her to Dunedin in January 2003 and did not return until mid-November of that year. He claims that this evidence will show that the petrol theft accusations made by the respondent's witnesses were untrue and not credible and that therefore their evidence in relation to the issue of whether or not the parties settled the claim for \$70,000 nett should also not be trusted.

[26] He further claims that if he had had the opportunity of pursuing his challenge, he would have been able to show that the respondent's position was not credible and that his claim for the remainder of the \$70,000 nett payment should succeed.

[27] After some considerable delays on the part of the respondent's representative,

which were the subject of several directions from both the registry and the Court,

and which delays will sound in costs, an affidavit of Mr A, sworn on 30 June 2010, was filed on 11 October 2010.

[28] In his affidavit, Mr A, deposes as follows. He recommended the applicant discontinue his proceedings on the basis that costs in the Employment Court would not be pursued and the respondent would not enforce the Authority's costs order. On

4 August 2008 he met with the applicant who instructed him to discontinue the proceedings on the basis that the respondent would not pursue costs. He then drafted a notice of discontinuance which he forwarded to the respondent's representative and received it back, duly signed, on 6 August 2008. He contacted the applicant by telephone upon receipt of that document and advised the applicant that the respondent had agreed to the discontinuance and that it would not seek costs. On that basis he was instructed to sign the notice of discontinuance on the applicant's behalf, he did so and filed it with the Court. Mr A says that he confirmed that he had taken the steps in accordance with the applicant's instructions by way of his 7

August 2008 letter. On 12 August 2008 he received further instructions from the applicant which indicated that the applicant had changed his mind and that he wanted to continue the proceedings. He advised the applicant that it was too late and that in any event he would not be able to continue to act and recommended another lawyer.

Submissions and discussion

[29] Mr Donovan took issue with the late filing of Mr A's affidavit and opposed the admission of that evidence on the ground that the respondent had failed to comply with the Court's numerous directions. As will be seen from my factual findings, I have taken that affidavit into account, notwithstanding its late filing, as a matter of justice and fairness to the respondent. The consequences of the late filing will sound in costs.

[30] Mr Donovan for the applicant submitted that the primary issue for the Court to determine was the effect of the purported notice of discontinuance. This notice should not prevent the applicant from proceeding with his challenge, because, he submitted, it did not comply with the requisite procedural requirements. In the

alternative, the applicant requested that the Court consider whether he should be permitted to pursue his challenge on the basis that he did not authorise Mr A to file the notice.

[31] Mr Donovan submitted the notice was invalid as it was not in the proper form and was not served on the respondent. He submitted that, like the case of *Edwards*

& *Hardy Hamilton Ltd v Woodhouse [Irregularity]*,^[2] the proceedings have therefore

not been actually discontinued. Mr Donovan also referred to *Kapadia v Axiom Rolle PRP Valuations Services Ltd*,^[3] where the Court noted there is no procedure in the [Employment Relations Act 2000](#) (the Act) or the Employment Court Regulations

2000 (the Regulations) for the filing of a notice of discontinuance.^[4] Clause 18 of

Schedule 3 to the Act simply provides that an applicant or appellant may at any time, withdraw a matter before the Court, but

does not say how that must be achieved.

[32] Mr Donovan submitted that this is a case which therefore must fall under reg 6(2) of the Regulations and be disposed of as nearly as practicable in accordance with the provisions of the Act or the Regulations or any rules affecting a similar case, or the provisions of the High Court Rules.

[33] At the time that the notice was filed the High Court Rules 1985 were still in force and Mr Donovan relied on r 475 which allowed for a plaintiff, before the giving of judgment, to file a notice of discontinuance, a copy of which had to be served on every other party to the proceedings. Mr Donovan submitted the rule had not been complied with because while Mr A had sent an unsigned notice of discontinuance to the respondent's advocate for execution, there was no evidence that a fully signed notice of discontinuance was ever served on the respondent.

[34] In response, Ms Stretton submitted that Mr A had received an executed copy of the notice of discontinuance on 6 August 2008 and, after filing it, then faxed a copy to the respondent's representative. Mr A in his affidavit does not say that he faxed a copy to her and there is no evidence from the respondent's representative

confirming this. The facsimile cover sheet to which Mr A attached the notice of

discontinuance when filing it in the Court on 6 August does not show that it was copied to the respondent. However, the Court's communication on 6 August 2008 to both Mr A and Ms Stretton referred to the joint notice and the Court's actions in treating the matter as withdrawn.

[35] In view of the fact that the respondent had signed the notice of discontinuance and received confirmation on 6 August 2008 from the Court that it had been filed, the non-service by Mr A on the respondent's representative, if that was in fact the case, is but a technical objection. I consider this objection does not promote the speedy, fair and just determination of the proceedings, in terms of reg 4, which is the manner in which the Regulations are to be construed. In these circumstances, I consider that the combination of the respondent's representative signing the notice and the confirmation by the Court on 6 August 2008 perfected the notice of discontinuance.

[36] Mr Donovan then submitted that a different form from that provided in the

High Court Rules had been used. The High Court form states:[\[5\]](#)

Take notice that [*name of plaintiff discontinuing proceeding*] discontinues this proceeding against [*name of the defendant or, if there is more than 1 defendant, the names of the defendants or the names of the defendants against whom the plaintiff discontinues the proceeding*].

[37] Mr Donovan pointed out that, by contrast, the form used in the notice simply stated:

1. These proceedings are hereby discontinued.
2. There is no issue as to costs in this Court.

[38] Whilst there has not been strict compliance with the High Court Rules, reg 6 requires compliance "as nearly as may be practicable", and here both parties signed the notice that was filed in Court.

[39] I therefore conclude that the notice amounted to a valid notice of discontinuance.

[40] If I should be wrong in that conclusion, then the position was that the Court treated the matter as having been withdrawn and vacated the fixture.

[41] As an alternative, Mr Donovan submitted that the Court should exercise its inherent jurisdiction to reinstate the proceedings, noting that the High Court has that jurisdiction, see *Ben View Farms Ltd v GE Capital Returnable Packaging Systems Ltd*.[\[6\]](#) In that case a mentally ill barrister had withdrawn the proceedings without authorisation.

[42] Mr Donovan also cited *RG Developments Ltd v MacLennan Realty Ltd*.[\[7\]](#) In that case the High Court commented that it might well be within the High Court's inherent jurisdiction and possibly within the District's Court inherent power to control its own procedures to set aside a discontinuance. In order to do so, the Court would have to be satisfied that not to do so would amount to an abuse of process.[\[8\]](#)

[43] Mr Donovan observed that both the *Ben View* and the *RG Developments* decisions had been referred to in *Kapadia* which observed that matters that could amount to an abuse of process could include the coercion of a plaintiff, irrational behaviour by counsel or fraud. It could not arise where the discontinuance had been filed as a result of a tactical or technical error.[\[9\]](#) Mr Donovan submitted that the Court should exercise its discretion where there would be a miscarriage of justice and/or an abuse of process if the proceedings were not reinstated. This would include comparing the prejudice that the applicant would suffer against whether the

respondent had relied on the discontinuance in a manner that could not be adequately addressed in costs.

[44] Mr Donovan submitted that the applicant did not authorise his counsel to file the notice, that he was not blameworthy and that he would suffer prejudice if the proceedings were discontinued because his challenge has merit and he will lose the benefit of that challenge.

[45] I am not persuaded that the factual position is as the applicant asserts. There is a direct conflict between the applicant and Mr A's accounts on the question of the instructions to file a discontinuance. I observe that Mr A's account has been accepted by both the Standards Committee of the Law Society and the Legal Complaints Review Officer. I cannot therefore find, as invited to do by Mr Donovan, that this was a case where counsel acted without actual authorisation. It is also to be noted that the applicant did agree that he consented to the draft notice of discontinuance being sent to the respondent's representative.

[46] I find there is sufficient evidence before the Court to conclude that Mr A did act with authorisation from the applicant. In any event, as a barrister, Mr A had the authority as the applicant's representative to discontinue or withdraw the proceedings on the applicant's behalf.

The merits of the challenge

[47] I accept Mr Donovan's submission that if the applicant's proceedings are not reinstated, he stands to lose the benefit of challenging the decision of the Authority. As Mr Donovan observed, the basis of the applicant's claim is that the respondent agreed to pay him \$70,000 nett to settle various claims he had in relation to his employment, that he received \$40,000 gross, but no more, and this was not a payment in full and final settlement. Mr Donovan submitted that the Authority's determination that the \$40,000 was a payment in full and final settlement was made with little evidence and the receipt given at the time was not expressed as being in full and final settlement. The applicant also wishes to advance evidence that attacks the credibility of the respondent's witness.

[48] Ms Stretton accepted that the Employment Court has the inherent power to set aside a discontinuance to avoid a miscarriage of justice, but submitted this was simply a case where the applicant has changed his mind.

[49] As to the merits, the events in question, when the agreement was allegedly reached, occurred on 9 March 2004 and the payment was made into the applicant's account by the respondent on 29 March 2004.

[50] The determination records that the initial claim raised by the applicant on 6

January 2004, was \$1,080,960. This was raised without any prior notice that the applicant had any current issues with the respondent over outstanding payments for wages or other monies owed. That the applicant, on his own evidence, was prepared to settle such substantial claims for \$70,000 does appear to undermine their validity. The Authority's determination also refers to contemporary documents which support its conclusion.

[51] I also observe that the applicant has had advice from another solicitor that his claim was without substantive merit.

[52] It appears that the applicant was basing his challenge largely on a collateral attack on the credibility of the respondent's witnesses due to what he alleges were false accusations relating to the theft of petrol. I note that there appears to have been no issue before the Authority as to the theft accusations. If those allegations were made, even on the evidence the applicant has led, they were not pursued by the respondent in any manner after they were allegedly raised in January 2004. They therefore do not provide a strong basis for a collateral credibility attack which is likely to result in a different finding to that which the Authority made concerning the settlement.

Conclusion

[53] The Court has jurisdiction to reinstate withdrawn or discontinued proceedings in appropriate cases where there would otherwise be a miscarriage of justice. I am not persuaded that the applicant's challenge has sufficient merit to warrant the reinstatement of these proceedings. The merits of the claim were weak. The proceedings were discontinued by an authorised representative of the applicant, acting on instructions. They were then formally withdrawn by the Court. There was no abuse of process. I note that it was a further 15 months before the applicant made formal application for the reinstatement of the proceedings, which were discontinued on 6 August 2008 and that delay further prejudiced the respondent. The respondent is entitled to have this matter, which involves claims going back as far as

1989, finally brought to a conclusion.

[54] The application for reinstatement is therefore dismissed.

Costs

[55] Ms Stretton sought costs, particularly as the respondent had waived its right to seek costs on the undertaking that the proceedings were to be withdrawn.

[56] Normally a party in the respondent's position would be entitled to costs on an unsuccessful attempt to reinstate proceedings. However, in this case, there were inordinate delays on the part of the respondent's representative and a failure to meet Court imposed time limits which no doubt increased the applicant's costs.

[57] In these circumstances, I consider the appropriate course is to make no order for costs.

B S Travis

Judge

Judgment signed at 4 pm on Friday 27 May 2011

[1] AA 322/07, 16 October 2007.

[2] (1990) 3 PRNZ 362.

[3] [2007] ERNZ 579.

[4] At [16].

[5] Form 34E.

[6] [2002] 1 NZLR 698.

[7] HC Auckland CIV-2003-404-3260, 18 March 2005.

[8] At [56].

[9] At [25].

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