IN THE EMPLOYMENT COURT
CHRISTCHURCH

[2015] NZEmpC 49
EMPC 296/2014

IN THE MATTER OF	an application for costs
BETWEEN	VULCAN STEEL LIMITED Plaintiff
AND	ERROL WALKER Defendant

Hearing: (on the papers dated 12, 20 and 25 March 2015)

Appearances: C Patterson, counsel for the plaintiff
P Yarrall, advocate for the defendant

Judgment: 20 April 2015

JUDGMENT OF JUDGE B A CORKILL

Background

[1] The plaintiff in this matter has discontinued its challenge to a determination of the Employment Relations Authority (the Authority) dated 15 October 2014.[1]

[2] The Notice of Discontinuance was filed after the Court issued an interlocutory judgment wherein an application for stay of the Authority's orders was declined.[2] At the conclusion of the judgment I reserved costs, indicating they would be determined following the substantive hearing. That direction has now been overtaken by the filing of the Notice of Discontinuance.

[3] In support of his application for costs, the advocate for Mr Walker submitted that there were features of the case and the conduct of the plaintiff that require a

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1 *Walker v Vulcan Steel Ltd* [2014] NZERA Christchurch 160.
2 *Vulcan Steel Ltd v Walker* [2015] NZEmpC [15].

departure from the usual approach of taking two-thirds of fair and reasonable costs. It was submitted that there should be an uplift to 100 per cent of the sum invoiced to Mr Walker. This is because it is said that Mr Walker was put to unnecessary and additional time in "drafting documents for the substantive hearing by the [plaintiff's] uncooperative approach to requests for PDF documents in MS Word format when these were sought to save time in drafting". It was also submitted that preparation was largely completed at the time that discontinuance was sought, and that it is has been necessary to "reconstruct" Mr Walker's case following the removal of the matter to the Court. The relevant invoice for $6,046 plus GST was placed before the Court, along with a "schedule of activities", which confirms attendances of 30.25 hours at $200 per hour, plus GST.

[4] Submissions filed for Vulcan Steel Limited (Vulcan) referred to the well-known legal principles as to costs; then it was submitted that there was no justification for increasing any costs liability above the normal 66 per cent two-thirds starting point; a full uplift would be unreasonable. It was submitted that insufficient details had been placed before the Court as to how costs had been incurred, and that there was no evidence to show that Mr Walker had been invoiced as a member of a union which represented him. It was further submitted that 11.34 hours for manually converting a PDF document to a Word document was excessive, and that it was unreasonable at this stage of the proceeding for Vulcan to meet a liability for costs of preparation for a hearing when the matter had not been set down. Nor was it accepted that the case needed to be reconstructed, since the matters in the Court were largely the same as those determined by the Authority. Finally, it was submitted for Vulcan that costs should, in fact, lie where they fall by the application of equity and good conscience principles.

Discussion

[5] It appears to be common ground that the usual starting point in ordinary cases is 66 per cent of actual and reasonable costs; from that starting point, factors that justify either an increase or a decrease must be assessed.[3]

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[3] *Binnie v Pacific Health Ltd* [2002] 1 ERNZ 438 (CA) at [14].

[6] The ordinary rule in courts of general jurisdiction is that unless the defendant otherwise agrees, or the Court otherwise orders, a plaintiff who discontinues a proceeding against a defendant must pay the costs of the defendant of and incidental to the proceeding up to and including the discontinuance.[4]

[7] In *Kroma Colour Prints Limited v Tridonicatco NZ Limited* the Court of Appeal noted that the presumption in favour of awarding costs to a defendant against whom a proceeding had been discontinued may be displaced if there were just and equitable circumstances not to apply it. A Court would not speculate on respective strengths and weaknesses of the parties cases. The reasonableness of the stance of both parties, however, had to be considered.[5]

[8] Vulcan lodged a challenge in respect of the Authority's determination, and then applied for a stay of the Authority's substantive and costs orders. In the course of my judgment with regard to that application, I stated that at the preliminary stage where the Court was required to consider the application, the conclusions reached by the Authority appeared to be conclusions which were available to it on the basis of the evidence summarised. My assessment was that Vulcan could not be assured of success on its challenge. For Mr Walker it had been submitted that the challenge was bordering on "frivolous", but I did not consider that to be the case. That said, the stay application was successfully resisted by Mr Walker.

[9] Mr Walker filed a statement of defence in response to Vulcan's statement of claim. The challenge was at the point of being set down for a hearing, which would have resulted in a timetable being made for the filing of evidence by both parties.

[10] This history persuades me that the presumption that a defendant is entitled to costs following the filing of a Notice of Discontinuance should apply. This is not a situation where costs should lie where they fall, as was proposed for Vulcan.

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4 See *Kelleher v Wiri Pacific Ltd* [2012] NZEmpC 98; [2012] ERNZ 406 at [10]; High Court Rules, r 15.23.

5 *Kroma Colour Prints Ltd v Tridonicatco NZ Ltd* [2008] NZCA 150; (2008) 18 PRNZ 973 (CA) at [12].

[11] The assessment of reasonable costs is not an exercise in second-guessing the reasonableness or otherwise of the actual legal costs incurred.[6] Rather the Court must make its own assessment of what would have been reasonable legal costs to conduct the case for the successful party for the purposes of assessing the liability of the other party, although I must take into account the actual costs incurred.

[12] I turn to consider other issues raised for Vulcan. First, on the question of whether Mr Walker in fact has a personal liability for the costs incurred on his behalf, that issue has now been resolved by him filing an affidavit which states that the invoice previously placed before the Court is a liability which he must meet, notwithstanding his membership of a union.

[13] Next, I have considered the schedule which summarises the attendances. As already mentioned, some 11.35 hours have been devoted to conversion of a PDF document to a Word document, but no explanation is given as to why so much time had to be devoted to this exercise. Approximately 5.8 hours have been devoted to preparing a statement of defence, and 2.4 hours to preparing a five-page memorandum in support of the opposition to the plaintiff's stay application. These amounts are high.

Conclusion

[14] In this case, I do not consider it appropriate to proceed by adopting the amounts referred to in the schedule of attendances when determining Vulcan's liability. Taking into account the extent of the attendances, I consider a fair and reasonable starting point is $4,500, exclusive of GST. This sum includes an allowance for the preparation of documentation in connection with this costs dispute.

[15] Sixty-six per cent of that sum is $2,970. I am not persuaded that an uplift above that percentage is justified. The normal percentage represents a fair contribution to Mr Walker's costs.

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6 *Kaipara v Carter Holt Harvey Ltd* [2012] NZEmpC 92 at [39].

[16] I order Vulcan to pay Mr Walker the sum of $2,970.

B A Corkill
Judge

Judgment signed at 10.30 am on 20 April 2015