IN THE EMPLOYMENT COURT
AUCKLAND

[2015] NZEmpC 81
ARC 91/13
EMPC 22/2015

IN THE MATTER OF	an application for a rehearing
BETWEEN	JAN SUSAN BRACEWELL Plaintiff
AND	RICHMOND SERVICES LIMITED Defendant

Hearing: (on the papers dated 9, 18 and 19 May 2015)

Representation: Dr J Cook, agent for the plaintiff
P Shaw, counsel for defendant

Judgment: 4 June 2015

COSTS JUDGMENT OF JUDGE B A CORKILL

Introduction

[1] On 11 May 2015 Ms Bracewell filed a memorandum in which she informed the Court that she wished to withdraw her application for a rehearing. She said she would instead pursue her concerns relating to the Protected Disclosure Act 2000 with the Ombudsman. Clause 18 of Sch 3 of the Employment Relations Act 2000 provides that where any matter is before the Court, it may at any time be withdrawn by the applicant or appellant. It was accordingly open to Ms Bracewell to take this step.

[2] Richmond Services Limited (Richmond) then filed an application for costs associated with the application for rehearing and related interlocutory matters. In that application, after referring to standard costs principles, it was submitted that the actual costs incurred with regard to the rehearing issues were $2,000 plus GST. This related to filing an opposition to the application for rehearing, and in respect of the

attendances required to deal with Ms Bracewell's applications for interlocutory orders.

[3] Ms Bracewell made an application in respect of information held by the Bay of Plenty District Health Board, an application for leave to examine confidential documents held by the Registrar, and an application for continuation of stay of execution. Each of those applications were dismissed.[1]

[4] Counsel for Richmond submitted that because the application for rehearing and the associated interlocutory applications could not possibly have succeeded, costs should be ordered on a solicitor/client basis; the decisions of *New Zealand Fire Service Commission v Reid*,[2] and *Asiaciti Trust New Zealand Limited v Harris*[3] were relied on to support this submission. Costs of $250 plus GST were also sought with regard to the application for costs.

[5] In response to the application for costs, Ms Bracewell submitted that she considered her applications to have been meritorious, and that she continued to believe that there had been a perversion of justice. She submitted that the Court had been biased in its various judgments, which meant there had been a miscarriage of justice.[4] She submitted that she should therefore not be financially penalised for her pursuit of a just outcome. She stated that she is a support worker on a low wage with little or no savings who had acted on her principles to protect a client from what she saw as gross neglect and abuse endangering client health, safety and life. In summary she submitted that Richmond's request for indemnity costs should be denied, and any costs awarded kept to a minimum.

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1 *Bracewell v Richmond Services Ltd* [2015] NZEmpC 59.
2 *New Zealand Fire Service Commission v Reid*, 1999, WEC 110/96 (EmpC).
3 *Asiaciti Trust NZ Ltd v Harris* [2013] NZEmpC 238.
4 Similar statements were also made in Ms Bracewell's memorandum filed on 11 May 2015.

Analysis

[6] Recently in *Vulcan Steel Ltd v Walker*,[5] I considered an application for costs where a Notice of Discontinuance had been filed. The principles which apply in a discontinuance situation are of assistance here. There I alluded to the usual starting point in ordinary cases, which is to take 66 per cent of actual and reasonable costs and from that starting point, consider factors that justify either an increase or a decrease.[6] Then I stated:[7]

> [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.
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> [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.

[7] I consider it appropriate to apply the principles that are applicable in a discontinuance situation to one where an applicant elects to withdraw a proceeding, as here.

[8] I have considered the information which has been provided to me by counsel for Richmond, and I am satisfied that the amount referred to, a total of $2,250 (exclusive of GST), is a fair and reasonable fee for the attendances involved. I exclude GST.[8]

[9] Sixty-six per cent is $1,485. That is an appropriate starting point for the assessment of costs in this case. For Richmond it has been submitted that there should be an increase on that amount, on the basis that the application for rehearing and associated interlocutory applications were unmeritorious.

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5 *Vulcan Steel Ltd v Walker* [2015] NZEmpC 49.
6 *Binnie v Pacific Health Ltd* [2002] 1 ERNZ 438 (CA) at [14].
7 *Vulcan Steel Ltd v Walke*r, above n 5 (citations omitted).
8 *Wills v Goodman Fielder New Zealand Ltd* [2015] NZEmpC 30 at [23].

[10] An applicant who seeks a rehearing has to satisfy the Court that there has been a miscarriage of justice. As the decided authorities make clear, the threshold is high. Judge Ford recently summarised these principles in *Davis v The Commissioner of Police* in these terms:[9]

> [10] The grounds upon which this Court may order a rehearing are set out in cl 5 of Sch 3 to the Employment Relations Act 2000 (the Act) which provides:
>
> > **5 Rehearing**
> >
> > (1) The court has in every proceeding, on the application of an original party to the proceeding, the power to order a rehearing to be had upon such terms as it thinks reasonable, and in the meantime to stay proceedings.
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> [11] On the face of it, this provision grants the Court a broad unqualified discretion in relation to rehearing applications but, as with any such general discretion, it must be exercised judicially according to principle.
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> [12] The authorities show that some special circumstance must be found to exist to warrant the ordering of a rehearing. It would be an impossible burden on this Court if a rehearing under cl 5 could be obtained merely by request and there is a strong countervailing public interest consideration in having finality to litigation.
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> [13] Traditionally, rehearings have been ordered when the integrity of a judgment has been placed in issue by some special and unusual circumstance. Examples include the discovery of fresh or new evidence, that could not with reasonable diligence have been discovered prior to the hearing, which is of such a character as to appear to be conclusive: *Hardie v Round.* A similar situation, albeit less common, may arise where a significant and relevant statutory provision or authoritative decision has been inadvertently overlooked or misapprehended: *Ports of Auckland Ltd v New Zealand Waterfront Workers Union* and *Yong t/a Yong and Co Chartered Accountants v Chin.* Other special and unusual circumstances will no doubt arise and each will fall to be considered on a case-by-case basis. The threshold test to be applied is whether the applicant can establish a real or substantial risk of a miscarriage of justice if the judgment is allowed to stand.
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> [14] The rehearing jurisdiction is not to be exercised for the purpose of re-agitating arguments already considered by the Court or providing a backdoor method by which unsuccessful litigants can seek to re-argue their case.

[11] At the time when the application for rehearing was withdrawn, Richmond had yet to file its evidence; and both parties had yet to file their submissions. All the information and contentions which would have been considered on the application

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[9] *Davis v The Commissioner of Police* [2015] NZEmpC 38 (citations omitted).

for rehearing are not before the Court. That said, on the basis of the circumstances I reviewed in the interlocutory judgment of 7 May 2015 and the legal principles just summarised, it would have been difficult to advance the application for rehearing successfully.[10] For the avoidance of any doubt, I record that the criticisms made now by Ms Bracewell of the Court's judgments cannot be relevant to this costs assessment and I place them to one side.

[12] A further relevant factor in the present case is that an application for leave to appeal had been dismissed by the Court of Appeal.[11] The Court of Appeal held that only one of three questions proposed could potentially have amounted to a question of law; and the Court was satisfied that this Court had not erred in relation to that question.

[13] A yet further difficulty for Ms Bracewell's application for rehearing was that it was filed and served out of time. The Court would need to have been satisfied that the application could not reasonably have been made sooner. Ms Bracewell's application did not address this requirement adequately.[12] All these factors led to a conclusion that there were a number of difficulties in the application for rehearing, and that there is a justification for increasing the quantum of costs which should now be awarded.

[14] However, I also consider it appropriate to take into account such information as has been provided relating to Ms Bracewell's means. Although that information is not detailed, I recognise that any award of costs now, in addition to those which have been awarded previously (exceeding $17,000) will have created a significant liability for Ms Bracewell.

[15] The result is that whilst there is a proper basis for considering an increase of the order for costs above the 66 per cent starting point, having regard to Ms Bracewell's circumstances, I decline to do so.

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10 *Bracewell v Richmond Services Ltd*, above n 1.
11 *Bracewell v Richmond Services Ltd* [2014] NZCA 629.
12 Employment Court Regulations 2000, reg 61(4).

[16] Accordingly, I order Ms Bracewell to pay Richmond in respect of the application for costs now made by it the sum of $1,485. I formally record that Ms Bracewell's application for rehearing will now proceed no further as she has discontinued it.

B A Corkill
Judge

Judgment signed at 3.45 pm on 4 June 2015