IN THE EMPLOYMENT COURT
AUCKLAND

AC 48/07
ARC 76/05

IN THE MATTER OF	point of law determination
BETWEEN	RAHUL RAMESH KAPADIA Plaintiff
AND	AXIOM ROLLE PRP VALUATIONS SERVICES LTD Defendant

Hearing: By memoranda of submissions filed on 2 and 4 May 2007

Judgment: 15 August 2007

INTERLOCUTORY JUDGMENT (NO 2) OF JUDGE B S TRAVIS

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[1] This judgment deals with the issue of whether a plaintiff can withdraw the withdrawal of a challenge.

[2] The plaintiff, who now resides in India, has challenged a determination of the Employment Relations Authority, dated 15 August 2005, which found he was an employee of the defendant and had breached the duty of fidelity he owed to it. The plaintiff is no longer represented by solicitors. By a judgment of the Court, issued on 1 November 2006, the plaintiff was ordered to provide the sum of $750 as security for costs on the basis that his challenge would be stayed until that amount was paid into Court. The defendant was awarded $200 as a modest contribution towards its costs on its successful application for security.

[3] The plaintiff has been communicating with the Court and the defendant by way of email. On 30 March 2007 the Registrar of the Court at Auckland sent an email to the plaintiff pointing out that the security for costs ordered had not been received and

asking him to advise the Court "*whether you still wish to pursue the proceedings*". The plaintiff replied on 2 April 2007 by an email to the Registrar, apologising for not having understood that the Court order required him to provide security for costs before he returned to New Zealand. He stated it seemed unlikely that he would be returning to New Zealand in the foreseeable future because of his financial circumstances. The email then stated:

> ...
>
> *At the same time, the defendant, who is the applicant in the Employment Relations Authority ERA 1007/04, has sought costs on the authority's determination. Once this cost award has been passed, this will lead to closure of the proceedings in the ERA. Any costs that are awarded by the ERA will be paid by me, though incase (sic) if the award against me is significant, I may request an extended time-table for undertaking such payment.*
>
> *In light of the above, I wish to inform the Court that since I may not be returning to New Zealand in the foreseeable future, and since the defendant has sought closure of the proceedings in the ERA,* ***I would like to withdraw my application before the Court****. As the Hon. Judge has determined that he costs of the defendant in his "application for security for costs" amounting to $200 are to be paid by me, which have still not been paid, I undertake to make this payment within one week of receiving a minute from the Court on this.*
>
> …
>
> [Emphasis added]

[4] The email concluded with a request for the defendant to return some personal belongings. The email was received by the Court on 3 April and the Registrar forwarded it to counsel for the defendant that day. Counsel for the defendant, Mr Patterson, responded on the same day advising that the defendant wished to seek costs in relation to the plaintiff's discontinuance and asking for 7 days in which to file a costs memorandum. I granted that request and gave the plaintiff 21 days to reply.

[5] On 4 April the plaintiff sent an email to the Court and to Mr Patterson stating "*I withdraw my email requesting withdrawal of proceedings before the Employment Court after seeking legal advice*". The email went on to ask how to make the payment into Court of the security for costs and the payment of the costs order that had been made in favour of the defendant. The Registrar replied that day and stated the plaintiff would be advised of the procedure once it had been ascertained how to

transfer money from overseas. Another email to the plaintiff the next day provided the requested details.

[6] Mr Patterson emailed a memorandum to the Court on 5 April, seeking a contribution of $2,000 towards the defendant's costs of defending the challenge. The Registrar responded by email to Mr Patterson that day stating:

> *Mr Kapadia withdrew his withdrawal letter saying that after obtaining legal advice he has changed his mind and wishes to continue with the proceedings. He asked for bank account details to pay his security for costs. That email has been copied to you.*
>
> *In your memorandum you have not addressed that issue. Please let me know whether you object to his proceedings to continue.*

[7] Mr Patterson replied that day stating:

> *The plaintiff has discontinued his proceedings. Judge Travis has noted the discontinuance and made timetable orders regarding the defendant's costs application.*
>
> *The plaintiff, as with any plaintiff who discontinues their proceedings, ran a risk that he may be exposed to a costs award. The fact that he has now changed his mind is irrelevant. The proceedings have been discontinued and he has no right or ability under the Court's regulations or via the High Court rules to withdraw his discontinuance. I cannot consent or otherwise to the proceedings continuing as they are at an end save only the issue as to costs.*

[8] The Registrar then advised the plaintiff not to pay the security for costs into Court until the issue of the current status of proceedings had been determined. By Minute issued on 19 April 2007, I required the plaintiff to file and serve upon the defendant within 30 days an application setting aside his withdrawal, which had to be accompanied by a memorandum making submissions in support of his application with reference to the applicable rules and authorities. The defendant was to have 30 days in which to reply. If neither party required an oral hearing the matter was to be determined on the papers.

[9] On 26 April the plaintiff filed a response to counsel for the defendant's memorandum on costs. On 2 May he filed a memorandum relating to the issue of

withdrawal. The plaintiff referred to the exchange of emails and stated that he suffers from impecuniosity, is attempting to pay off debts, is unrepresented by legal counsel and was currently without a job in India. He stated that this had added an additional burden of stress as a result of which he was unable to think clearly. The plaintiff claimed his 2 April communication was an inquiry into some aspects of the security for costs judgment and, had he intended to withdraw the challenge, he would have provided a formal official communication stating his "*withdrawal*" and not just mentioning his intention of withdrawing. He submitted that the words "*I would like to withdraw*" are different from saying "*I withdraw*", the latter being a positive statement the former being an expression of desire or intention. He contended that his email to the Court was meant to be an enquiry as to the processes and formalities and if something was to be addressed to the Judge it would have been done in a proper way as he had done in all his earlier applications. He contended the Court had misunderstood his position and he had ensured that his email was corrected rapidly the next day.

[10] He also submitted that the Registrar had confirmed the continuance of the proceedings through the emails he received the following day and on 5 April concerning the payment into Court. The plaintiff says that he was unable to obtain legal advice and so his submissions were put on the basis of logic rather than case law. As to his stress he stated:

> *The plaintiff was put into enormous stress when he received the email from the Court Registrar, coupled with an additional email from the Solicitors on Record. Knowing full well the financial position the Plaintiff was really under, these emails came as a huge bomb-shell. The Plaintiff began to think along the lines of withdrawal and not having any legal advice to turn too, emailed the Court Registrar stating that he would* "like to…*", hoping to hear back with regard to the formalities for such withdrawal to then be considered by the Plaintiff.*
>
> *It was unfortunate that the Court took it to mean that the Plaintiff was withdrawing from the case.*

[11] He submitted that the proceedings should continue for these reasons and stated that he was prepared, within seven days, to pay into Court the security for costs and to pay the defendant's costs of $200.

[12] Mr Patterson filed his memorandum on 4 May 2007. He submitted that the plaintiff had failed to set out the basis in law for any contention that he had a right to withdraw his withdrawal of the current proceedings and that any issues of fairness, which were disputed by the defendant in any event, would not be relevant in the absence of any legal right to withdraw his withdrawal.

[13] He accepted the High Court has an inherent jurisdiction to set aside a discontinuance, citing *Ben View Farms Ltd v GE Capital Returnable Packaging Systems Ltd* (2001) 16 PRNZ 25 but submitted that the Employment Court's statutory jurisdiction did not go that far. He also contended that the facts of *Ben View Farms* were clearly distinguishable.

[14] In *Ben View Farms* a mentally ill barrister, acting entirely without instructions, withdrew an appeal. The appeal was reinstated because there had been no contributory conduct on the part of the appellant, which was ordered to pay solicitor/client costs to the other side from the time of the withdrawal of the appeal. Justice Fisher held that the High Court has an inherent jurisdiction to safeguard the integrity of its processes and to avoid miscarriages of justice when to do so would not expressly or impliedly conflict with any legislative provision to the contrary. He held that the High Court has an inherent jurisdiction to set aside a discontinuance in civil proceedings, citing *Clemance v Cleary* (1995) 9 PRNZ 194. He also noted that even in the Court of Appeal, which had statutory jurisdiction rather than inherent jurisdiction, a purported abandonment of an appeal can be withdrawn later in special circumstances, citing *R v Pelikan* [1959] NZLR 1319 and *R v MacKay* [1980] 2 NZLR 490. He found there would normally be a miscarriage of justice if, without fault on the part of the litigant, a party has been significantly prejudiced by some incompetent or unauthorised act or omission attributable to the mental disability of counsel. In exercising the discretion an important element will be a comparison between the prejudice to the client and reliance by other parties that cannot be adequately redressed in costs. Another element would be whether there was contributory fault on the part of the client.

The Employment Court's jurisdiction or power

[15] Clause 18 of Schedule 3 to the Employment Relations Act 2000 provides:

> ***18 Withdrawal of proceedings***
>
> *Where any matter is before the Court, it may at any time be withdrawn by the applicant or appellant.*

[16] No form of procedure is provided. Regulation 6 of the Employment Court Regulations 2000 provides that in any case for which no form of procedure has been provided by the Act or the regulations or any rules made under s212(1) of the Act, the Court must dispose of the case as nearly as practicable in accordance with the provisions of the Act or the regulations or rules affecting any similar case, or the provisions of the High Court Rules affecting any similar case. If there are no such provisions then the Court must determine the matter in such manner as it considers will best promote the objects of the Act and the ends of justice.

[17] In terms of reg 6 it is therefore necessary to look at the High Court Rules.

[18] Sections 219 and 221 of the Employment Relations Act, which empower the Court to extend time, validate informal proceedings, amend or waive errors, join or strike out parties or generally give such directions as are necessary or expedient in the circumstances, were not relied on by either party.

High Court jurisdiction

[19] The High Court Rules give a plaintiff the right to discontinue proceedings by filing a notice of discontinuance in the form provided and serving a copy of it on every other party to the proceeding, or by orally advising the Court of the discontinuance at the hearing (r475). The form required is form 34E which requires the plaintiff to state:

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

[20] The form must be dated and signed by the plaintiff or the plaintiff's solicitor and addressed to the Registrar of the High Court and the name of the other parties to the proceedings.

[21] Rule 475 is subject to the exceptions contained in r476 which sets out a number of situations not relevant to the present proceedings which require the leave of the Court before the plaintiff may discontinue a proceeding. Further the High Court may, on the application of a defendant against whom a proceeding is discontinued, set aside the discontinuance if it is satisfied that it is an abuse of the process of the Court (r476B). Unless the defendant otherwise agrees or the Court otherwise orders, a plaintiff who discontinues a proceeding against the defendant must pay costs to the defendant of, and incidental to, the proceeding up to and including the discontinuance (r476C). A valid notice of withdrawal brings the proceedings to an end: see *Auckland Trotting Club (Inc) v Ralf Enterprises Ltd* (2003) 16 PRNZ 710. Rule 476D places a restriction on the plaintiff who discontinues a proceeding from commencing another proceeding against the same defendant that arises out of the facts that are the same or substantially the same, unless the plaintiff has paid any costs awarded to be paid to the defendant.

Was the 2 April email a valid discontinuance or withdrawal?

[22] As reg 6 requires the Employment Court to dispose of the case as nearly as practicable in accordance with the High Court Rules, a notice of discontinuance in form 34E should be filed and served to have the effect of withdrawing the proceedings. Applying clause 18 of Schedule 3 by analogy with r475, the applicant or appellant or plaintiff must be able to withdraw any matter before the Court by orally advising the Court of the withdrawal at the hearing. This was done in *IHC New Zealand Inc v Scott* unreported, Judge Perkins, 18 October 2006, AC 45A/06. That withdrawal left the defendant, who had not filed a cross-challenge, with no basis to seek additional remedies. Leave was reserved for the defendant to apply to file a cross-challenge out of time but the matters then settled.

[23] Form 34E requires the signature of the plaintiff or, where applicable, the solicitor for the plaintiff. Although the Employment Court does accept service of

documents electronically (see practice direction of Chief Judge Goddard [2005] 1 ERNZ 60), where a signature is required, that requirement must be met with an electronic signature see: s22 Electronic Actions Act 2002.

[24] No such signed notice of discontinuance was filed and served in the present case. A failure of a plaintiff to serve a notice of discontinuance was held to be fatal in *Edwards & Hardy Hamilton Ltd v Woodhouse [Irregularity]* (1990) 3 PRNZ 362. In that case it appeared that a solicitor was not properly qualified but had directed another solicitor to file a memorandum of discontinuance. No copy was served on the defendant. It was submitted that the proceedings were not discontinued because the non-service of the memorandum did not complete the procedure necessary to discontinue. Alternatively, if there had been a discontinuance, then the High Court has an inherent jurisdiction to set aside a discontinuance and reinstate the proceedings. However because the memorandum had not been served there was no need to set it aside as there had been no actual discontinuance of the proceedings.

[25] There is no express rule in the High Court allowing a plaintiff to withdraw a discontinuance. However, as *Ben View* indicates, the High Court has inherent jurisdiction to allow a discontinuance to be withdrawn in appropriate cases. To similar effect see *RG Developments Ltd v MacLennan Realty Ltd and Anor* unreported, Laurenson J, 18 March 2005, HC Auckland, CIV 2003-404-003260. His Honour commented that it might well be within the High Court's inherent jurisdiction, and possibly within the District Court's inherent power to control its procedures, to set aside a discontinuance on the application of a plaintiff, there being no specific part to this under the relevant rules. In order to do so the Court will have to be satisfied that not to do so would amount to an abuse of process. This could include matters such as the coercion of a plaintiff, irrational behaviour by counsel, or fraud. It could not arise in a situation where the discontinuance had been filed as a result of a tactical or technical error.

[26] However, as no discontinuance had been filed and served in the present case it is not necessary to invoke the Employment Court's inherent or implied power to control its procedures. The 2 April email did not have the effect of withdrawing the

proceedings because a formal signed notice of discontinuance was not filed and served.

[27] I therefore conclude, against the submissions of counsel for the defendant that the present proceedings have not been withdrawn and the plaintiff is free to continue with them.

[28] In light of the undertakings the plaintiff has given, he should now proceed to provide the security for costs and pay the defendant's costs of $200. The plaintiff's memorandum said he would be prepared to do this within seven days of being so advised by the Court but, to avoid any difficulties, I will extend this to 21 days from the date of this judgment within which the payments must be made in New Zealand.

[29] Once the payments are made, the matter will be ready for setting down and at that point in time consideration will need to be given to the plaintiff's advice that he will not be returning to New Zealand for some time in the future. I reserve leave to apply to the Court for directions concerning the progress of this challenge.

[30] Costs are reserved.

BS Travis
Judge

Judgment signed at 4pm on Wednesday 15 August 2007