

issue in this case is whether the presumption should be displaced by the particular circumstances which have arisen in this proceeding and, if so, to what extent.

Background

[2] These proceedings first came before the Court by way of an application for extension of time to file a challenge to a determination of the Employment Relations Authority (the Authority) dated 1 August 2023.¹ The respondents opposed the application. A telephone directions conference was convened with the parties on 4 October 2023 to progress Ms Pride’s application. Directions were made to set the application down to be heard for half a day in Auckland. Timetable directions were made to allow for Ms Pride to file and serve further affidavit evidence and for the respondents to file reply evidence. No further evidence was filed. The parties were directed to file submissions in advance of the hearing. The Court provisionally allocated a costs categorisation of category 2, band B, in accordance with the Court’s Guideline Scale² but made it clear that the parties would be heard on the issue of costs in due course. The matter was allocated a hearing date of 11 December 2023.

[3] On 29 November 2023, Ms Pride filed a notice of discontinuance. Her notice of discontinuance expressly states: “There are no issues of costs”. However, the respondents did not agree to this. The respondents seek costs against Ms Pride up to and including the discontinuance. It is this issue of costs that is now before the Court.

Submissions

[4] Ms Maelzer, counsel for the respondents, seeks costs in accordance with category 2, band B. She confirms that the respondents’ actual legal costs incurred in defending the proceeding significantly exceeded the scale costs it is claiming.

[5] The scale costs total \$7,648, which includes preparation of written submissions and a bundle for the hearing. The respondents acknowledge that they had not filed the written submissions or bundle of authorities prior to the discontinuance being filed.

¹ *Pride v Barker* [2023] NZERA 325 (Member Baker).

² “Employment Court of New Zealand Practice Directions” <www.employmentcourt.govt.nz> at No 18.

However, it is submitted that they had already prepared their submissions and bundle of authorities and that both documents were ready to be filed. A copy of the draft submissions and bundles of authorities were provided to the Court.

[6] The respondents submit that Ms Pride's application was without merit and that the costs it incurred are entirely reasonable and in line with industry standards. It also seeks a further amount of \$750, being costs arising for its application for costs.

[7] Ms Pride disputes that the respondents are entitled to costs and submits that they should lie where they fall. In her submissions she refers to the strength of her claim against the respondents, her belief that she has not caused them any harm, rather it is the respondents that have caused her stress and duress. She refers to her willingness to walk away from the proceedings and her mistaken belief that the discontinuance settled all debts between her and the respondents. Ms Pride has omitted to place any information about her financial position before the Court. Accordingly, the Court cannot take this factor into account.

Analysis

[8] The Court has discretion as to costs.³ There is a presumption that the discontinuing party pay the costs of the other party up to the date of the discontinuance, and this is not easily displaced.⁴ However, case law establishes that there are circumstances where it is just and equitable that the respondent should not receive an award of costs.⁵

[9] The costs sought by the respondents are not unreasonable on their face given the nature of the proceedings, the steps taken by the respondents in the proceedings and the award sought being calculated according to the Court's guideline scale.

³ Employment Relations Act 2000, sch 3 cl 19; and Employment Court Regulations 2000, reg 68.

⁴ High Court Rule 2016, r 15.23; and *Yarrall v Earthquake Commission* [2016] NZCA 517, (2016) 23 PRNZ 765 at [12].

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

[10] However, the guideline scale is just that: a guideline. It does not override the Court's broad discretion to allocate costs as it considers reasonable having regard to the particular features of the case.⁶

[11] While I agree with counsel for the respondents that there are factors which weigh in favour of a costs award, the Court is mindful that these proceedings arose in the context of a case involving the uncertain intersection of employment rights and obligations, and cases involving COVID-19. Ms Pride lost her job as a result of her exercising her right to refuse medical testing and her right to privacy. Ms Pride is a self-represented litigant, with no apparent legal training or appreciation of how costs are dealt with in Court. She has commendably chosen to discontinue her proceeding, despite her strong beliefs in the merits of her claims and the losses she has suffered. She submits that she did so with a view to moving forward and leaving matters where they lie. It is apparent from her notice of discontinuance that she did not understand that the respondents could seek a costs award from her.

[12] When considering whether the presumption should be displaced, the Court is required to consider whether it is just and equitable in the circumstances for the respondents to receive an award of costs. In this case, the important issue of access to justice arises, together with the uncertainty caused by COVID-19 on workplaces and the impact this had on the obligations of employers and employees. In these particular circumstances, I am satisfied that the Court's discretion ought to be exercised in favour of a modest award of costs that reflects a contribution to the reasonable costs associated with the steps taken by the respondents in preparing and filing its notice of opposition and submissions. Having regard to the circumstances, Ms Pride is ordered to pay the respondents the sum of \$3,824.

[13] This is not a suitable case for the award of costs with regard to the costs application.

M S King
Judge

Judgment signed at 11 am on 4 June 2024

⁶ Employment Relations Act, sch 3 cl 19; and *Judea Tavern Ltd v Jesson* [2017] NZEmpC 120, [2017] ERNZ 726.