

[5] I convened a telephone conference with the parties' representatives on 21 February 2017 at which the applicant indicated the matter would settle with an appropriate apology.

[6] I thought that a sensible approach and said so.

[7] An apology was subsequently tendered by the respondent but the applicant protested it was insincere.

[8] I told the parties I had no legal power to require an apology, let alone the power to "*... require the redrafting of an apology*", per the Authority's email of 24 March 2017 to the parties.

[9] In that same email, I said that the applicant had to either accept the apology and pay the compensation or the matter would be set down for hearing.

[10] I set a date by which the applicant was to decide its position and I noted that if the apology was accepted, the applicant must file a notice of discontinuance.

[11] In the result, a notice of discontinuance was filed and the compensation subsequently paid. In the notice of discontinuance, the applicant asserted there was no issue as to costs.

[12] The respondent protested that last assertion, on the footing that there was no agreement between the parties that costs lie where they fell, that the respondent had incurred costs in defending the claim made by the applicant and that costs were sought.

[13] By email dated 13 April 2017, I set a timetable for the issue of costs to be considered, the effect of which is that the applicant was to file and serve submissions by 27 April 2017 and the respondent to reply by 4 May 2017.

[14] That timetable was complied with by the parties, although the respondent then sought to file further submissions on 4 May 2017. The applicant protested the filing of the 4 May 2017 submissions on the basis it was not contemplated by the timetable I set.

[15] I agree. I have not considered the 4 May 2017 submission in the interests of fairness. The respondent's position is abundantly clear from the earlier submission of 21 April 2017.

Determination

[16] The law on costs setting in the Authority is well settled and need not be recited again here. It is enough to say that costs are a discretionary remedy to be awarded in accordance with principle, and that costs traditionally follow the event.

[17] But this is a special situation. This is a case where a matter has been lodged and then withdrawn before being investigated and determined by the Authority.

[18] It follows that despite the applicant's attempts to convince me otherwise, there can be no defined winner or loser because there has been no determination of the Authority on which to base that judgement.

[19] Even if that proposition were not accepted, it is also true that there was, in principle, error on both sides. It seems common ground that the respondent did something for which an apology was appropriate and for the applicant, at the time the notice of discontinuance was filed, the compensation had not been paid.

[20] On either basis then, I conclude that there was no winner or loser.

[21] More than that, this matter was initiated by the applicant, which caused the respondent to incur cost in dealing with it, and it was then withdrawn by the applicant without an agreement about costs between the parties.

[22] The applicant claims it was directed to file a notice of discontinuance by the Authority in the Authority's email to the parties dated 24 March 2017.

[23] It is true that the Authority indicated that if the respondent's apology was to be accepted then the applicant was to file a notice of discontinuance. But it goes too far to suggest the Authority somehow directed the terms of that notice of discontinuance. In particular, costs are always a matter for the parties first, and only if there has been no agreement on costs can the matter come before the Authority for consideration.

[24] Put shortly, it is settled law in the Authority that where a matter is initiated by one party and then withdrawn by that party without determination, if the other party has incurred costs they can be sought.

[25] Costs of \$600 are sought. That figure is entirely reasonable, given the work that the respondent's counsel would have had to perform.

[26] It is a truism that parties must bear the consequences of their actions and that where they initiate proceedings and then discontinue them without agreeing costs, there is a risk that costs will be sought, as in this case.

[27] I am satisfied that the applicant should pay to the respondent the sum of \$600 as a contribution to its costs and I so order.

James Crichton
Chief of the Employment Relations Authority