

[3] On 21 January 2009 Peter Burns withdrew his claim before the Authority.

[4] At the same time as Mr Burns withdrew his application the respondent's representative filed briefs of evidence that contained the information being relied upon by the respondent's witnesses about the other employee and Mr Burns. This was consistent with the consolidation of both applications being heard together.

[5] An investigation meeting continued in respect of the other employee and the respondent, and costs in regard to Mr Burns and the respondent were reserved.

The issues

[6] Should costs be awarded to WLT?

[7] If so, how much?

Submissions

[8] I have received submissions from both parties. The respondent has requested \$1,000 reasonable contribution towards costs incurred before the matter was withdrawn. WLT says that the applicant has caused unnecessary costs by not withdrawing at the earliest opportunity because the work had been done for the investigation meeting. In particular I was asked to consider the following:

- a. The cost for the consideration that was required to be given to the statement of problem filed by the applicant and the filing of a statement of reply by the respondent's lawyer.
- b. The retrieval of documents relating to the applicant.
- c. The briefing of witnesses.
- d. Counsel's preparation, including for the investigation meeting.
- e. Counsel's involvement with the applicant's representative in discussions prior to the investigation meeting.
- f. The advice that Mr Burns had moved to Australia to live.
- g. The respondent did not have the opportunity to consent to Mr Burns' withdrawal.

[9] The respondent's representative advised me of various circumstances in the Employment Court where the Court had ordered costs up to \$650 and that there are cases on various length of time between the date of the withdrawal and the hearing scheduled to occur.

[10] The applicant has asked that there be no award of costs because he has moved permanently to Australia, the financial consequences of the situation have been devastating for him, he has been unable to obtain similar paid employment and he has had to use savings, and sell assets such as a motor vehicle.

[11] In addition it was submitted that the respondent had to prepare anyway for the case involving the other employee.

[12] The matter never had mediation because there was no agreement reached on accommodating the respondent's desire to save costs and the applicant declining telephone mediation. It was also submitted that the Authority is not bound by precedent and that it would be in order to dismiss the application.

Determination

[13] Although there was no investigation meeting held on the applicant's claims he does have the right under the Act to withdraw the proceedings at any time. However that right has to be tempered with the obligation of ensuring that the opposing party is not put to unnecessary costs. There was reasonable time available to the applicant to withdraw earlier considering, he had moved to Australia, the Authority's telephone conference occurred on 24 November 2008, the parties were encouraged to use the Department of Labour's mediation services and there was some discussion between the parties' representatives before the timetable commenced.

[14] The parties agreed to a timetable. At no stage was the respondent alerted at a reasonable time before the timetable commenced that Mr Burns was going to withdraw. The respondent's documents and written briefs of evidence were filed on time and at the same time that the withdrawal notice was made. It was not challenged that the first advice to the respondent's representative that Mr Burns had moved to

Australia was on 11 January 2009. That is not the same as advance notice of any intention to withdraw.

[15] I am also satisfied that the late notice of withdrawal prevented some agreement that might have saved costs because the written briefs needed to be prepared and filed on time. In the absence of any notice of withdrawal it was entirely reasonable for the respondent to arrange for the preparation of briefs in accordance with the timetable.

[16] The respondent has been put to unnecessary cost of preparing written briefs to cover the claims involving Mr Burns. The respondent reasonably believed the matter was proceeding and in accordance with the timetable before the announcement of the withdrawal.

[17] I have discounted any costs incurred by the respondent for briefing counsel to reply to the statement of problem because the dispute resolution process should minimise that cost and it is a matter of choice to engage a representative.

[18] No costs have been provided for the retrieval of documents. Indeed no difficulties on the retrieval of documents have been identified that could have caused unnecessary costs to the respondent. The filing of Mr Burns' personal file involved documents that should have been reasonably available given the employment relationship issues that were identified. Indeed such documents could have reasonably been expected to be made available in the statement in reply and it was the respondent's decision not to do that.

[19] I accept that counsel would have carried out some preparation and would have made arrangements for attendance. However Mr Burns' withdrawal of his employment relationship problem meant that there was no investigation meeting required for his employment relationship problem. A representative's attendance for WLT occurred anyway because of the other case scheduled for the same date and time. The cost of that cannot be put on Mr Burns. I consider that it was reasonable for the respondent based in Tauranga to use counsel from there for its preparation on Mr Burns' employment relationship problem.

[20] The telephone conference between the parties' representatives to facilitate discussions to try and settle the matter is an indicator of an attempt to save costs, but does not satisfy me that it was an adequate substitute for the Department of Labour's mediation services. There was no agreement reached by the parties to attend mediation with an independent mediator from the Department of Labour or any other mutually agreed mediator. The disagreement over telephone mediation and a venue for a mediation to occur has not assisted the parties in trying to save costs and settle and avoid an investigation meeting, which had to be set down. Mostly mediations occur where the place of work is. The applicant cannot be held responsible for WLT's decision not to attend in Napier. The respondent has not established that it reasonably rejected the applicant's request to meet in Napier with an independent mediator. Nor has the applicant justified its position on insisting on a meeting when telephone mediation could have reasonably saved costs. It was my decision not to direct the parties to mediation because the opposing positions being taken by the parties would not contribute constructively to resolve the matter and where there did not appear to be any proactive involvement from the Department of Labour.

[21] The applicant's submission that there should be no costs is dismissed because the company incurred costs that could have been avoided if the application had been withdrawn earlier. I do not know why the applicant withdrew his application. There is no evidence that the applicant will not be able to make some payment over time in the future, given that he has now obtained employment and getting paid, he did not provide any details of his savings he says he has used and has not provided any details of remaining assets he owns.

[22] The Authority has jurisdiction to award costs under clause 15 of Schedule 2 of the Act. In the absence of any details, invoices and receipts it is appropriate to apply the tariff approach to costs.

Orders of the Authority

[23] The respondent incurred costs that could have been avoided by the applicant because of the late withdrawal and where there was reasonable preparation by the respondent before the scheduled investigation meeting and before the withdrawal.

[24] It is my assessment that a range would be at one level for costs to lie where they fall (being a situation that applied in another Authority matter), and at a higher level for a payment up to \$650 (in the Employment Court), depending on the circumstances. Here the applicant's withdrawal was unreasonably late. I conclude that at least from 11 January 2009 the applicant had no intention of proceeding because he was residing in Australia and no briefs were prepared to exchange on 21 January. The respondent had reasonably spent money on getting witness briefs prepared that covered Mr Burns' claim.

[25] Peter Burns is to pay Whirinaki Log Transfer Limited a contribution of \$200 costs.

P R Stapp
Member of the Employment Relations Authority