

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2015] NZERA Auckland 113
5469315

BETWEEN NEW ZEALAND GUARDIAN
TRUST COMPANY LIMITED
Applicant

AND KATHARINE MAYNE
Respondent

Member of Authority: Robin Arthur

Representatives: Fiona McMillan, Counsel for the Applicant
Paul Wicks QC, Counsel for the Respondent

Submissions: 20 March 2015 from the Respondent and 13 April 2015
from the Applicant

Determination: 20 April 2015

COSTS DETERMINATION OF THE AUTHORITY

A. New Zealand Guardian Trust Company Limited must pay Katharine Mayne \$3000 as a contribution to her legal costs reasonably incurred in responding to its claim against her that it withdrew before an investigation meeting was held.

[1] Katharine Mayne sought an order for \$4600 to be paid to her by New Zealand Guardian Trust Company Limited (Guardian) after it withdrew, in February 2015, a claim lodged in the Authority in July 2014. She sought that payment as a contribution to actual legal costs of just under \$7000 incurred between 11 July 2014 and 28 February 2015. Those costs were for her representative's time in preparing and lodging a statement in reply, preparing for and attending mediation, preparing for and taking part in an Authority case management conference, and starting preparation for a scheduled investigation meeting.

[2] Guardian opposed any award of costs but, if the Authority thought some contribution was reasonable, submitted only "*a minimal contribution*" should be

allowed for the lodging of Ms Mayne's statement in reply.

[3] Guardian's statement of problem had alleged Ms Mayne, its former head of Risk and Compliance Management, had breached certain contractual and statutory duties owed to it while she was its employee. Guardian sought penalties for the alleged breaches and an inquiry into damages that it said resulted from those breaches.

[4] In reply Ms Mayne denied the alleged breaches occurred and raised an estoppel defence that she said prevented Guardian pursuing its claim. Because the factual background to that defence was also subject to a term of confidentiality agreed earlier between the parties, further references to it in this determination have been purposely left somewhat vague but the details are known to the parties.

[5] The parties attended mediation about Guardian's claim in late October 2014 but the matter was not resolved there. At a case management conference held in December the Authority set down an investigation meeting to consider, as a preliminary issue, Ms Mayne's estoppel argument. The meeting was notified for 14 April 2015. Timetable directions required witness statements to be lodged in March 2015. By email on 26 February 2015 Guardian, through counsel, withdrew its application.

The parties' arguments on costs

[6] Five points from the parties' costs memoranda required consideration:

- (i) The applicability of a principle from a High Court rule about the liability of a discontinuing plaintiff for a defendant's costs; and
- (ii) The reason given by Guardian, in its costs submissions, for its decision to withdraw its claim; and
- (iii) Whether costs incurred for preparing and attending mediation should be excluded; and
- (iv) Whether Guardian's claim was vexatious and unnecessary; and
- (v) Whether it was reasonable to award costs to Ms Mayne in the particular circumstances and, if so, what costs should reasonably be allowed.

(i) Application of a High Court Rule

[7] Ms Mayne suggested the general principle expressed in High Court Rule 15.23 that a plaintiff discontinuing a proceeding was liable for the defendant's costs should apply to matters before the Authority. While the list of basic tenets guiding awards of costs in the Authority are non-exhaustive, the Authority's investigative nature means parties should not have the same expectations about costs that they may have in the adversarial context of a court.¹ The principles expressed in the High Court rules may sometimes assist in the Authority's exercise of its broad discretion in awarding costs but there is no automatic or presumed application of any particular such rule.² And even if the rule did apply, its particular requirements are also subject to the Court's general discretion as to costs and other case law principles that may, where just and equitable to do so, displace the rule's presumed application.³ The result is that a discretionary assessment is required in any case that, in my view, is no different from the approach that the Authority must take anyway.

(ii) Guardian's reason for withdrawing its claim

[8] Guardian's costs memoranda said its withdrawal decision was made because the manager supervising the claim had reduced his work commitments due to personal health concerns and that manager considered it was not appropriate to delegate pursuit of the claim to anyone else at Guardian. It was an assertion as to facts (that is evidence) about an executive's health and thoughts rather than a submission. While there was no reason to doubt the fact of the health concerns, the notion that a sophisticated corporate entity such as Guardian lacked the capacity or the will to have someone else take over the work, if the claim was truly meritorious, was unconvincing.

(iii) Should mediation costs be allowed?

[9] Ms Mayne submitted her mediation costs should be included in any award as mediation was now effectively a compulsory step after the lodging of a statement of problem and she could not have reasonably refused to attend. She relied on principles

¹ *PBO v Da Cruz* [2005] ERNZ 808 (EC) at [41]. See *Kelleher v Wiri Pacific Limited* [2012] NZEmpC 98 for the principles regarding costs on discontinuance of proceedings in the Employment Court.

² See also *Cole v Development Engineering Ltd and Anor* [2013] NZERA Christchurch 58 at [9].

³ *McGeechan on Procedure* at HR 15.23.01 citing *Kroma Colour Prints Ltd v Tridonicatco NZ Ltd* [2008] NZCA 150 and *FM Custodians Ltd v Pati & Ors* [2012] NZHC 1902 at [10]-[12].

discussed in the Employment Court's decision in *RHB Chartered Accountants Ltd v Rawcliffe* to the effect that consideration of the broad interests of justice and attention to the particular circumstances of each case meant that the Authority should not apply a 'blanket rule' against awarding costs in relation to mediation.⁴

[10] Guardian simply sought to distinguish any application of the principles considered in *Rawcliffe* on the facts of that particular case (where the applicant had initially pursued the wrong party and, after mediation, then amended his statement of problem to pursue a different party) as having been "*unusual*".⁵

[11] In *Rawcliffe* – where the wrongfully identified party sought costs for having had to attend mediation by direction – the Court referred to strong policy considerations to be weighed in assessing the extent to which mediation costs might be recoverable. It confirmed no blanket rule can or should be adopted as costs were inherently discretionary. Costs should be neither automatically awarded nor withheld as much turned on the facts of each individual case.⁶ For example, repeated failure to attend mediation directed by the Authority could result in a costs order.

[12] I was not persuaded doing justice to Ms Mayne's costs application required an order for her legal costs related to mediation. It may have been that the time and money spent there proved, in fact, of longer term benefit to her in influencing Guardian's eventual decision not to pursue its claim (and saving her further costs that could have been incurred if an Authority investigation had gone ahead). However, in the absence of obvious 'bad faith' conduct such as not attending mediation when directed, the circumstances of Ms Mayne's case did not require a change to the general, but not automatic, approach of leaving parties to bear their own costs for mediation.

(iv) Was Guardian's claim vexatious and unnecessary?

[13] Ms Mayne's costs memoranda suggested Guardian's claim was "*vexatious and unnecessarily pursued*". She did so because Guardian knew from the outset about the

⁴ [2012] NZEmpC 31.

⁵ Referring to the description given to it by Judge Ford in *Quan Enterprises Limited v Fair* [2012] NZEmpC 62 at [9].

⁶ At [31] and [34].

facts on which she would have based her estoppel defence and was put notice of it by her statement in reply but had not withdrawn its claim until well after the investigation meeting was scheduled.

[14] I have agreed with Guardian's submission that its claim did not meet the high threshold required to be characterised as vexatious. However no concluded view could be reached on the merits of its claim – including whether it was 'necessary' – because the full evidence for it was never presented and tested. Neither was its necessity established, as Guardian had submitted, because the Authority had agreed to have a preliminary hearing on the estoppel argument. An Authority investigation of that point was needed to establish whether the claim could go ahead. Scheduling of the investigation, in itself, said nothing of the need for or merits of Guardian's claim.

[15] However Ms Mayne's application for costs did not need to establish that Guardian's claim was either vexatious or unnecessary. The question was a simpler one of whether, having been put to expense in responding to Guardian's subsequently withdrawn claim, she had reasonably incurred legal costs and the costs incurred were reasonable.

(v) Reasonable to award costs and, if so, how much?

[16] The Authority's broad discretion to award costs includes an assessment of the overall justice or fairness of the situation. In this case Guardian's withdrawal of its claim spared Ms Mayne further cost of time and money but did not come until she had been put to considerable expense. It was not unreasonable for her to have incurred costs for legal representation. Guardian's claim made serious allegations that, if successful to any degree, could have had a significant effect on her financially and her professional reputation. Engaging a lawyer to prepare a statement in reply, attend mediation with her, and to prepare for an Authority investigation was a plainly reasonable thing to do in those circumstances.

[17] The following details from the three invoices she received for those legal services were relevant to assessing the reasonableness of the costs incurred. The first, for \$2127, was for receiving instructions, reviewing documents and drafting and lodging the statement in reply. The second, for \$2173, was for preparation for and

attendance at mediation. The third, for \$2616, was for attendance at the Authority's case management conference, commencing preparation for the timetabled investigation meeting and discussion with Ms Mayne about withdrawal of Guardian's claim and then seeking costs.

[18] For reasons already given I have excluded mediation costs, which conveniently were those set out in the second invoice. While Ms Mayne exercised her choice to engage senior counsel, I have evaluated the level of costs that could be reasonably claimed on the basis of what might have been incurred with less experienced (though still able) counsel at the rate of \$250 an hour and allowing for 12 hours as a reasonable amount of time for the work involved. The result was an assessment of reasonable costs as totalling \$3000. I allowed for 12 hours on the basis of seven hours for taking her instructions, reviewing documents, conducting any necessary legal research, and drafting and lodging a statement in reply; a further two hours for preparing for, attending and reporting on the case management conference; and a further three hours for meeting with her, beginning preparation for the investigation meeting, and further consultation with her on the discontinuation issue. The result of this notional assessment was coincidentally a little less than two thirds of the actual costs invoiced to Ms Mayne for those tasks. It was also a modest amount in light of her actual overall costs.

[19] Accordingly I have ordered Guardian pay Ms Mayne \$3000 as a contribution to her reasonably incurred costs in responding to the proceedings that it discontinued.

Robin Arthur
Member of the Employment Relations Authority