IN THE EMPLOYMENT COURT
CHRISTCHURCH

[2017] NZEmpC 58
EMPC 178/2016

IN THE MATTER OF	proceedings removed from the Employment Relations Authority
BETWEEN	AFFCO NEW ZEALAND LIMITED Plaintiff
AND	NEW ZEALAND MEAT WORKERS & RELATED TRADES UNION INC Defendant

Hearing: (on the papers dated 13 April and 2 May 2017)

Appearances: P Wicks QC, counsel for the plaintiff
P Cranney, counsel for the defendant

Judgment: 17 May 2017

COSTS JUDGMENT OF JUDGE B A CORKILL

The issue

[1] The issue before the Court is whether AFFCO New Zealand Limited (AFFCO) should pay a contribution to the costs of New Zealand Meat Workers & Related Trades Union Inc (the Union), and if so, to what extent.

Background

[2] In this removed proceeding, AFFCO filed a statement of claim alleging that since May 2015, numerous items had been published and posted on a Twitter account, a website, a newspaper and on a Facebook page that were unbalanced, untruthful or derogatory of AFFCO and its parent company and officers. It pleaded that these actions breached the duty of good faith as described in s 4(1)(a) of the Employment Relations Act 2000 (the Act). The Union denied that it had breached its

good faith obligations, stating that since the issues arose in the context of bargaining between the parties, ss 4 and 32 were both relevant.

[3] AFFCO sought urgency for an application for an interim compliance order, requiring the Union, its officers, employees and agents to comply with the duty of good faith by ceasing and desisting from publishing adverse statements; and prohibiting the Union from appointing a particular officer to act as its representative.

[4] The primary assertion for the Union in opposition to that application was that the Court did not have jurisdiction to grant the order sought; but that even if it did, the claim was very weak, the balance of convenience strongly favoured the Union as to overall justice, AFFCO's hands were "unclean", the company had breached the law in multiple respects which deserved public criticism; and finally it was contended that an interim order would be unjust and would infringe the rights of the Union and its members.

[5] It is to be noted that the proceeding was brought in a context where there were significant unresolved bargaining issues between the parties;[1] there were also multiple proceedings between them which related to bargaining, and also as to a lockout which this Court concluded was illegal.[2]

[6] The hearing for AFFCO's interlocutory application took place on 11 October 2016. The Court heard submissions both as to jurisdiction and as to whether any interim orders should be made.

[7] My judgment was issued on 23 November 2016.[3] I concluded that neither the Authority nor the Court had jurisdiction to grant the relief sought by AFFCO.[4]

---

1 As discussed by Chief Judge Colgan in *AFFCO New Zealand Ltd v New Zealand Meat Workers & Related Trades Union Inc* [2016] NZEmpC 17, [2016] ERNZ 85.

2 *New Zealand Meat Workers & Related Trades Union Inc v AFFCO New Zealand Ltd* [2015] NZEmpC 204, (2005) 10 NZELC 79-057; an appeal was considered by the Court of Appeal: *AFFCO New Zealand Ltd v New Zealand Meat Workers & Related Trades Union Inc* [2016] NZCA 482, (2016) 10 NZELC 79-067; leave to appeal that judgment to the Supreme Court was subsequently granted: *AFFCO New Zealand Ltd v New Zealand Meat Workers & Related Trades Union Inc* [2017] NZSC 30. This has yet to be heard.

3 *AFFCO New Zealand Ltd v New Zealand Meat Workers & Related Trades Union Inc* [2016] NZEmpC 154.

4 At [64].

This was firstly because there was no relevant function or power to grant an interim compliance order, and secondly because there was no relevant function or power to grant an interim injunction as had been sought at the hearing itself.

[8] It had been AFFCO's case that if it could not establish these orders, there would be no foundation for granting an order prohibiting the appointment of a particular officer for certain purposes.

[9] Accordingly I dismissed the interlocutory application in both respects.

[10] I went on to state that it was not strictly speaking necessary to review and evaluate the competing factual assertions which the parties had made.[5] There was a question, however, as to whether factual findings should nonetheless be made, in case the matter went further.

[11] I recorded that since the hearing of the application, the parties had agreed to resume bargaining in good faith for a new collective employment agreement, with the assistance of a private mediator. In those circumstances it appeared that events had moved on, and that it may be unnecessary for the Court to review a great deal of the material where each party had been very critical of the other. I observed that it may be counter-productive for this to occur in the circumstances which had developed.[6]

[12] In fact the parties were able to settle the terms of an agreement with the assistance of a private mediator; this agreement was later ratified.

[13] This meant that litigation which was before the Court with regard to bargaining issues was able to be discontinued on 3 March 2017.

[14] In this proceeding, AFFCO filed a notice of discontinuance on 21 March 2017, although the Court was advised that costs issues between the parties were unresolved.

---

5 At [66].
6 At [67].

Parties' submissions as to costs

[15] On 13 April 2017, the Union applied for costs according to the Court's Costs Guideline Scale.[7] It was submitted in effect, that costs should follow the event on a Category 2, Band B basis.

[16] Accordingly, Mr Cranney, counsel for the Union, submitted that an appropriate award would be $12,265, having regard to the applicable provisions of the scale.

[17] Mr Wicks QC, counsel for AFFCO, focused on the fact of the discontinuance, and submitted that costs should lie where they fall. In summary he argued:

a. The primary reason for the discontinuance was because the parties had recently entered into a new collective employment agreement. The re-litigation of historic conduct following such a "restoring" event would have conflicted with those objects of the Act which emphasise the obligation to build and maintain productive relationships.

b. AFFCO had sought to promote and recognise the value of the then current collective bargaining when memoranda were served inviting the Court to defer making findings on the factual merits.

c. Mr Wicks emphasised that the proceeding was genuinely brought and genuinely discontinued.

d. He submitted that an award of costs in all the circumstances would amount to penalising AFFCO for its endeavours to meet the objects of the Act, as well as having the effect of dissuading plaintiffs from bringing proceedings. He said that the Court's equity and good conscience jurisdiction should apply to costs considerations such as this, noting that s 189 of the Act specifically refers to such

[7] Employment Court of New Zealand Practice Directions (Costs – Guideline scale) at 18 – 22 www.employmentcourt.govt.nz/assets/Documents/Publications/Employment-Court-Practice-Directions.pdf.

considerations as being "for the purpose of supporting successful employment relationships".

e. The case had been an important one since there were significant considerations as to whether there were breaches of ss 4 and 32 of the Act in the course of the Union's social media publications.

f. That the proceeding related to a test case was supported by the Authority's determination to remove the matter to the Court on its own volition, wherein it was observed that there were potentially significant implications for other parties involved in collective bargaining.[8]

g. Mr Wicks said that AFFCO had not initially sought interim relief on an urgent basis, but the decision to do so was brought about when further alleged derogatory publications occurred in mid August 2016. AFFCO could not be criticised for seeking urgency.

h. In all these circumstances immunity from costs was appropriate. Alternatively, these factors would justify a reduction of the sum which would normally be awarded under the Costs Guidelines.

Discussion

[18] There is no dispute as to the calculation of costs made by Mr Cranney under the Costs Guidelines. Those costs primarily related to the hearing of AFFCO's interlocutory application.

[19] The question is whether the sum sought should be awarded, as Mr Cranney contends; or whether there should be a nil award, or alternatively a reduced award, as Mr Wicks contends.

[20] The starting point must be cl 19 of Sch 3 of the Act, which confers a broad discretion as to costs when it provides:

---

[8] *AFFCO New Zealand Ltd v New Zealand Meat Workers & Related Trades Union Inc* [2016] NZERA Christchurch 117 at [53].

> **19 Power to award costs**
>
> (1) The court in any proceedings may order any party to pay to any other party such costs and expenses … as the court thinks reasonable.
>
> (2) The court may apportion any such costs and expenses between the parties or any of them as it thinks fit, and may at any time vary or alter any such order in such manner as it thinks reasonable.

[21] Regulation 68(1) of the Employment Court Regulations 2000 also deals with costs. It provides that in exercising the Court's discretion under the Act to make an order as to costs, the Court may have regard to "any conduct of the parties tending to increase or contain costs …".

[22] The discretion to award costs, whilst broad, is to be exercised judicially and in accordance with principle. The primary principle is that costs follow the event.[9]

[23] It is well established that a discontinuing plaintiff is generally liable to pay costs to the defendant up to the date of the discontinuance. But that practice is not immutable.

[24] There are several features of the present case which fall for consideration. The first is that a significant step was taken by AFFCO before the discontinuance was filed. It applied for and was granted urgency for the hearing of its interlocutory application, which was then heard promptly. However, the result of that application was a finding that the Court did not have jurisdiction to grant the interim relief which had been sought. The Union's costs relate primarily to this step.

[25] The second relevant factor, however, was the decision not to request the Court to issue factual findings. That decision was made in light of the Court's observation that there was a great deal of material where each party had been very critical of the other, and that it may be counter-productive for the Court to express views about the conduct of the parties when they were engaged in bargaining on a good faith basis.

[26] Both parties took the same – constructive – position on this issue, but since I am assessing at present the conduct of AFFCO for costs purposes, I conclude that it

---

9 *Victoria University of Wellington v Alton-Lee* [2001] ERNZ 305 (CA) at [48].

is entitled to credit for recognising that for the time being factual findings should not be sought.

[27] The third factor, which is relevant to the present assessment, relates to the fact that the issues raised were potentially significant.

[28] The legal issue which underpinned the assertions which each party made of the other related to the scope of their respective duties of good faith when collective bargaining was ongoing. Specifically, there was an important question as to the actions that unions and employers might take in making publications, including on social media and other Internet forums that enable widespread communication and comment. The questions of law would potentially have involved the Court in making significant findings as to the scope of both ss 4 and 32 of the Act; and would have required a consideration of the right to freedom of expression in a bargaining context.

[29] This issue was the subject of submissions on a preliminary basis for the purposes of the interlocutory application. Since there was no jurisdiction for the granting of interim relief, these issues did not need to be explored.

[30] However, a more detailed consideration would have taken place at the substantive hearing, had the proceeding not been discontinued. For present purposes, I therefore take into account that there were significant underlying issues which, had the matter proceeded, could have resulted in guidance being given by the Court on important good faith matters. Against that, I also take into account the fact that the proceeding appeared to have a tactical objective.

[31] Drawing these strands together, it is my judgement that AFFCO must bear some responsibility for having brought an interim application for which there was no jurisdiction; that it is entitled to some credit for not having requested the Court to issue a further judgment recording factual findings which were likely to be critical of the parties when they were engaged in good faith bargaining; and it is entitled to modest credit for the fact that the proceeding itself was in the nature of a test case.

[32] In the result, I am satisfied that AFFCO should contribute to the Union's costs in the sum of $9,000.

B A Corkill
Judge

Judgment signed on 17 May 2017 at 3.20 pm