Employment Court of New Zealand

Bourne v Real Journeys Limited [2012] NZEmpC 2 (18 January 2012)

Last Updated: 31 January 2012

IN THE EMPLOYMENT COURT CHRISTCHURCH

[2012] NZEmpC 2

CRC 27/09

IN THE MATTER OF a challenge to a determination of the

Employment Relations Authority

AND

IN THE MATTER OF an application for costs

BETWEEN DAVID BOURNE First Plaintiff

AND JOHN STEPHEN CONRAD Second Plaintiff

AND JAMES KING TURNER Third Plaintiff

AND NEW ZEALAND MERCHANT SERVICE GUILD INDUSTRIAL UNION OF WORKERS INCORPORATED

Fourth Plaintiff

AND REAL JOURNEYS LIMITED Defendant

Hearing: on the papers - memoranda received 8 November, 12 December and

16 December 2011

Judgment: 18 January 2012

COSTS JUDGMENT OF JUDGE A A COUCH

[1] In my substantive judgment, I concluded by saying:

[179] Although the plaintiffs have been successful in their challenge, that has only been to a very limited extent. My preliminary view is that costs should lie where they fall. If any party wishes to seek an order for costs, however, a memorandum should be filed and served within 30 working days after the date of this judgment. The other parties will then have 20 working days in which to respond.

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[2] Ms Copeland filed submissions seeking an award of costs to the defendant. Mr McBride responded in detail, opposing any award. Ms Copeland then replied to one aspect of Mr McBride's submissions.

[3] The principles applicable to the Court's exercise of its discretion to award costs are well known and need not be repeated in detail. In *T & L Harvey Ltd v Duncan*[1], I summarised them as follows:

[5] The fundamental purpose of an award of costs is to recompense a party who has been successful in litigation for the cost of being represented in that litigation by counsel or an advocate. A useful starting point is two- thirds of the costs actually and reasonably incurred by that party but that proportion may be adjusted up or down according to the circumstances of the case and the manner in which it was conducted. Ability to pay is also a factor to be taken into account.

[4] Where there is a single issue or all issues in a case are decided in favour of one party, applying those principles is relatively straightforward. Where, as in this case, each party has had a measure of success, it can be problematic. As the Court of Appeal observed in *Health Waikato Ltd v Elmsly*[2]:

[39] It is not usual in New Zealand for costs to be assessed on an issue by issue basis, albeit that it is common enough, where both parties had a measure of success at trial, for no order as to costs to be made. The reluctance to assess costs on an issue by issue basis probably stems from the reality that in most cases of partial success it is not practical to separate out from the total costs incurred by the parties what was incurred in relation to the individual issues before the Court.

[5] In this case, Ms Copeland invites me to take an issue based approach. She submits that the number of issues on which the plaintiffs' challenge succeeded was smaller than the number on which it failed and that, for this reason, an award of costs ought to be made to the defendant.

[6] I identified seven issues in this case[3]. The plaintiffs were successful on one issue and partially successful on another. In that arithmetic sense, Ms Copeland is

correct in her submission. It would be unjustly simplistic, however, to reflect that

result directly in an award of costs. The issues were so intertwined that much of the evidence was relevant to many or all of the issues. In particular, evidence of the defendant's proposal for restructuring and how consultation about it proceeded formed the foundation on which the allegations of breach of the collective agreement and lack of good faith were based. Had the plaintiffs pursued only the issues on which they were successful or partially successful, the hearing may well have been somewhat shorter and simpler but I seriously doubt that the costs incurred by the parties would have been reduced to less than half of what was actually incurred.

[7] In making that assessment I take into account the nature of particular issues and their importance to the parties. Under the Employment Relations Act 2000, collective agreements play a key role in defining employment relationships. Those relationships also depend on good faith behaviour by the parties to them. The Authority's conclusion that the Guild and its members had breached the applicable collective agreement and their obligation of good faith to the extent that penalties were warranted was something they were entitled to regard as particularly serious and worthy of comprehensive challenge. Thus, had they pursued only those issues, it is likely they would have presented detailed evidence relating to them.

[8] I confirm my preliminary view that costs in this case should lie where they have fallen.

[9] In reaching this conclusion, I have not overlooked the numerous shortcomings in the plaintiffs' pleadings and the unsatisfactory manner in which their case was presented. I described these in detail in my substantive decision. They undoubtedly increased the costs incurred by the defendant and, had I concluded that an award of costs was warranted by the outcome, I would have taken them into account against the plaintiff. Standing back and looking at the case as a whole,

however, this factor does not alter my view that no costs award should be made.

Signed at 11.30 am on 18 January 2012.

A A Couch
Judge

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[1] [2010] NZEmpC 36 at
[2] [2004] NZCA 35; [2004] 1 ERNZ 172
[3] See paragraph [24] of the substantive judgment.

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