Employment Court of New Zealand

Burns v Media Design School Limited AC40/09 [2009] NZEmpC 104 (17 November 2009)

Last Updated: 20 November 2009

IN THE EMPLOYMENT COURT

AUCKLANDAC 40/09ARC 42/09

IN THE MATTER OF a challenge to a determination of the Employment Relations Authority

AND

IN THE MATTER OF an application for costs

BETWEEN BRENDAN BURNS
Plaintiff

AND MEDIA DESIGN SCHOOL LIMITED
Defendant

Hearing: Memoranda received 9 July, 24 July and 12 August 2009

Judgment: 17 November 2009

COSTS JUDGMENT OF JUDGE A A COUCH

[1] Mr Burns was dismissed from his employment by Media Design School Limited on 25 March 2009. On 29 April 2009, he commenced proceedings in the Employment Relations Authority seeking interim reinstatement. The Authority declined that application in a determination dated 15 June 2009 (AA 185/09). Mr Burns challenged that determination by filing a statement of claim in this Court on 26 June 2009.
[2] As the issue was one of interim reinstatement, the Court accorded the matter urgency and, by agreement with counsel for both parties, a timetable was established for filing of further documents prior to a hearing on 9 July 2009. On 8 July 2009, less than 24 hours before the hearing was to begin, the plaintiff discontinued the proceedings. Not surprisingly, the defendant then sought an order for costs.
[3] Initial memoranda were filed in July but they were deficient. I gave counsel an opportunity to provide further information which they did in August by way of a further memorandum from the defendant and an affidavit of the plaintiff.
[4] The established principles are that the starting point for assessing an award of costs in this Court is two thirds of the costs actually and reasonably incurred. That is then subject to adjustment up or down according to the manner in which the case was conducted. Another important consideration is the ability of the unsuccessful party to pay.
[5] Mr Langton and Mr Schirnack say that the costs actually incurred by the defendant in responding to the challenge were $26,500 plus GST and disbursements. They say that the whole of this amount was reasonably incurred and seek an order that the plaintiff pay 80% of that amount.
[6] I accept that the defendant actually incurred costs of $26,500 plus GST. To assess the extent to which that amount was reasonable, I was provided with details of the time spent on the matter and the rates at which the defendant was charged for that time. Mr Langton also described in the defendant's second memorandum the nature of the work done and, in particular, the reason for filing numerous affidavits.
[7] In all, 11 affidavits were filed on behalf of the defendant. To an extent, these were in response to three affidavits filed on behalf of the plaintiff by persons other than the plaintiff. I accept the work required to respond

to the additional material introduced by the plaintiff was necessary but much of the other content of the affidavits must have been prepared and reduced to writing in the affidavits provided to the Authority. Similarly, all of the initial work required for counsel to become familiar with the essential factual and legal issues must have been done in the course of the Authority investigation. The documents the defendant needed to prepare and file other than affidavits were few and relatively straightforward.

[8] In these circumstances, I do not accept that more than 122 hours of time was reasonably required to prepare the defendant's case in response to the challenge. In particular, I cannot accept that 56 hours of time was reasonably required to draft documents and a further 10 hours to amend them after the proceedings in the Court were commenced. Further, although the factual issues were relatively complex, the legal issues were not and I do not accept that more than 20 hours of time was required by way of preparation.

[9] While the time spent on the matter was, in my view, unreasonable, the rates at which that time was charged to the defendant were reasonable.

[10] Overall, I find that the costs actually incurred by the defendant were reasonable to the extent of $15,000 but no more. Thus, I take as a starting point two thirds of that amount which is $10,000.

[11] For the defendant, Mr Schirnack urges me to increase the proportion which the plaintiff ought to pay from two thirds to four fifths, that is from 66% to 80%. This submission is based very largely on the fact that the plaintiff elected to withdraw the proceedings at a late stage. I accept that the natural implication of the plaintiff discontinuing his proceedings at a late stage is that he believed he had little chance of success. In his memorandum, Mr Nicholson, for the plaintiff, sought to persuade me that this was not so. Rather, he said, the reason for the discontinuance was that the plaintiff had no time to properly respond to the numerous affidavits served on him at a late stage. Effectively, Mr Nicholson submits that it was impracticable for the plaintiff to comply with the timetable set by the Court.

[12] I do not accept this submission, certainly not as an explanation for the plaintiff discontinuing the proceedings. If the plaintiff was genuinely embarrassed by the volume of affidavits filed by the defendant and the timing of them, it was open to him to seek a variation of the timetable made by Travis J. He did not do so. The implication that the plaintiff withdrew for substantial reasons after reading the defendant's affidavits is irresistible.

[13] On the other hand, it cannot be said on the papers before me that the plaintiff's challenge was frivolous or pursued other than in good faith. This was certainly not one of those cases where it was clear from the outset that the plaintiff's claim was bound to fail. Rather, it is a case where the evidence provided by the defendant convinced the plaintiff that his case was unlikely to succeed. That point was reached only after the defendant's affidavits were served on the plaintiff late on Tuesday 7 July 2009. According to Mr Nicholson, and I accept his word to this effect, he advised counsel for the defendant later that day that the plaintiff intended to withdraw. It follows that counsel for the defendant were put to little work that was truly wasted in the sense that the plaintiff ought to have withdrawn earlier. I therefore would not increase the proportion of the defendant's actual and reasonable costs which the plaintiff ought to pay above the starting point of two thirds.

[14] The final issue is the ability of the plaintiff to pay. The accepted principle is that a party will be presumed to be able to pay an award of costs unless the Court is satisfied on proper evidence that to do so would cause undue hardship. In his affidavit sworn in relation to this issue, the plaintiff details his financial position. Much of this evidence is anecdotal but is sufficient to persuade me that the plaintiff is truly impecunious. His essential outgoings exceed his income and his debts greatly exceed his assets. In addition, the plaintiff's ability to obtain work in this country is limited by the need to have his visa amended in order to work. In such circumstances, I am satisfied that a substantial award of costs against the plaintiff would cause undue hardship.

[15] The plaintiff is ordered to pay the defendant $1,000 by way of costs.

A A Couch

Judge

Signed at 4.00pm on 17 November 2009.