Employment Court of New Zealand

Butcher v OCS Limited CC 8A/08 [2008] NZEmpC 117 (16 December 2008)

Last Updated: 22 December 2008

IN THE EMPLOYMENT COURT

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

AND IN THE MATTER OF an application for costs

BETWEEN HARRY BUTCHER
Plaintiff

AND OCS LIMITED
Defendant

Hearing: By submissions filed by the plaintiff on 15 September 2008
and by the defendant on 20 August 2008 and 16 September 2008

Judgment: 16 December 2008

COSTS JUDGMENT OF JUDGE B S TRAVIS

[1] In my judgment of 16 July 2008 (CC 8/08) dismissing the plaintiff's challenge, I reserved costs allowing them to be the subject of an exchange of memoranda if they could not be agreed. The parties had been unable to agree on costs.
[2] Mr McBride, on behalf of the defendant, submitted that the plaintiff's challenge *"boiled down to whether his decision to engage in flagrant disregard of requirements that he knew applied to him, on the basis that he would only be caught if he was* "unlucky*", rendered his dismissal unjustified*". He submitted that, given this premise, a factor going to costs was that the plaintiff's chances of success in his challenge were extremely low.
[3] Mr McBride noted that the hearing took a very full half day with written submissions being required to be filed in advance. A substantial award of costs was sought compensating the defendant for what was, in counsel's submissions, a challenge devoid of merit. Mr McBride advised that solicitor/client costs incurred were $7,500 plus GST and disbursements of $256 including GST comprising a portion of counsel's travel expenses. The defendant sought an award of costs in the vicinity of $5,500 and full disbursements.
[4] Mr McBride referred to the union's involvement in representing the plaintiff throughout and contended there was no argument that the plaintiff could have difficulty in meeting an appropriate costs award.
[5] Mr Oldfield, in response on behalf of the plaintiff, contested the reasonableness of the costs incurred by the defendant. He submitted that the hearing of the challenge, which only took half a day of approximately 3 to 3.5 hours, could have involved only about 10 to 10.5 hours for reasonable preparation and hearing time. Applying the

approach of the Court of Appeal in *Binnie v Pacific Health Ltd* [2003] NZCA 69; [2002] 1 ERNZ 438, a broad approach of 2 days' preparation for every day of hearing, was a useful rough and ready guide. On this basis Mr Oldfield submitted that the defendant's reasonably incurred costs should have been more in the vicinity of $3,000 to $4,500 on the basis of a 10-hour work charge out at the rate of between $300 and $450 per hour. He observed that the defendant had not specified what its counsel's charge out rate was (nor, I note, the hours spent on the matter). Mr Oldfield observed that the plaintiff had already offered the defendant $3,000 on account of its costs.

[6] Mr Oldfield drew attention to the observations of Judge Colgan (as he then was) in *Smith v Air New Zealand* AC 17/01, 19 March 2001, where the Employment Court indicated it would take account of what the High Court would award in analogous litigation, although ultimately the decision of costs rests on the fairness and justice of an award as between the particular parties. He submitted that if the matter were the equivalent to a category 2 proceeding under rule 48 of the High Court Rules, the appropriate daily rate, representing two-thirds of the actual daily rate, would be $1,600. Given that the hearing took half a day he submitted the defendant might be expected to recover approximately $2,400 in the High Court for a similar hearing.

[7] As to whether the plaintiff's challenge was allegedly devoid of merit, Mr Oldfield drew attention to my observations at paragraph [36] of the judgment where I stated:

... The plaintiff's challenge clearly raised an important question of law as to the effect of the defendant's disciplinary code and the earlier instruction in all the circumstances at the time, and whether the defendant had acted as a fair and reasonable employer would have done. ...

[8] Mr Oldfield observed that it was two of the defendant's submissions that the Court had found to be "*entirely without merit*" or "*without merit*" and that no such comments were made about the plaintiff's challenge.

[9] Mr Oldfield observed that the plaintiff's actions which led to his dismissal were relevant to the issue of justification but not relevant to costs. He therefore submitted that the appropriate contribution to the defendant's costs was between $2,000 and $3,000 with disbursements of $256.

[10] Mr Oldfield observed that the plaintiff was unsure whether the Court was going to decide costs in the Authority but submitted that a contribution of $1,500 towards the defendant's costs in the Authority would be reasonable.

[11] Mr McBride in response firstly observed that costs were sought only in the Court and that costs in the Authority were already the subject of an application to the Authority. In these circumstances I will not refer again to the costs in the Authority.

[12] Mr McBride observed that the hearing time was slightly over 3 hours with written submissions being filed and served prior to the hearing and that counsel's hourly rate at the relevant time was $280 plus GST, and the fees as actually charged to the defendant were as indicated.

[13] Mr McBride submitted that the plaintiff's analogy to the High Court Rules was flawed. Even assuming that the matter fell into category 2, being a proceeding of average complexity requiring counsel of skill and experience considered average in the High Court, as opposed to category 3, proceedings that because of their complexity or significance require counsel to have special skill and experience in the High Court, then the daily rate would be $1,600. He accepted for present purposes that it could be assumed, in the plaintiff's favour, that this was a matter in band B.

[14] Mr McBride submitted that the plaintiff had failed to recognise that commencement of the defence by the defendant, including receiving instructions, and filing and serving a statement of defence, is provided for in the Rules as itself comprising 2 days under band B. Filing a memorandum for a case management conference was 0.4 days under band B; an appearance at a case management conference was 0.3 days under band B; and preparation time under item 7.4 for a list of issues and authorities and other preparation is 2 days under band B. In addition, Mr McBride submitted under item 8, the additional preparation for hearing is twice the time occupied by the hearing, measured in half days and actual hearing time is then added. He submitted that these matters give a substantially higher figure than approximately $2,400 and would indicate a figure approximating what the defendant has sought.

[15] I agree with Mr Oldfield that the plaintiff's challenge was not entirely without merit and that an important legal issue was raised. I also note that the hearing was accommodated extremely efficiently in half a day, partly because the parties had exchanged submissions in advance. I agree, however, with Mr McBride that this is a matter where, because of the additional attendances, the High Court scale would have produced a substantially higher figure than $2,400 and one that would have been closer to the figures advanced by the defendant. I therefore conclude that the $7,500 actually incurred by the defendant was not unreasonable.

[16] However, because the matter was disposed of so efficiently and in recognition of the plaintiff's contribution to this efficiency, the usual starting point of two-thirds of the actual and reasonable costs is higher than I consider appropriate. I therefore award less than the usual two-thirds and instead award the defendant $4,500 plus the disbursements accepted by the plaintiff of $256.

B S Travis
Judge

Judgement signed at 4.40pm on 16 December 2008
