New Zealand Employment Relations Authority Decisions

Butterworth v TBA Communications Limited (Auckland) [2011] NZERA 379; [2011] NZERA Auckland 258 (17 June 2011)

Last Updated: 24 June 2011

IN THE EMPLOYMENT RELATIONS AUTHORITY AUCKLAND

[2011] NZERA Auckland 258 5159479

BETWEEN TRUDY BUTTERWORTH

Applicant

AND TBA COMMUNICATIONS

LIMITED Respondent

Member of Authority: Alastair Dumbleton
Submissions Received 17 January, 14 and 16 February 2011
Determination: 17 June 2011

COSTS DETERMINATION OF THE AUTHORITY

[1] This is an application under the Employment Relations Act 2000 for costs. It follows the investigation and determination of Ms Trudy Butterworth's employment relationship problem by the Authority. That investigation began in April 2009, a fortnight after Ms Butterworth's employment with TBA Communications Ltd had been terminated for the reason given by the company that her position was redundant.

[2] Ms Butterworth alleged that TBA had unjustifiably dismissed her. She claimed the redundancy was not genuine and that TBA had not followed a fair process in dismissing her.

[3] After mediation in May 2009, the Authority heard Ms Butterworth's application for interim reinstatement in June and issued its determination (AA201/09 of 23 June 2009). For the reasons given interim reinstatement was declined.

[4] In its June 2009 determination the Authority advised that a full investigation would take place within a month. In mid July, counsel for Ms Butterworth, Mr Ryan, advised that she no longer sought reinstatement as a remedy. The parties returned to mediation but could not resolve the personal grievance. It was not until June 2010 that the investigation meeting to hear the substantive grievance took place, a delay for which Ms Butterworth rather than TBA was responsible.

[5] Following an investigation in August 2010 the Authority issued a determination (AA424/10 of 29 September 2010). The Authority held that Ms Butterworth had not been dismissed unjustifiably but that TBA had without justification acted to her disadvantage in her employment. The Authority found that the dismissal was justifiable as a consequence of a genuine redundancy situation but that TBA had acted to Ms Butterworth's disadvantage by not giving her, in writing, a copy of an intended or proposed employment agreement for the position TBA intended replacing hers with. This omission was found to be a breach of s 63A(2) of the Employment Relations Act.

[6] The Authority found that the failure to commit the intended variation of Ms Butterworth's employment agreement to writing and provide her with a copy, led to a situation of uncertainty between the parties as to whether she had agreed to take the position by the time TBA decided to advertise it as a full time position replacing Ms Butterworth's part time one.

[7] The Authority did not order reimbursement of lost wages as a remedy because a genuine redundancy situation had led to the dismissal. As the harm caused to Ms Butterworth personally was a consequence of that situation compensation was not

appropriate, but she was awarded $1,000 for distress caused by not having the proposal to vary her employment agreement put in writing as she had requested. The award was pursuant to s 123(1)(c)(i) of the Act. As one had not been claimed, no penalty was awarded for the breach of the Act.

[8] Costs were reserved. When the parties could not settle that question themselves TBA applied for an order against Ms Butterworth and she responded by opposing the application.

[9] TBA seeks an award of costs against Ms Butterworth on a full indemnity or solicitor client basis, in the amount of $25,141. It is submitted that the basis for such an award, rarely made by the Authority, is that TBA made 'without prejudice save as to costs' settlement offers to Ms Butterworth well in advance of the substantive meeting but which were rejected. Those *Calderbank* offers were significantly in excess of the amount ultimately awarded by the Authority.

[10] Counsel Ms Stone in submissions for TBA also noted that significant delay before the substantive hearing was able to be set down had resulted in case preparations having to be repeated.

[11] The *Calderbank* offer was $5,000 pursuant to s 123(1)(c)(i) of the Act with $1,500 plus GST as a contribution towards Ms Butterworth's legal costs. When she had not responded to it despite the offer being repeated TBA could see that Ms Butterworth had rejected the offer.

[12] As an alternative to full indemnity costs TBA seeks a substantial contribution towards its costs in a sum well above the notional tariff of about $3,000 per day of Authority investigation meeting. Meeting time in total was closer to two days than one and a half. The time needed for preparation would have been increased by the delay between the first and second meetings which resulted in some of the case preparation having to be repeated.

[13] In opposition to the application for Ms Butterworth it is submitted that she was successful in the Authority, a factor distinguishing her claim from the situation before the Court of Appeal in *Chen v. New Zealand Sugar Company Ltd* [2010] NZCA 477. Indemnity costs were approved by the Court where Mr Chen had been entirely unsuccessful with his claims, in both the Authority and the Employment Court. It is submitted that costs should be determined by the application of the normal principles as set out in the Employment Court's decision in *PBO Ltd v. Da Cruz* [2005] NZEmpC 144; [2005] 1 ERNZ 808.

[14] It is submitted for Ms Butterworth that taking into account she was awarded a modest amount of $1,000 in compensation and incurred modest legal costs to achieve that slight success, this is a case where the discretion of the Authority can be exercised by ordering that costs should lie where they fall.

[15] Mr Ryan provided copies of Ms Butterworth's bank statement as evidence of what he submitted was "her inability to pay costs at the level sought by the Respondent."

[16] Solicitor client costs where claimed must still satisfy the test of reasonableness as to the amount. The copies of invoices submitted on behalf of TBA simply specify amounts for "professional services", "typing services" and administration fees. There is little or no detail as to what the nature of the professional services rendered was.

Some of the invoices are partly for unrelated work, and from Ms Stone's submissions it is clear that they include legal work for and attendances at two mediations.

[17] I decline to award solicitor client costs but will consider whether Ms Butterworth should be required to make a reasonable contribution to TBA's actual costs.

[18] Dealing with the submission that Ms Butterworth is unable to pay costs at the level sought by TBA, the only information provided about that is a print out of her bank statements from September to December 2010. It indicates that the closing balance of the account is $10.93 although she has credit available of an additional $2,000. There is an indication that income was earned from other employment and there are credit transfers from undisclosed sources, but there is no indication given of any other assets or liabilities Ms Butterworth may have. Whether she owns a house or has equity in a residence or other real property, or what valuable personal property she has or whether she has other accounts, has not been made known to the Authority. On the face of it Ms Butterworth manages her finances well and keeps up with payments due.

[19] Present or future inability to pay costs is a matter an applicant party must consider carefully before rejecting a reasonable offer to settle a claim, as Ms Butterworth received from TBA. Knowing the effect of a *Calderbank* offer, if the applicant is later unsuccessful it must take responsibility for risking indebtedness incurred through having an order for costs made against it. That risk can be avoided or reduced by accepting a reasonable settlement offer.

[20] In *Carter Holt Harvey Ltd v Eastern bays Independent Union and others* [2011] NZEmpC 13, the Employment Court noted that in its leading decision on costs in the Authority - *PBO Ltd v Da Cruz* [2005] NZEmpC 144; [2005] ERNZ 808 - the Court had endorsed the approach of taking an accepted daily tariff and, in a principled way, adjusting it up or down if necessary to meet the justice of the case.

[21] In this case an award of about $6000 will not achieve justice. This is a case where it should be taken into account that a

party which has been successful, albeit only slightly, twice declined a reasonable *Calderbank* offer that would have fairly and adequately compensated for the wrong found to have been caused to the party. If it had been accepted, TBA's offer would also have provided Ms Butterworth with some compensation for her legal costs.

[22] Although the terms and conditions of the replacement position created by TBA should have been given in writing to Ms Butterworth, she could have expected the details to be very similar to her position, apart from the hours of work. For that reason the actual disadvantage to her was limited. Even if the terms and conditions had been supplied in writing it is likely she would not have accepted the job, as the Authority found. For that reason TBA's offer to settle, which it repeated, was generous. The rejection of it was unreasonable and led TBA unnecessarily to incur significant costs, for which it should be compensated.

[23] Exercising the discretion the Authority has, in the circumstances I consider that total costs of $9,000 (about $4,500 per day of meeting) are appropriate as a reasonable contribution to be made by Ms Butterworth to TBA's much greater costs. She is therefore ordered to pay that amount to TBA, pursuant to clause 15 of Schedule 2 of the Employment Relations Act 2000.

A Dumbleton

Member of the Employment Relations Authority
