Employment Court of New Zealand

Checkmate Precision Cutting Tools Limited v Tomo [2013] NZEmpC 107 (13 June 2013)

Last Updated: 1 July 2013

IN THE EMPLOYMENT COURT AUCKLAND

[2013] NZEmpC 107

ARC 85/11

IN THE MATTER OF a challenge to a determination of the

Employment Relations Authority

AND IN THE MATTER of an application for costs

BETWEEN CHECKMATE PRECISION CUTTING TOOLS LIMITED

Plaintiff

AND MAPU TOMO Defendant

Hearing: By memoranda of submissions filed on 3, 15 and 28 May and

4 June 2013

Appearances: Mark Beech, counsel for plaintiff

Sam Wimsett, counsel for defendant

Judgment: 13 June 2013

COSTS JUDGMENT OF JUDGE CHRISTINA INGLIS

[1] In my substantive judgment1 I dismissed the plaintiff's challenge to a determination of the Employment Relations Authority (the Authority) that the defendant was entitled to proceed with his grievance. I invited the parties to agree costs, if possible, but they have been unable to do so. Memoranda have now been filed.

[2] This Court has a discretion in relation to the issue of costs. Clause 19(1) of

Sch 3 of the Employment Relations Act 2000 (the Act) provides that:

The court in any proceedings may order any party to pay to any other party such costs and expenses ... as the court thinks reasonable.

1 [2013] NZEmpC 54.

[3] Regulation 68(1) of the Employment Court Regulations 2000 (the

Regulations) provides that:

In exercising the court's discretion under the Act to make orders as to costs, the court may have regard to any conduct of the

parties tending to increase or contain costs, ...

[4] The principles relating to costs' awards in this Court are well recognised.2

The usual approach is that costs follow the event and generally amount to 66 per cent of costs actually and reasonably incurred by a successful party (absent any factors that might otherwise warrant an increase or decrease from that starting point).

[5] The plaintiff submits that in the circumstances of this case, and in light of how the hearing evolved, it should be awarded costs notwithstanding the fact that it was the unsuccessful party. The defendant contends that the circumstances do not warrant such an approach, and that costs ought to be awarded in his favour. While both parties seek costs, in the absence of a costs award in their favour their fall-back position is that costs should lie where they fall.

[6] Mr Tomo had initially been represented by Mr Austin, an employment advocate. Mr Austin withdrew as advocate when it became clear that he would have to give evidence. That was because the challenge centred on whether or not the parties had reached a full and final settlement at a meeting on 6 April 2010. Mr Austin had attended the meeting with Mr Tomo. The issue of representation was raised during a telephone conference with Judge Travis on 16 December 2011, and subsequently. In the event, Mr Tomo appeared on his own behalf (as is his right) when the hearing of the challenge commenced. However it soon became apparent that Mr Tomo was not in a position to conduct any cross-examination of the plaintiff's witnesses, and the hearing was adjourned in the interests of justice to enable him to obtain representation. I indicated at the time that costs were likely to be an issue consequent on the adjournment. Mr Tomo was granted legal aid, although there were delays in resolving this issue. Mr Wimsett subsequently

appeared on his behalf.

2 See *Victoria University of Wellington v Alton-Lee* [2001] NZCA 313; [2001] ERNZ 305; *Binnie v Pacific Health Ltd*

[2003] NZCA 69; [2002] 1 ERNZ 438; *Health Waikato Ltd v Elmsly* [2004] NZCA 35; [2004] 1 ERNZ 172.

[7] Mr Wimsett submits that the adjournment was unnecessary because the point at issue between the parties was a narrow one and the defendant would have succeeded on the basis of the plaintiff's evidence alone. I do not accept this, given the factual issues in dispute, the nature of the evidence called on behalf of the company, and the contemporaneous documentation. I am satisfied that the plaintiff incurred additional unnecessary costs as a result of the adjournment, and the subsequent delays in resolving issues relating to Mr Tomo's legal aid application.

[8] As Mr Wimsett points out, the Court's discretion in relation to costs must take into account the fact that the defendant was legally aided. Section 45 of the Legal Services Act 2011 provides that no award of costs may be made against an aided person in a civil proceeding unless the Court is satisfied that there are

exceptional circumstances.3 A range of conduct which may give rise to a finding of

exceptional circumstances is listed under s 45(3), including any conduct that causes the other party to incur unnecessary cost.4 In *Laverty v Para Franchising Ltd*5 the Court of Appeal observed that:6

For circumstances to qualify as exceptional, however they have to be "quite out of the ordinary": *Awa v Independent News Auckland Ltd* at 186.

[9] And in *Johns v Johns & Holloway*7 Asher J said that:8

The word "exceptional" in itself has a clear meaning. It must be something distinctly out of the ordinary which warrants the Court departing from the rule set out in s 40(2) [of the Legal Services Act 2000].

[10] While it is true that the defendant's conduct leading to the adjournment unnecessarily added to the plaintiff's costs, I do not consider that it was exceptional for the purposes of s 45, or sufficiently egregious to warrant forfeiture of his entitlement to the protections afforded by that provision. I decline the plaintiff's application to make a costs order against the defendant in the circumstances. Nor do I propose to award costs in favour of the defendant. While I accept that actual legal costs

of $3,236.10 were incurred, the unnecessary costs incurred by the plaintiff as a result

3 Section 45(2).

4 Section 45(3)(a).

5 [2005] NZCA 436; [2006] 1 NZLR 650 (CA).

6 At [31].

7 HC Auckland CIV-2000-404-5101, 23 August 2007.

8 At [6]. Section 45 of the current Act is in identical terms to s 40 of the Legal Services Act 2000.

of the adjournment were significant, well in excess of this amount, and effectively

nullified any award that might otherwise have been made in the defendant's favour.

[11] In the circumstances, I adopt the ultimate submission advanced on behalf of both parties, namely that costs should lie where they fall. There will be orders accordingly.

[12] Neither party sought costs on the current applications and none are ordered.

Christina Inglis
Judge

Judgment signed at 11.30am on 13 June 2013
