Employment Court of New Zealand

Dumulo v Lakes District Health Board [2014] NZEmpC 75 (16 May 2014)

Last Updated: 13 June 2014

IN THE EMPLOYMENT COURT AUCKLAND

[2014] NZEmpC 75

ARC 60/11

IN THE MATTER OF	a challenge to a determination to the Employment Relations Authority
AND IN THE MATTER	of costs
BETWEEN	DAVID DUMULO Plaintiff
AND	LAKES DISTRICT HEALTH BOARD Defendant

Hearing:	By memoranda filed by the plaintiff on 7 April, by the defendant on 22 April and by the plaintiff on 30 April 2014
Appearances:	B Buckett, counsel for plaintiff G Peploe, advocate for defendant
Judgment:	16 May 2014

COSTS JUDGMENT OF JUDGE M E PERKINS

[1] On 14 March 2014 I issued a judgment dealing with Mr Dumolo's challenge

to the determination of the Employment Relations Authority (the Authority) dated

29 July 2011.1 Mr Dumolo's challenge was partially successful and I reserved the issue of costs to enable submissions to be forwarded to the Court. Memoranda have now been received.

[2] Miss Buckett, counsel for the plaintiff, has sought the leave of the Court to the filing of submissions on costs outside the time limit set by the Court. Good grounds are disclosed and Mr Peploe, for the defendant, appropriately does not

oppose the application. Accordingly, leave is granted.

1 *Dumolo v Lakes District Health Board* [2014] NZEmpC 40.

[3] Both Miss Buckett and Mr Peploe have referred me to the established principles on awards of costs, which bind this Court and are contained in three main decisions of the Court of Appeal.2 The general approach arising from those principles is that costs follow the event and that the starting point in the quantification process is that the party against whom costs are awarded should contribute two thirds of actual and reasonable costs incurred by the successful party.

[4] In this case, Miss Buckett has sought indemnity costs against the defendant. This is on the basis of correspondence, which preceded the hearing of the challenge in the Court and contained proposals to settle the matter. The correspondence from Miss Buckett is appropriately written on the basis of being without prejudice save as to costs. This correspondence has now been produced to the Court for the purposes of the costs application. The monetary proposal made in the correspondence was that Mr Dumolo would accept the sum of $10,000 plus GST pursuant to s 123 of the Employment Relations Act 2000 (the Act). The letter did not say how that sum was

to be divided between claims for loss of income and compensation for other remedies covered by s 123. In addition to that sum, Mr Dumolo also sought a contribution of $10,000 plus GST towards his costs.

[5] The submission now made by Miss Buckett is that the monetary component of the proposal for reimbursement and compensation, amounting to $10,000, is less than the awards of the Court in favour of Mr Dumolo in respect of lost remuneration and compensation. Those amount to $14,012.50. Miss Buckett's submission in this regard is that the proposal should be considered on the basis that the costs proposed should be isolated from the offer as to compensation and other monetary remedies. She also submitted that some culpability on the issue of costs rests with the defendant for failing to respond at all to the settlement proposals, or at the very least, to make a counter proposal.

[6] Mr Peploe has submitted that as the total sum of $20,000 proposed by Mr

Dumolo was greater than the remedies that were awarded, no consideration should be given to it. This submission, however, includes the proposal for costs and of

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

course that cannot be assessed against the actual award until an award of costs is made.

[7] Mr Peploe also pointed out that the letter from Miss Buckett contained a number of non-monetary proposals, which would, if accepted, have involved the defendant in further costs by way of compliance. This is in view of the fact that the proposal was that Lakes District Health Board (the Board), at its expense, should for an indefinite period store offsite all materials relating to the dismissal of Mr Dumolo. In addition Mr Peploe pointed out that Mr Dumolo was seeking to have the reasons for termination of his employment subsequently re-couched in language unacceptable to the Board. Mr Peploe also inferred that the Board did not ignore the proposal that had been contained in the correspondence from Miss Buckett.

[8] Miss Buckett seeks, in addition to the costs of the challenge, a contribution to the costs of attendance at the Judicial Settlement Conference. This conference was unsuccessful in achieving a resolution between the parties prior to the hearing. Mr Peploe submitted in reply that the conference was an initiative of the Court to which both parties agreed to attend. As a matter of public policy, he submitted, the costs for such a conference should not be awarded on a party to party or any other basis.

[9] Finally Mr Peploe submitted that Miss Buckett's total fees, which at that point had been set out in a single summarised invoice of one page, were not, in any event reasonable, and were excessive. Miss Buckett responded to this assertion in her final reply, even though such a reply had not been reserved to her in my judgment.

[10] Regulation 68 of the Employment Court Regulations 2000 covers the exercise of the discretion of the Court in dealing with costs to consider offers of settlement. This regulation is in addition to cl 19 of sch 3 to the Act, which sets out the powers of the Court to award costs. Clause 19 of sch 3 reads as follows:

19 Power to award costs

(1) The Court in any proceedings may order any party to pay to any other party such costs and expenses (including expenses of witnesses) as the Court thinks reasonable.

(2) The Court may apportion any such costs and expenses between the parties or any of them as it thinks fit, and may at any time vary or alter any such order in such manner as it thinks reasonable.

[11] The discretion is therefore wide and is extended by Regulation 68, which reads as follows:

68 Discretion as to costs

(1) 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, including any offer made by either party to the other, a reasonable time before the hearing, to settle all or some of the matters at issue between the parties.

(2) Under subclause (1), the Court—

(a) may have regard to an offer despite that offer being expressed to be without prejudice except as to costs; but

(b) may not have regard to anything that was done in the course of the

provision of mediation services.

[12] Similar, although not identical, provisions to reg 68 exist in the High Court Rules. In considering the principles applying under reg 68, it is appropriate as well to have regard to those principles, which have been established on the same issue under the High Court Rules. This Court has done that on numerous occasions, and established principles, which will generally apply in this Court.

[13] The following apply to what are generally referred to as Calderbank offers and have been established in many decisions of the High Court and decisions of this Court. First, the offer must be written, although handwriting will suffice. The aim of this is to remove any scope for disagreement as to the terms of the offer. Second, the offer should be clearly and unambiguously stated; it must be transparent. Third, the offer should be clear as to whether or not it includes costs. Fourth, whilst such an offer may be made at any time, realistically it should be made in sufficient time prior to commencement of the hearing to allow the other party to consider it and take advice upon it. The later the offer the less will be its impact upon costs. Finally, it can be said in the context of the present claim

that rejection of a Calderbank offer does not thereby expose the unsuccessful party to indemnity costs on a full solicitor/client basis. It merely goes to the manner in which the Court exercises its overall discretion on costs.

[14] Having regard to the letter, which Miss Buckett wrote on Mr Dumolo's behalf in this case, in addition to seeking monetary remedies, she proposed steps be taken and statements made by the defendant aimed at vindicating Mr Dumolo's position. He had been dismissed for theft and dishonesty. Miss Buckett's proposals were specific in regard to the steps Mr Dumolo sought by way of a public non- monetary outcome.

[15] In the present case I am not prepared to find that the letter in settlement, upon which Mr Dumolo relies, would justify an award of indemnity costs. It is true that the award for compensation, income, and the eventual award of costs to be made in his favour, will exceed the monetary value of the offer both as to compensation and costs. Nevertheless, the other factors contained in the offer aimed at vindicating Mr Dumolo's reputation cannot be separated from the monetary proposals so that such claims are considered in isolation. While one of the aims of Mr Dumolo pursuing the challenge was to clear his name from the allegations of theft and dishonesty, he did not in fact achieve that. His success on the challenge was not down to his establishing that he had not taken the disk; he admitted he did that. It was rather because the defendant failed to give adequate regard to one extraneous circumstance applying to Mr Dumolo's employment, which may have led it to a softer view as to Mr Dumolo's intentions in taking the disk, and thereby the Board should have arrived at a disciplinary outcome short of dismissal. That falls short of a complete vindication of Mr Dumolo's position.

[16] This is also not a case for indemnity costs having regard to the fact that Mr Dumolo's remedies were substantially reduced because of his contributing behaviour. While it is not appropriate that Mr Dumolo suffer a double detriment as a result of his contributing behaviour, it nevertheless is a matter to be taken into account in the overall exercise of the discretion as to whether or not indemnity costs are an appropriate award against the defendant.

[17] In dealing with the submission that Mr Dumolo should receive a contribution towards costs for the Judicial Settlement Conference, I agree with Mr Peploe's submissions. There will only rarely be cases where such an order is appropriate. Almost invariably, the Court will refuse to order costs for attending an unsuccessful

Judicial Settlement Conference. To do otherwise runs counter to the objective of encouraging parties to attend such conferences in advance of their cases proceeding to a hearing. The settlement of claims to save the parties from having to incur the substantial costs of proceeding to a hearing is a very desirable objective. The present case is certainly not one where that principle or objective should be abrogated. Miss Buckett's claim for such costs on behalf of Mr Dumolo is accordingly rejected.

[18] In view of Mr Peploe's submission that Miss Buckett's fees are excessive I have perused the evidence submitted by Miss Buckett to justify actual costs incurred by Mr Dumolo. In her initial memorandum Miss Buckett claimed $45,000 plus GST making a total of $51,750. The copy of the invoice attached to her submissions was inadequate to provide the Court with the information it needs to assess the matter. In her submissions in reply Miss Buckett has attached further invoices on the basis that the invoice attached to the initial submissions was a consolidated invoice. However, even the further invoices give no real breakdown of attendances or time expended in this matter. Miss Buckett, in her submissions in reply, stated that she has charged at the rate of $430 per hour plus GST. The total charges she has made in the later invoices for the three days hearing (including preparation and travel) are in the vicinity of $22,000. In the consolidated invoice attached to her first set of submissions, it appears to total $17,630 with other preparation being isolated into another category.

[19] Certainly the sum of $8,600 plus GT ($9,890) charged for the Judicial Settlement Conference is disallowed for the reasons I have already mentioned. Because of the failure by Miss Buckett to provide a proper breakdown of time and attendances, it is difficult to assess the time expended and charged. Deducting the sum of $9,890 from the total GST inclusive fee of $51,750 the balance is $41,860. Using the rule of thumb referred to by the Court of Appeal in *Binnie v Pacific Health Ltd* of two days preparation for every day in Court, the total number of days Miss Buckett should have spent would be nine days. If she was charging an hourly rate of

$430 plus GST ($494.50) then a generous daily rate would be $4,450.50 ($494.50 x

9 hours). That would then arrive at a total of $40.054.50, which includes GST. In all the circumstances then Miss Buckett's fees for conducting the challenge are reasonable.

[20] Two thirds of the balance of $41,860 is $27,906.66. I round that up to

$28,000 and that is, accordingly, the award I make in favour of Mr Dumolo for costs. The disbursements of $1,048.87 for Court hearing and filing fees are allowed.

[21] In order to make the position clear, insofar as the Authority's investigation is concerned, I note that no claim is made by Mr Dumolo for any costs in the Authority. In my earlier judgment I decided that no costs award should be made to the defendant in respect of the Authority's investigation. It is appropriate that that approach should continue. Accordingly, each party is to bear their own costs in those proceedings.

M E Perkins

Judge

Judgment signed at 3.15 pm on 16 May 2014