Employment Court of New Zealand

Gaut v BP Oil New Zealand Limited [2011] NZEmpC 111 (30 August 2011)

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Last Updated: 20 September 2011

IN THE EMPLOYMENT COURT CHRISTCHURCH

[2011] NZEmpC 111

CRC 23/10

IN THE MATTER OF a challenge to a determination of the

Employment Relations Authority

BETWEEN LEON BURGESS GAUT Plaintiff

AND BP OIL NEW ZEALAND LIMITED Defendant

Hearing: (in response to memoranda dated 15 July and 10, 15, 23 August 2011) Counsel: Mr Tim Jackson, advocate for the plaintiff

Ms Samantha Turner and Mr Simon Clarke, counsel for the defendant

Judgment: 30 August 2011

COSTS JUDGMENT OF JUDGE A D FORD

The issues

[1] In a judgment dated 23 June 2011,[1] I upheld the plaintiff's challenge to a determination of the Employment Relations Authority (the Authority) and concluded, for the reasons stated, that he had been unjustifiably dismissed from his

employment at the BP Connect Service Station at Timaru. I particularised the compensation payable to Mr Gaut and I indicated that he was also entitled to recover a reasonable award of costs. Counsel were not able to reach agreement on the costs issue but they have now filed helpful memoranda which I have carefully considered.

[2] The amount Mr Gaut recovered pursuant to my judgment was $3,868.32 under s 123(1)(b) of the Employment Relations Act 2000 (the Act) for the loss of

earnings and $8,000 under s 123(1)(c) of the Act on account of his non-economic

loss. From the total award of $11,868.32 I then made a reduction of 60 per cent under s 124 of the Act on account of Mr Gaut's contribution which left a net amount of $4,747.33. I also ordered that Mr Gaut was entitled to a reasonable award of costs.

[3] As I noted in *Zhang v Sam's Fukuyama Food Service Ltd*,[2] the general methodology and principles relating to awards of costs in this Court are now well established and need not be repeated – *Binnie v Pacific Health Ltd*.[3] The recognised normal starting point for an award is two-thirds of the actual legal costs reasonably incurred. Having determined the starting point, the next step is to consider any factors which might justify an increase or decrease in this figure.[4]

[4] Mr Jackson, advocate for the plaintiff, has confirmed that the plaintiff's actual costs amounted to a total of $15,858.50 including GST. Disbursements amounted to an additional $1,271.76. The hearing occupied three full days. Mr Jackson has produced an invoice showing the breakdown of the costs and disbursements claimed. The plaintiff also seeks an award of costs in respect of the investigation before the Authority. The Authority made no award but reserved the issue of costs. Mr Jackson submits that an appropriate figure for costs before the Authority would be "no more than $3,000". The Authority investigation occupied one day.

[5] Mr Jackson's charge-out rate is shown at $140 plus GST. The case was not without difficulties from the plaintiff's point of view and I consider that Mr Gaut was well served by his advocate. In my view, the amount of $15,858.50 claimed is reasonable. Applying the two-thirds rule, the starting point can then be rounded off at $10,500.

[6] Counsel for the defendant, Ms Turner, submitted:

BP submits that Mr Gaut is not entitled to an award of reasonable costs. BP's position is that because Mr Gaut has not actually incurred any costs, and he rejected two *Calderbank* offers which offered more than Mr Gaut

achieved in the Court, no costs should be awarded and instead an award of costs should be made in favour of BP, alternatively, costs should lie where they fall.

[7] I now turn to consider the grounds advanced by Ms Turner in support of her submissions.

No costs incurred

[8] Ms Turner highlighted the principle confirmed by the Court of Appeal in *Binnie*[5] and *Victoria University of Wellington v Alton-Lee*[6] that costs awarded in the Court should amount to a reasonable contribution to costs actually and reasonably incurred by the winning party. But counsel submitted that on the evidence in the present case no costs had actually been incurred by Mr Gaut. In this regard, Ms Turner referred to the following paragraph which appeared in Mr Gaut's brief of evidence:

83. In my position I don't have much more to lose. My advocate has not been paid anything. He has done all this for nothing and said that if I am awarded anything then he will be happy to accept any amount that I want to pay him, but that there is no obligation on me at all. He does not want recognition for that but said it should probably be mentioned in case anyone thinks I have money to pay for this.

[9] Ms Turner submitted that from this passage of his own evidence, Mr Gaut established that he had not actually incurred any costs in this Court but he appears to have been "retrospectively issued with an invoice from his advocate, Mr Jackson."

[10] In response, Mr Jackson took exception to what he claimed were the suggestions that he had issued an invoice that was not genuine and that the plaintiff had misled the Court. Mr Jackson explained that para 83 had been included in Mr Gaut's brief filed with the Authority but it was not intended to be included in the brief of evidence filed in the Court. He said that the mistake had been detected and an amended brief had been filed on Friday, 1 April 2011. It appears, however, that, at that stage, the Court file had already been forwarded by courier from Wellington to Timaru for the hearing which was set to commence on Monday, 4 April. The brief

of evidence Mr Gaut had before him at the hearing was taken from the Judge's file,

and that included para 83 but the transcript specifically records that the witness did not read paras 81, 82 and 83 and he concluded reading his brief of evidence at paragraph 80. The Registrar has listened to the recording of the evidence and she has been able to confirm that para 83 was not part of Mr Gaut's oral evidence.

[11] For the record, I confirm that Ms Turner filed a further memorandum on

23 August in which she confirmed that she did not intend to suggest in any way that the invoice Mr Jackson has presented was not genuine or that the plaintiff had misled the Court.

[12] Ms Turner's first submission, therefore, fails because it proceeds on an incorrect premise. The paragraph from the plaintiff's original brief of evidence which her submission was based upon did not form part of Mr Gaut's evidence before the Court.

The *Calderbank* offers

[13] Ms Turner referred the Court to two *Calderbank* offers made by BP to Mr Gaut on 15 October 2009 and 6 August 2010 respectively, submitting that they were timely and reasonable offers to settle the matter at issue between the parties and that Mr Gaut's rejection of the offers was unreasonable. Both of the offers were for

$4,000 to be paid under s 123(1)(c)(i) of the Act plus $1,000 as a contribution towards legal costs. The first offer expired at 12.00 pm on Monday, 19 October

2009. The second offer was open for acceptance until 4.00 pm on Friday, 13 August

2010.

[14] Ms Turner based her submissions on the applicable regulations and rules relevant to *Calderbank* offers as summarised in the recent judgment of the Court of Appeal in *Bluestar Print Group (NZ) Ltd v Mitchell*:[7]

Employment Court Regulations

[6] Regulations 68 and 69 contain costs rules for that Court. Regulation

68(1) states:

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.

[7] Regulation 6 states that where there is no relevant procedure in the Regulations or the ERA, the Court must resolve the issue, as nearly as is practicable, in accordance with the High Court rules.

High Court Rules

[8] Rules 14.1–14.23 of the High Court Rules set out the costs regime.

Rule 14.10 states that a party may make a Calderbank offer at any time. Rule 14.11 governs the effect of Calderbank offers on costs:

Effect on costs

(1) The effect (if any) that the making of an offer under rule 14.10 has on the question of costs is at the discretion of the court.

(2) Subclauses (3) and (4)–

(a) are subject to subclause (1); and

(b) do not limit rule 14.6 or 14.7; and

(c) apply to an offer made under rule 14.10 by a party to a proceeding (party A) to another party to it (party B).

(3) Party A is entitled to costs on the steps taken in the [proceeding]

after the offer is made, if party A–

(a) offers a sum of money to party B that exceeds the amount of a judgment obtained by party B against party A; or

(b) makes an offer that would have been more beneficial to party B than the judgment obtained by party B against party A.

(4) The offer may be taken into account, if party A makes an offer that–

(a) does not fall within paragraph (a) or (b) of subclause (3); and

(b) is close to the value or benefit of the judgment obtained by party B.

[15] Ms Turner made specific reference to the following passage from the

Bluestar judgment, which she submitted emphasised the significance of *Calderbank*

offers:[8]

It has been repeatedly emphasised that the scarce resources of the Courts should not be burdened by litigants who choose to reject reasonable settlement offers, proceed with litigation and then fail to achieve any more than was previously offered. Where defendants have acted reasonably in such circumstances, they should not be further penalised by an award of costs in favour of the plaintiff in the absence of compelling countervailing factors.

[16] Ms Turner submitted that the *Calderbank* offers "must be given considerable weight" in the exercise of the Court's discretion as to costs and that "it would be a just exercise of discretion for costs to lie where they fall". In support of those submissions counsel contended:

5.8 BP's offers were timely. The offers were made clearly and were expressly recorded. Further, the offers exceeded the value to Mr Gaut of the remedies made by the Court. The offers amounted to $5,000, which was more than the award of $4,747.33, especially as no costs have been incurred.

[17] Mr Jackson attached to his submissions a copy of a letter dated 5 July 2011 which he had sent to the defendant's solicitors rejecting the proposition that the *Calderbank* offers exceeded the value of the judgment obtained by Mr Gaut. In this regard he referred to Mr Gaut's entitlement to costs in terms of the judgment in addition to the awards of compensation and loss of earnings.

[18] In his written submissions, Mr Jackson stressed the fact that the *Calderbank* offers did not attempt to address Mr Gaut's claim for reinstatement which was the primary remedy he was seeking. Mr Jackson highlighted matters touched upon at the hearing regarding the plaintiff's efforts to negotiate a settlement which would have included reinstatement and, in this regard, he detailed the attempts he had made to have the dispute dealt with at an early stage through mediation. Correspondence was produced touching upon these matters, including a letter Mr Jackson had written to the defendant on 8 June 2009 suggesting options for settlement that would have involved reinstatement. Mr Jackson noted in his letter that BP had advertised for two customer service representatives, "positions identical" to the position which Mr Gaut had held with the company at the time of his summary dismissal on 25 March 2009.

[19] Mr Jackson submitted:

11. The plaintiff wanted to go back to work and his position was informed, opened, fair and pragmatic; all factors that this jurisdiction regards as worth encouraging and which are in general terms, endorsed by the Act.

12. In response, the defendant maintained its process was fair (in as many words), but otherwise did not address the offer or earlier invitations.

13. The parties did not resolve the grievance at mediation.

[20] In reference to the defendant's second *Calderbank* offer in August 2010, Mr Jackson stressed that Mr Gaut still sought reinstatement as his primary remedy but that factor had not been addressed nor did the offer contain any element of vindication. In this regard, Mr Jackson highlighted a newspaper article that had appeared after the Authority's determination which had referred to Mr Gaut as a "habitual swearer". Mr Jackson submitted that *Bluestar* recognised that *Calderbank* offers could appropriately contain an element of vindication, citing the following passage from the Court of Appeal judgment:

[19] We accept that there may be cases where vindication through seeking a statement of principle in the employment context may be relevant to the exercise of the Court's discretion. Thus the relevance of reputational factors means that cost assessments are not confined solely to economic considerations. But equally, an offer to pay compensation at a level that is reasonable might well be regarded as conveying a distinct element of vindication to the plaintiff.

Discussion

[21] There was no dispute that when assessing the value or benefit of a judgment in this Court in terms of r 14.11 of the High Court rules, it is appropriate to proceed on the basis of the net value of the judgment after making reduction for any contributory behaviour under s 124 of the Act.

[22] In the present case, the net figure came to $4,747.33 and in addition to that sum Mr Gaut was awarded costs. The *Calderbank* offers were for a sum of $4,000 plus $1,000 towards costs. Given the way in which the offers were specifically broken down, I do not accept that they exceeded the value of the judgment. I would accept, however, that the respective value of the offers and the judgment are such that it is appropriate for the Court in the exercise of its discretion to consider the offers in accordance with r 14.11(4) of the High Court Rules.

[23] In my view, however, the overriding consideration in any assessment of the *Calderbank* offers is the fact, forcefully advanced by Mr Jackson, that they did nothing to address the issue of reinstatement which was the primary remedy Mr Gaut was seeking at the time that they were made. Mr Gaut was entitled to seek reinstatement under s 123(1)(a) of the Act and indeed, at the relevant time, s 125 of the Act specifically recognised reinstatement as the primary remedy. The Court heard compelling evidence about the unfortunate effects the summary dismissal had had on Mr Gaut and I accept that, at all material times, reinstatement was his primary concern. Against that background, it does not seem fair and just that Mr Gaut should now be penalised in terms of his entitlement to costs on the basis that he was not prepared to accept *Calderbank* offers which failed, in any way, to address his statutory entitlement to seek reinstatement.

[24] Admittedly, on the eve of the hearing, Mr Gaut withdrew his claim for reinstatement and that was no longer a live issue. But the hearing came almost two years after his dismissal and over the passage of time, his circumstances had changed. Had the *Calderbank* offers addressed the reinstatement issue in some meaningful way, the situation would have been different. The offers, for example, could conceivably have included a proposal for Mr Gaut's redeployment at another BP service station or in some other position at the BP Connect outlet. They might also have included as an option the discrete offer of a specific monetary sum as an alternative to reinstatement. But the *Calderbank* offers were silent in relation to the issue of reinstatement. Because they offered Mr Gaut absolutely nothing in terms of the primary remedy he was then seeking, I consider it would be unjust to allow their existence to now dictate the outcome of his costs application and I do not consider it necessary to make any reduction in the costs award on account of the *Calderbank* offers.

[25] I have taken into account all of the other submissions made by Ms Turner. One of those submissions was that this Court did not have jurisdiction to award costs in relation to the Authority investigation and reliance in this regard was placed on decisions of this Court in *Eniata v AMCOR Packaging (New Zealand) Ltd, (t/a*

AMCOR Kiwi Packaging)[9] and *Chief Executive, Department of Corrections v*

Harris.[10] The issue Ms Turner refers to was reviewed by the full Court in *PBO Ltd (formerly Rush Security Ltd) v Da Cruz*[11] where it was held that the Court was empowered under cl 19 of sch 3 of the Act to make an award of costs for proceedings in the Authority. Even had there been evidence before the Authority of

some contingency arrangement along the lines referred to in [8] above, it would not preclude this Court from now making an award of costs for the proceedings in the Authority.

[26] I fix Mr Gaut's costs entitlement in respect of the substantive hearing at

$10,500 together with disbursements amounting to $1,231.76. I have made a small adjustment to the disbursements claimed on account of a point raised by Ms Turner in her submissions. I fix Mr Gaut's entitlement to costs in respect of the Authority investigation in the sum of $1,500. The plaintiff is entitled to further costs in relation to the present application. To avoid any additional expense to the parties, I fix his entitlement in this regard at $500. The total costs award, therefore, comes to

$13,731.76.

A D Ford

Judge

Judgment signed at 10.30 am on 30 August 2011

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[1] [2011] NZEmpC 71.
[2] [2011] NZEmpC 69 at [4].
[3] [2003] NZCA 69; [2002] 1 ERNZ 438.

[4] *Binnie* at [14].
[5] At [7].
[6] [2001] NZCA 313; [2001] ERNZ 305 at [48].

[7] [2010] NZCA 385.

[8] At [20].

[9] AC19A/02, 24 May 2002.

[10] CC10A/01, 27 July 2001, at [10].

[11] [2005] NZEmpC 144; [2005] ERNZ 808 at [13].
