Employment Court of New Zealand

Hayllar v The Goodtime Food Company Limited [2012] NZEmpC 193 (14 November 2012)

Last Updated: 19 November 2012

IN THE EMPLOYMENT COURT WELLINGTON

[2012]NZEmpC 193

WRC 28/11

WRC 29/11

IN THE MATTER OF proceedings removed from the

Employment Relations Authority

BETWEEN LEITH HAYLLAR First Plaintiff

AND ANDRE MATENE Second Plaintiff

AND THE GOODTIME FOOD COMPANY LIMITED

Defendant

Hearing: (on the papers by way of submissions filed on 25 September 2012 and

18 October 2012)

Counsel: John McDowell, counsel for the plaintiffs

Gary Tayler, advocate for the defendant

Judgment: 14 November 2012

COSTS JUDGMENT OF JUDGE A D FORD

[1] In my substantive judgment[1] dated 6 September 2012, I found in favour of the respective plaintiffs and, in addition to the remedies granted in my judgment, I ruled that the plaintiffs were entitled to costs (one award) against the defendant. The parties were unable to reach agreement on costs but each has filed helpful submissions. I record that Mr McDowell, counsel for the plaintiffs, has only recently been instructed in the matter. He advised the Court that Mr Cressey, who acted for

both plaintiffs and represented them at the hearing, has apparently obtained

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employment which, in Mr McDowell's words, "makes him unable to continue to act for the First and Second Plaintiff."

[2] Under cl 19(1) of sch 3 of the Employment Relations Act 2000, the Court has a broad discretion in relation to the issue of costs but that discretion is to be exercised judicially and in accordance with recognised principles. Those principles are now well-established. They are based on the Court of Appeal judgments in *Victoria University of Wellington v Alton-Lee;*[2] *Binnie v*

Pacific Health Ltd[3] and

Health Waikato Ltd v Elmsly.[4] The usual approach is to determine whether the costs

actually incurred by the successful party were reasonably incurred and, if not, the Court is to make its own assessment of what would be reasonable legal costs in relation to the litigation in question. Once that step has been taken the Court must then decide, after an appraisal of all relevant factors, at what level it is reasonable for the unsuccessful party to contribute towards those costs. The figure of 66 per cent of the reasonably incurred costs is generally regarded as an appropriate starting point and that figure is then to be adjusted upward or downward, if necessary, depending upon all relevant considerations.

[3] Both plaintiffs were in receipt of legal aid and they seek an award of

$6,806.44, which is said to be 66 per cent of the legal aid granted to them which totalled $10,312.80, together with disbursements of $1,497.42. I say at once that I find the costs claimed to be entirely reasonable. The hearing ran for three days and involved some reasonably complex issues. In *Reynolds v Burgess*,[5] Judge Couch opined that "it must be presumed that the Legal Services Agency would not approve and pay excessive grounds of legal aid."[6] With respect, I share that observation which is amply illustrated in the present case.

[4] Mr Tayler, for the defendant, does not challenge the reasonableness of the costs claimed but in his submissions he rhetorically queries whether the figure includes mediation costs which, he submits, should not be included. The Court

cannot speculate about matters of this nature, however. There is nothing in the

plaintiffs' submissions to suggest that the figure claimed included mediation costs. Mr McDowell actually attached to his submissions a letter he had sent to Mr Tayler dated 14 September 2012 detailing the plaintiffs' claim for costs and disbursements. He also sent Mr Tayler a copy of his submissions before they were filed. It was open to Mr Tayler if he had wanted to clarify the position to respond directly to Mr McDowell querying whether mediation costs were included in the sum claimed but Mr McDowell states that he received no response from Mr Tayler. In these circumstances, I am not prepared to take the issue of mediation costs any further.

[5] Mr Tayler submitted that in the adjustment exercise the Court is required to carry out, costs in this case should be set at one-third of the plaintiffs' actual and reasonable costs rather than the two-thirds starting point for the following reasons:

6.1 This was a test case and the Courts have historically left costs to lie where they fall in such cases.

6.2 The plaintiffs put the defendant to unnecessary extra costs by waiting until the Authority's preparation was completed before transferring the case up to the Court. This put the defendant to unnecessary costs of ensuring compliance with the Courts processes.

6.3 The case was longer than necessary as the plaintiffs, against objection from the defendant, attempted to introduce and claim historic grievances which the Court completely disallowed.

[6] Without commenting on the historical position, I do not accept that this was a

'test case' in any sense of the term. Nor do I accept that steps taken to comply with

'the Court's processes' can be described as 'unnecessary costs'. I accept, however, that there is some substance in the third issue raised by Mr Tayler. It was a matter I specifically referred to in my judgment. Counsel for the plaintiffs attempted to introduce through his pleadings and witness briefs, evidence relating to historic alleged grievances which were not matters properly before the Court but in preparing the defendant's briefs of evidence, Mr Tayler was required to respond to them. I accept that some adjustment is required to be made to the costs claimed in recognition of this factor.

[7] Mr Tayler has also challenged two of the items claimed as disbursements. First, a fee of $147.12 claimed as a filing fee in the Employment Relations Authority. Mr Taylor submitted that that item should have been determined by the Authority

when it specifically dealt with the issue of costs. On the information before me, I am inclined to agree with Mr Tayler on this issue.

[8] Mr Tayler also challenges a claim for photocopying of $150 which he submitted should be disallowed as being 'normal office overheads'. I would accept that submission if the photocopying charge was for a nominal amount but the photocopying expenses clearly related to the production of the agreed bundle of extensive documentation which the plaintiffs were required by the Court to collate and assemble. For that reason, the charge was outside the scope of ordinary office overheads and I allow it in full.

[9] GST is claimed on the disbursements, including the photocopying charge, but I am not satisfied on the information before me that it is a recoverable disbursement in this case and it is disallowed.

[10] Allowing for the adjustment referred to in [6] above and my decision in relation to the disbursements claimed, I award costs to the plaintiffs in the sum of

$6,306.44 and disbursements in the sum of $1,154.98. The defendant is accordingly hereby ordered to pay in total the amount of $7,461.42.

A D Ford

Judge

Judgment signed at 2.15 pm on 14 November 2012

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[1] [2012] NZEmpC 153
[2] [2001] NZCA 313; [2001] ERNZ 305 (CA).
[3] [2003] NZCA 69; [2002] 1 ERNZ 438.
[4] [2004] NZCA 35; [2004] 1 ERNZ 172.
[5] CC 5A/07.
[6] At [9].
