Employment Court of New Zealand

Johnson v Gilligan Business School Limited AC14A/09 [2009] NZEmpC 57 (3 July 2009)

Last Updated: 10 July 2009

IN THE EMPLOYMENT COURT

AUCKLANDAC 14/09ARC 53/08

IN THE MATTER OF a challenge to a determination of the Employment Relations Authority

BETWEEN CATHY JOHNSON
Plaintiff

AND GILLIGAN BUSINESS SCHOOL LIMITED
Defendant

Hearing: By Memoranda of submissions filed on 23 January, 25 February and
6 and 20 March 2009

Judgment: 3 April 2009

JUDGMENT OF JUDGE B S TRAVIS

[1] The plaintiff has challenged a determination of the Employment Relations Authority which ordered the plaintiff to pay $3,750 costs to the defendant. This was said by the Authority to be appropriate compensation for the defendant for the expense it was put to in taking part in a one day investigation which found that the plaintiff had not been unjustifiably dismissed.
[2] The plaintiff seeks a finding that this award was unreasonable.
[3] Because of the amount in dispute the parties very sensibly agreed that they should not be involved in the further expense of a formal hearing, when the challenge could be dealt with on the papers on the basis of an exchange of submissions.
[4] The plaintiff's submissions canvassed the background to the matter. Her employment was terminated by the defendant on the grounds of redundancy. The plaintiff was unrepresented at the Authority's investigation The defendant had sought indemnity costs of $15,326.96 alternatively the figure of $10,118 as two thirds of its actual and reasonable costs. The plaintiff did not file any costs submissions in the Authority.
[5] The Authority stated it could not agree that there should be an award as high as $10,118, or alternatively $9,000, being a daily tariff of $3,000 applied to three days for the reasonable preparation and attendance at the investigation meeting. The Authority held that an award of either amount would be punitive rather than compensatory, which is the proper purpose of costs. It also observed that the Authority should try to maintain reasonable consistency with levels awarded in other cases. It found there was nothing out of the ordinary about the case which might lead to a much higher award of costs than normal.
[6] Mr Ryan counsel for plaintiff referred to the principles set out in *PBO Ltd (formerly Rush Security Ltd) v Da Cruz* [2005] NZEmpC 144; [2005] ERNZ 808. Mr Ryan accepted that the Authority member was exercising a discretion in awarding costs to the successful party and that costs should follow the event. He submitted that the Authority's award was arbitrary in that the defendant had not provided any evidence to support its claim that $15,326.96 costs had been incurred and therefore the Authority was deprived of the opportunity of considering whether all or any of the defendant's costs were unnecessary or unreasonable. He contended that the awarding of $3,750 was equally punitive as an award of $10,118 or $9,000 would have been and amounted to an expression of the Authority's

disapproval of the plaintiff being unrepresented in the hearing.
[7] He submitted, as the Court had stated in *PBO Ltd*, that Authority costs awards would generally be modest and submitted an award of $3,750 for a one day hearing which was unsophisticated in nature was inconsistent with this principle.
[8] He observed that the Authority was intended to be a low cost dispute resolution facility to allow easy access for the parties in an employment relationship to have their problems resolved without the requirement of judicial intervention. He submitted that costs at the level of $3,750 for an unrepresented party to pursue a perceived employment relationship problem acted as a deterrent to other similarly unrepresented parties from utilising the Authority. He submitted that costs awarded at this level for a one day hearing on an unsophisticated matter also punished the unrepresented party. He submitted that a reasonable costs order would have been around $2,000.
[9] Ms Larmer, for the defendant, also dealt with the background to the award in her submissions. She observed there were no criticisms of the defendant or its actions in the Authority's substantive decision. They had tried, unsuccessfully, to resolve costs by agreement. The defendant's costs submissions in the Authority were served on the plaintiff through her solicitor. She was given an opportunity to file submissions but did not do so. No criticism was raised by her as to the information presented by the defendant to the Authority in support of its costs claim. The plaintiff was represented by her solicitor, up to, but not at the investigation meeting. Ms Larmer submitted that the plaintiff should have known from her legal advisor that her claim was entirely without merit and she put the defendant to unnecessary costs in defending it.
[10] Ms Larmer also relied on the *PBO* case and cited from *Department of Corrections v Tawhiwhirangi* [2008] ERNZ 73 where Judge Shaw at paragraph 7 stated:

In a judgment in November 2006 the Court noted that the Authority's tariff ranged up to about $3,000 per day. Given the passage of time since then, that figure is most likely to be an appropriate starting point for the Authority's tariff rather than an upper figure.

[11] The defendant submitted that the award of $3,750 for a longer than normal 1 day hearing was in line with the current range applied by the Authority.
[12] Ms Larmer submitted that the defendant had, in addition to appearing at the investigation meeting, been required to review documentation, draft a statement in reply, draft a brief of evidence, prepare a bundle of documents, draft written submissions and correspond with the Authority and the plaintiff's solicitors. It also had to make submission on costs.
[13] Ms Larmer submitted that a failure to file evidence in support of the costs figure given to the Authority as actually incurred, is not an appropriate ground to challenge the Authority's determination. She submitted that if there was an issue about whether the costs were actually incurred or not, this could have been raised at the time. Ms Larmer submitted that the defendant's actual costs far exceeded the amount awarded.
[14] I accept Ms Larmer's submissions. I agree that the Authority's costs award was discretionary and should not be lightly set aside by the Court. This is, however, a de novo challenge and the Court must make its own decision on the matter (s183(1) Employment Relations Act 2000).
[15] I agree with the observations of Judge Shaw in the *Department of Corrections* decision that the higher end of the scale is not to be regarded as a fixed rate but as of an appropriate starting point.
[16] Applying the principles set out in *PBO* I find that the award was at the higher end of the range, but that that is explainable by the hearing being longer than a normal one day hearing.
[17] I agree with Ms Larmer that the failure to provide evidence of the actual costs incurred where the figure itself has been set out, should not be fatal, as it was obvious that the costs incurred would be higher than the daily tariff in any event. Further the plaintiff had the opportunity to complain about this at the time, if this was a real issue.
[18] The plaintiff's submissions also suggest that because the plaintiff was unrepresented at the hearing then an award at the higher end of the daily tariff is to be regarded as punitive. I do not share that view. The successful party is entitled to a contribution to the costs it incurred, regardless of the nature of representation of the unsuccessful party.
[19] I also agree with Ms Larmer's submissions that the Authority was in a better position than the Court in assessing an appropriate award of costs, having carried out the investigation and being fully aware of the circumstances surrounding the case. The original merits of the matter were not put before the Court in this challenge.
[20] In all the circumstances I find the challenge must fail. I order the plaintiff to pay the sum of $3,750 as a contribution towards the defendant's costs in the Authority.
[21] Costs in relation to the challenge are reserved, and if they cannot be agreed may be the subject of an exchange of memoranda, the first of which is to be filed within 30 days, with a response within 21 days.

B S Travis
Judge

Judgment signed at 3.15pm on 3 April 2009

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