Employment Court of New Zealand

Johnston v Fletcher Construction Company Limited [2018] NZEmpC 18 (14 March 2018)

Last Updated: 20 March 2018

IN THE EMPLOYMENT COURT
AUCKLAND

[2018] NZEmpC 18
EMPC 131/2017

IN THE MATTER OF	an application for special leave to remove matter to the Employment Court
AND IN THE MATTER	of an application to strike out application for special leave
AND IN THE MATTER	of an application for costs
BETWEEN	GRANT CAMPBELL JOHNSTON Applicant
AND	THE FLETCHER CONSTRUCTION COMPANY LIMITED Respondent

EMPC 270/2017

IN THE MATTER OF	an application for leave to extend time to file challenge
AND IN THE MATTER	of an application for costs
AND BETWEEN	GRANT CAMPBELL JOHNSTON Applicant
AND	THE FLETCHER CONSTRUCTION COMPANY LIMITED Respondent

Hearing:	By memoranda of submissions filed on 22 January, 7 February and 9 February 2018
Representatives:	T Drake, counsel for applicant R Upton, counsel for respondent
Judgment:	14 March 2018

COSTS JUDGMENT OF CHIEF JUDGE CHRISTINA INGLIS

GRANT CAMPBELL JOHNSTON v THE FLETCHER CONSTRUCTION COMPANY LIMITED NZEmpC AUCKLAND [2018] NZEmpC 18 [14 March 2018]

Introduction

[1] The applicant applies for costs against the respondent. The application follows the Court's judgment of 11 December 2017 dismissing the respondent's application to strike out the applicant's application for special leave to remove a matter to the Court and granting the applicant's application for special leave.1 The judgment also dealt with the applicant's parallel application for leave to extend time to file a challenge to the determination of the Employment Relations Authority declining removal.2 The application for leave was dismissed, the Court finding that an application for special leave was the

correct procedural route.

[2] The applicant seeks a contribution to costs on his application for special leave; a contribution to costs in the Authority (on his application to remove, which was declined in that forum but which was effectively reversed in the Court); and a contribution towards the costs he has incurred in seeking costs. The applicant seeks indemnity costs in responding to the respondent's strike-out application.

[3] The respondent says that the application for indemnity costs is misconceived and that there is no basis for an uplift; costs ought to be calculated on a 2B basis for the strike-out application and the application for special leave; the actual costs claimed in relation to seeking costs are excessive; and that only a modest contribution to costs in the Authority is warranted in the particular circumstances.

Approach

[4] The starting point for costs in the Court is cl 19 of sch 3 to the Employment Relations Act 2000. It confers a broad discretion as to costs. A scale has been adopted to guide the setting of costs in the Court. As the guidelines make clear, the scale is intended to support (as far as possible) the policy objective that the determination of costs be predictable, expeditious and consistent.3 It is not intended to replace the Court's ultimate discretion as to costs. Generally costs will be

1 *Johnston v The Fletcher Construction Co Ltd* [2017] NZEmpC 157.

2 *Johnston v The Fletcher Construction Co Ltd* [2017] NZERA Auckland 130.

3 Practice Direction: Costs: Guideline Scale www.employmentcourt.govt.nz/legislation and rules.

assessed by applying the appropriate daily rate to the time considered reasonable for the steps reasonably required in relation to the proceeding. Principles applying to increased and indemnity costs apply in appropriate cases.4

[5] The sort of circumstances in which indemnity costs may be considered appropriate are well established, including where there has been particular misconduct that causes loss of time to the Court and to other parties; commencing or continuing proceedings for some ulterior motive; doing so in wilful disregard of known facts or clearly established law; and/or prolonging a case by advancing groundless contentions. Indemnity costs generally require exceptionally bad behaviour. Increased costs may be appropriate in cases where, for example, a party has pursued an argument or a claim that lacks merit.

Costs on the application for special leave

[6] The proceedings were provisionally assigned category 2B for costs purposes. Mr Drake submits that, given the fact that the application for special leave involved a reconsideration of the case law and an in-depth analysis of it, category 2C ought to be applied. I accept that preparation of legal submissions would have required a comparatively large amount of time given the nature of the issues involved, and the need to undertake a comprehensive review of the relevant authorities. Band C is accordingly allocated for this step. The other steps in pursuing the application for special leave are appropriately Band B. This leads to a figure of $9,143.

[7] It is appropriate (for the reasons set out in *Stormont v Peddle Thorp Aitken Ltd*) that an additional amount equivalent to GST be awarded on that sum,5 and I did not understand Mr Upton to be suggesting otherwise.

[8] I am not satisfied that the claimed disbursement sought in relation to a taxi fare was reasonably necessary to the conduct of the proceeding and I disallow it.

4. *Bradbury v Westpac Banking Corp* [2009] NZCA 234, [2009] 3 NZLR 400. See also Employment Court Regulations 2000, reg 68(1) which provides that, in deciding costs, the Court may have regard to any conduct of the parties tending to increase or contain costs.

5 *Stormont v Peddle Thorp Aitken Ltd* [2017] NZEmpC 159 at [35]- [37].

Costs on the respondent's strike-out application

[9] I have already traversed the broad approach to indemnity costs. Mr Drake submits that the respondent's application was doomed from the outset and that indemnity costs are appropriate in the circumstances. Full costs amount to

$5,675.25.

[10] Mr Drake submits that the notice of application to strike out contained no reference to any statutory or regulatory provision, no High Court Rule or any previous authoritative provision, as a basis for the application being brought. It is evident, Mr Drake says, that the application was brought for an ulterior motive, and in order to delay the Court hearing.

[11] While there is, as Mr Drake says, authority for the proposition that increased or indemnity costs may be awarded against a party who takes or pursues an unnecessary step or an argument that lacks merit, or has pursued a wholly unmeritorious or hopeless case, it is equally evident that the fact that a point has not previously been argued, or which has failed to succeed, will not automatically lead to an enhanced costs exposure.6 I am not satisfied that this is the sort of case in which indemnity costs are appropriate.

[12] Costs calculated on the basis of Category 2B would amount to $4,460. The applicant says that he incurred actual costs of $5,675.25 on the application (although the composition and reasonableness of these costs is queried by the respondent). The figure of $5,675.25 includes GST. The figure arrived at by applying the Guideline scale, does not.

[13] As I have already said, it is appropriate to reflect the applicant's GST status in making a costs award in his favour. That is because he is not GST-registered and has no way of recovering that component of his costs.

[14] In the circumstances I consider that an appropriate contribution towards the costs the applicant has incurred in responding to the respondent's strike-out

6. *NR v MR* [2014] NZCA 623, (2014) 22 PRNZ 636 at [50]- [53]; *Bradbury v Westpac Banking Corp*, above n 4, at [24]-[27].

application is $4,460, plus an additional amount to reflect the applicant's GST position. This leads to a total of $5,129.

The application for leave to extend time to challenge

[15] The respondent does not appear to seek a contribution to costs on the applicant's unsuccessful application for leave to extend time to challenge. I accordingly put this issue to one side (except to the extent that I have sought to ensure that they do not comprise part of the costs contribution made in the applicant's favour on the application for special leave and strike out application).

Authority costs

[16] I see no reason to depart from the generally applied daily tariff in terms of allocating costs in the Authority. I agree with Mr Upton that an appropriate amount is $1,125 having regard to the amount of time consumed in that forum in pursuing the application for removal of the matter to the Court, namely the equivalent of quarter of a day. I do not propose to make an allowance for preparation time in filing written submissions.7

[17] I see no reason in principle to adopt a different approach to GST in the Court and the Authority. The applicant is accordingly entitled to an additional sum equivalent to GST on the removal application.

[18] The applicant is also entitled to reimbursement of the filing fee ($153.33).

Costs on costs

[19] The parties were invited to agree costs. That did not prove possible. The applicant has been put to the trouble of advancing a formal application to the Court and has incurred costs in doing so. I do not accept that costs in the quantum sought (namely $7,687.75) would be reasonable. In my view a contribution of $1,000 is appropriate having regard to what was reasonably required in the circumstances.

7. See the discussion in *Booth v Big Kahuna Holdings* Ltd [2015] NZEmpC 4 at [13]; *MacNab v Mount Campbell Communications Ltd* [2016] NZERA Christchurch 73 at [20].

Summary

[20] The following orders are accordingly made. The respondent is ordered to pay the applicant:

- The sum of $9,143 on his successful application for special leave;
- the sum of $4,460 on the respondent's unsuccessful application to strike out the application for special leave;
- a contribution of $1,125 by way of costs in the Authority;
- the sum of $1,000 on the application for costs;
- a sum equivalent to GST on each of the above amounts; and
- disbursements of $153.33 (filing fee in the Authority), such sum being inclusive of GST.

[21] Such payments are to be made within 21 days of the date of this judgment.

Christina Inglis Chief Judge

Judgment signed at 1 pm on 14 March 2018
