Employment Court of New Zealand

Katz v Mana Coach Services Ltd [2011] NZEmpC 88 (18 July 2011)

Last Updated: 2 August 2011

IN THE EMPLOYMENT COURT WELLINGTON

[2011] NZEmpC 88

WRC 42/10

IN THE MATTER OF an application for costs

BETWEEN BEATRICE KATZ Plaintiff

AND MANA COACH SERVICES LTD Defendant

Hearing: On the papers

(in response to memoranda filed on 7 and 22 June 2011)

Counsel: Tanya Kennedy, counsel for the plaintiff

Blair Scotland, counsel for the defendant

Judgment: 18 July 2011

JUDGMENT OF JUDGE A D FORD

Introduction

[1] In my substantive judgment[1] dated 25 May 2011, I dismissed the plaintiff's claim and awarded costs to the defendant. The parties were unable to reach agreement as to an appropriate figure for costs and the matter has now fallen back on the Court for determination. Both parties have filed helpful memoranda.

[2] The short issue in the case had been whether the plaintiff, a bus driver, was entitled to be indemnified by her employer, the defendant, for legal costs she had incurred in successfully defending a careless driving charge arising out of an

accident occurring in the course of her employment.

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[3] As I noted in *Zhang v Sam's Fukuyama Food Service Ltd*,[2] the 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] In this case the defendant claims that the actual legal costs it incurred (exclusive of GST) amounted to

$14,170.09 together with disbursements of $106.09.

[4] The recognised starting point for an award is two thirds of the legal costs reasonably incurred.[4] Some unusual issues have been raised in relation to the assessment of this particular award. First, the plaintiff claims that costs should lie where they fall because the case could be viewed as a test case or one involving a dispute over the interpretation of a collective agreement. In the alternative, counsel for the plaintiff submits that the costs claimed are excessive and were not reasonably incurred. Finally, it was submitted that the Court needed to have regard to the ability of the plaintiff to meet any award of costs.

[5] For its part, the defendant submits that it is entitled to indemnity costs, in other words, to an award for the full amount

claimed. It advances three submissions in support of this proposition. First, that the plaintiff unreasonably failed to agree to an agreed statement of facts; secondly, that proper allowance needs to be made for a

Calderbank offer it made to the plaintiff[5] and thirdly, that the award should recognise

that the defendant incurred additional costs because of the plaintiff 's unreasonable

objection to the defendant's proposed production of certain documentation.

Agreed statement of facts

[6] Dealing first with the defendant's submissions, the point Mr Scotland made about the agreed statement of facts was that it should have been possible to conduct the hearing without having to call any witnesses but the plaintiff unreasonably would not agree to any mention in the agreed facts that she was at fault for the accident which gave rise to the case. It was, therefore, necessary for the defendant to locate and call evidence from the driver of the other vehicle. Ms Kennedy, for the plaintiff,

pointed out that she had been the one who had drafted the agreed statement of facts

and she submitted that it was the defendant who had been unreasonable in insisting upon an admission of fault when that was an issue before the Court. Ms Kennedy also made the point that she had spent approximately two hours in preparing the draft statement of facts compared with the five hours claimed by defendant's counsel for his input.

[7] I accept Ms Kennedy's submissions in this regard. Each party maintained a strongly opposing stance in relation to the issue of fault. I have not been persuaded that any additional costs incurred by the defendant in having to call one or more witnesses on the issue of fault can properly be attributed to any unreasonableness on the part of the plaintiff. Likewise, I have not been persuaded that the plaintiff acted unreasonably in relation to the production of any documentation given that fault was strongly contested.

The *Calderbank* offer

[8] On 14 March 2011, nine days before the hearing on 23 March 2011, the defendant made an offer to the plaintiff, expressed to be without prejudice save as to costs, stating that if the plaintiff was prepared to withdraw her claim, then the defendant would not pursue costs. The letter stated that if the offer was refused and the plaintiff's remedies were less than what was offered then the defendant would seek "full indemnity costs for any further legal costs incurred from this time."

[9] The plaintiff submitted that there were several reasons why the *Calderbank* offer should not be taken into account. First, no payment was offered. In this regard Ms Kennedy referred the Court to the judgment of Chief Judge Goddard in *Ogilvy & Mather (NZ) Ltd v Darroch*,[6] where, in reference to the definition of a *Calderbank* offer, his Honour said: "It is an offer to compromise the action by some payment." Ms Kennedy correctly made the point that no payment was offered in the present

case. Secondly, the offer was made at too late a stage and remained open for acceptance for only two days which, it was submitted, was too short a time. In this regard, counsel said that at the time the offer was made the plaintiff 's case had

already been fully prepared. Then it was submitted that the offer was

"fundamentally flawed" because it was expressed to be limited to legal costs

incurred from the date upon which it was made.

[10] The fact that the offer did not include a monetary payment does not mean that it cannot be considered when it comes to determining costs. An offer that would allow a party to litigation to walk away bearing only its own costs can on occasions provide a real benefit and be a sensible litigation strategy. Such offers are not to be discouraged. Regulation 68(1) of the Employment Court Regulations 2000 requires only that the offer be one that would "settle all or some of the matters at issue between the parties". If the defendant's offer had been accepted in the present case it would have accomplished that objective.

[11] Although this Court is not bound by the provisions of the High Court Rules, it regularly refers to them for guidance on matters of principle. Rule 14.10 of the High Court Rules, which makes provision for a party to a proceeding to make a written offer without prejudice as to costs, requires only that the offer be in writing, expressly stated to be without prejudice as to costs and that it should relate to an issue in the proceeding. Likewise, r 14.11(3) which deals with the effect of making an offer on the question of costs specifically recognises that a without prejudice offer may be an offer for either "a sum of money" or something that would have been "more beneficial" to the party than the judgment obtained.

[12] For the reasons explained, I do not consider the fact that the offer in the present case failed to include a monetary payment should prevent it from being taken into account in the final assessment of the award of costs. In *Computer Machinery Co Ltd v Drescher*,[7] Sir Robert Megarry V-C expressed the view that the courts ought to enforce the terms of an

offer made without prejudice save as to costs "as tending to encourage compromises and shorten litigation".[8] From any viewpoint, the without prejudice offer made by the defendant in the present case had the potential to meet the criteria the Vice-Chancellor had in contemplation. Having said that, it is nevertheless settled law that a *Calderbank* offer does not automatically entitle the offeror to an award of indemnity costs and my assessment of the significance of the

offer in the present case will need to make allowance for the timing of its arrival, the

limited time for acceptance and its stated application to costs incurred only from that point in time.

Plaintiff's ability to pay

[13] The plaintiff submitted that costs must be assessed taking into account her own financial circumstances and ability to pay.

[14] The ability of a party to pay a costs award has long been a relevant factor in the exercise of the Court's discretion. In *Order of St John Midland Regional Trust Board v Greig*, Judge Colgan, as he then was, stated:[9]

In exercising their unique equity and good conscience jurisdiction, I consider the Court and the Authority must have regard, in appropriate cases, to a party's ability to pay both when considering whether an award of costs should be made but more especially the amount of such an award. That has been a long-standing principle in this specialist jurisdiction and nothing said by counsel for the plaintiff has persuaded me that this should be departed from.

[15] In *Burns v Media Design School Ltd*,[10] Judge Couch reduced a costs award to

$1,000 on the basis of affidavit evidence that the plaintiff's financial situation was dire with his essential outgoings exceeding his income and his debts greatly exceeding his assets. The Court considered that the plaintiff was "truly impecunious".[11]

[16] In the present case, the Court does not have any significant information about the plaintiff's financial situation. No affidavit evidence was filed and there is no evidence that the plaintiff is impecunious. In her memorandum to the Court, counsel for the plaintiff does not deny the defendant's assertion that the plaintiff was represented by her union and that it is the union's practice to pay the costs for unsuccessful litigants. On the evidence presented, I do not consider that any issue

arises over the plaintiff's ability to pay a costs award.

Assessment

[17] Returning to my assessment of the legal costs reasonably incurred by the defendant, I do not accept the plaintiff's submission that this should be viewed as a test case and that costs should lie where they fall. While the principal issue involved was relatively novel, that characteristic alone should not deprive the successful defendant of its entitlement to an award of costs. Likewise, I do not consider that the case involved a dispute over the interpretation of a provision in a collective agreement in terms of the category of cases referred to in the costs judgment of

Judge Shaw in *Service and Food Workers Union Nga Ringa Tota v OCS Ltd.*[12]

[18] Having said that, I do agree with Ms Kennedy that the amount of just over

$14,000 claimed for actual costs is excessive and cannot be regarded as reasonable for the purposes of fixing the award. The hearing took only half a day. The evidence was brief and straightforward, as one would expect when the parties came very close to reaching an agreement on the facts. The particulars provided in the invoices are brief and I do not propose to go through each individual entry. Suffice it to say that the amount claimed, especially in respect of consultations between Mr Scotland, Mr Cleary and Mr Mitchell, appears to be excessive. While a litigant is quite entitled to enjoy the luxury of involving more than one solicitor or counsel in the conduct of a case, such excesses cannot then be presented under the guise of the successful party's reasonably incurred costs. In her submissions, Ms Kennedy highlighted other apparent excesses such as time spent in lengthy meetings with the defendant's HR manager who was not called as a witness and nearly four hours claimed for preparation of a simple agreed bundle of documents when the bundle was actually prepared and copied by the plaintiff.

[19] Taking an holistic approach and bearing in mind the need for some consistency in costs awarded in this Court, I have concluded that a reasonable figure for actual costs incurred would have been something of the order of $4,500. After applying the two thirds rule and making a modest allowance for the *Calderbank*

offer, I fix the award in the sum of $3,500 together with disbursements of $58.09 on

account of witnesses' expenses. Insufficient information is provided to justify the balance of the disbursements claimed and they are disallowed.

A D Ford

Judge

Judgment signed at 3.15 pm on 18 July 2011

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[1] [2011] NZEmpC 49.

[2] [2011] NZEmpC 69 at [4].

[3] [2003] NZCA 69; [2002] 1 ERNZ 438.

[4] *Binnie* at [14].

[5] *Health Waikato Ltd v Elmsly* [2004] NZCA 35; [2004] 1 ERNZ 172 at [53].

[6] [1993] NZEmpC 172; [1993] 2 ERNZ 943 at 952.

[7] [1983] 3 All ER 153.

[8] At 156.

[9] [2004] NZEmpC 83; [2004] 2 ERNZ 137 at [27].

[10] AC 40/09, 17 November 2009.

[11] At [14].

[12] WC 8A/07, 7 May 2007.
