Employment Court of New Zealand

Knapp v Locktite Aluminium Specialities Limited [2015] NZEmpC 124 (28 July 2015)

Last Updated: 1 August 2015

IN THE EMPLOYMENT COURT AUCKLAND

[2015] NZEmpC 124

ARC 53/14

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
AND IN THE MATTER	of an application for costs
BETWEEN	MURRAY KNAPP Plaintiff
AND	LOCKTITE ALUMINIUM SPECIALITIES LIMITED Defendant

Hearing:	On the papers filed on 19 and 22 June and 16 July 2015
Appearances:	W Reid, advocate for plaintiff P Kotze, advocate for defendant
Judgment:	28 July 2015

COSTS JUDGMENT OF JUDGE CHRISTINA INGLIS

[1] The defendant has applied for costs following the plaintiff's unsuccessful challenge to a determination of the Employment Relations Authority (the Authority) dismissing his personal grievance.1 The parties have been unable to agree costs and have subsequently filed memoranda.

[2] The defendant seeks $7,853.75 by way of costs. This includes costs in the Authority, although no challenge to the Authority's determination (ordering that costs were to lie where they had fallen) was mounted; a contribution to the costs associated with attending mediation; inclusion of GST in assessing the costs incurred

by the defendant in responding to the plaintiff's challenge; a contribution to costs on

1 *Knapp v Locktite Aluminium Specialities Ltd* [2015] NZEmpC 71.

its costs application; and an uplift for two settlement offers that were made, and rejected, prior to the hearing.

[3] The plaintiff has filed very brief submissions in reply, seeking an order of costs of $2045.21.

Framework

[4] The starting point is cl 19 of sch 3 of the Employment Relations Act 2000 (the Act). It confers a broad discretion as to costs, providing that:

(1) The Court in any proceedings may order any party to pay to any other

party such costs and expenses ... as the Court thinks reasonable.

(2) The Court may apportion any such costs and expenses between the parties or any of them as it thinks fit, and may at any time vary or alter any such order in such manner as it thinks reasonable.

[5] Regulation 68(1) of the Employment Court Regulations 2000 (the Regulations) also deals with costs and has particular significance in this case. It provides that, 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.

[6] The discretion to award costs, while broad, is to be exercised judicially and in accordance with principle. The primary principle is that costs follow the event.2 The usual starting point in ordinary cases is 66 per cent of actual and reasonable costs. From that starting point factors that justify either an increase or decrease are assessed.3 I approach the application for costs in this case on this basis.

Authority costs available?

[7] The defendant seeks a contribution to costs incurred in the Authority. While

no challenge was pursued to the Authority's costs determination it is submitted that

2 *Victoria University of Wellington v Alton-Lee* [2001] NZCA 313; [2001] ERNZ 305 (CA) at [48].

3 *Binnie v Pacific Health Ltd* [2003] NZCA 69; [2002] 1 ERNZ 438 (CA) at [14].

the Court has the power to revisit the award of costs in that forum under s 189(1) of the Act. That is an ambitious submission. Section 189(1) provides that:

In all matters before it, the Court has, for the purpose of supporting successful employment relationships and promoting good faith behaviour, jurisdiction to determine them in such manner and to make such decisions or orders, not inconsistent with this or any other Act ... as in equity and good conscience it thinks fit.

[8] The short point is that the issue of costs in the Authority is not before the Court. The Court dismissed the plaintiff's challenge and the Authority's costs order (that costs were to lie where they had fallen) was left undisturbed. While the Court may, in appropriate cases, uplift costs in its broad discretion, it is not appropriate to uplift costs in the way contended for by the defendant.

[9] I accordingly put the costs incurred by the defendant in the Authority to one side.

Actual costs

[10] Tax invoices relating to attendances on the plaintiff's challenge are before the

Court.

Mediation costs

[11] The costs of attending mediation are included. The plaintiff does not take issue with the inclusion of such costs, and I am satisfied that it is appropriate to do so in the circumstances. They were necessarily incurred in the proceeding.4

[12] The actual costs incurred by the defendant in relation to attendance at mediation amounted to $800 (excluding GST).

GST

[13] The defendant seeks GST in relation to the costs it incurred in defending the

plaintiff's challenge, relying on *Booth v Big Kahuna Holdings Ltd* in support of this

4 See *Jinkinson v Oceana Gold (NZ) Ltd* [2011] NZEmpC 2 at [16].

part of the application.5 There the successful plaintiff (Mr Booth) had incurred legal costs inclusive of GST and was not in a position to recover them. I held that the GST costs were part of his actual and reasonably incurred costs associated with the proceeding and that they ought to be included in the costs calculus. In doing so I observed that:6

I see no reason in principle why the Employment Court ought not to take into account the ability of a successful party to recover GST in determining actual and reasonable costs. To approach the issue otherwise would lead to inequities. The plaintiff was obliged to incur GST on his legal costs. This effectively added 15 percent to his total costs which he is otherwise unable to recover. By way of contrast, the defendant company can offset the GST component of its own legal costs by claiming them as a business expense.

[14] The position in relation to GST on costs is not beyond doubt in this Court and has been the subject of differing approaches. In *Air New Zealand Ltd v Kerr*7 what was described as a "GST-neutral" approach was adopted.8 This was recently followed in *Wills v Goodman Fielder New Zealand Ltd*,9 where it was said that costs between the parties must be GST neutral as the unsuccessful party making a

contribution to costs is not paying for a service provided to it by the successful party.

[15] In *Burrows v Rental Space Ltd* the High Court observed that:10

Costs between parties are GST neutral. The party ordered to pay costs is not paying for a service provided to it by the other party or its lawyers.

[16] As one commentator (Andrew Beck) has pointed out,11 to be "GST neutral" the party seeking GST does not have to account to Inland Revenue for GST on a costs award, and the party paying costs is not able to claim back a GST component from Inland Revenue. As noted in *Burrows*, this is because no GST-attracting service is being provided by the claimant to the party paying costs. In other words, the issue of GST neutrality relates to the cost claim transaction *not* to the underlying

transactions giving rise to the costs incurred by the claimant party in a proceeding.

5 *Booth v Big Kahuna Holdings Ltd* [2015] NZEmpC 4.

6 At [51].

7 *Air New Zealand Ltd v Kerr* [2013] NZEmpC 237.

8 At [37].

9 *Wills v Goodman Fielder New Zealand Ltd* [2015] NZEmpC 30 at [23].

10 *Burrows v Rental Space Ltd* [2001] NZHC 770; [2001] 15 PRNZ 298 (HC) at [14].

11 See the discussion relating to GST and costs and disbursements in the High Court by Andrew

Beck "Litigation" [2009] NZLJ 69.

In relation to those transactions, GST will have been included in virtually all cases. If the claimant is GST registered, they will have been able to claim the GST back. If they are not GST registered they will not have been able to claim the GST back. In my view the GST neutrality principle applies to the extent that costs awards do not, of themselves, attract GST. However this is a different consideration to whether or not a claimant can properly include GST in the amount sought by way of a costs award.

[17] GST has obvious implications for the net quantum of actual costs incurred by the parties, and implications for the first stage of an assessment of costs generally adopted by this Court – namely, an assessment of actual costs. That is because, depending on whether or not the claimant is GST registered, they have the potential to claim back the GST component from Inland Revenue. If they are, then their actual costs are the GST exclusive amount. If they are not, their actual costs will be the GST inclusive amount. At the current GST rate of 15 per cent the difference can be significant. It is employees who more likely to be adversely affected.

[18] In *Wills* Judge Corkill held that:12

Any circumstances which might otherwise have justified the inclusion of GST in an assessment of costs can still be ameliorated by the Court through an uplift in its eventual award beyond the standard 66 per cent starting point.

I favour the latter approach which permits the Court to exercise a discretion as may be appropriate in the circumstances. In the present case, I allow a modest increase for this factor since the plaintiff is not GST registered.

[19] I prefer a different approach. As I have already observed, the usual starting point for costs in ordinary cases in this Court is 66 per cent of actual and reasonable costs. In my view a determination of the actual costs incurred by the claimant party requires knowledge of whether or not they are GST registered. A simple example reflects the inequities, generally against employees, that can arise depending on the

approach that is followed:

12 At [23]-[24].

Under the *Wills* approach:13

Scenario 1: Employer A has succeeded on a claim against Employee B and has incurred legal costs of $11,500 (GST inclusive). Employer A is GST registered, so has actual costs of $10,000 given that they are able to claim the GST component back from Inland Revenue. Employee B is ordered to pay a contribution to costs of $6,600 (being 66 per cent of $10,000). Employer A's true recovery is $8,100 (being $1,500 GST plus the $6,600 costs award), which represents approximately 70 per cent of the GST inclusive costs they incurred.

Scenario 2: Employee B has succeeded on a claim against Employer A and has incurred legal costs of $11,500 (GST inclusive). Employee B is not GST registered, so has actual costs of $11,500. Employer A is ordered to pay a contribution of $6,600 (being 66 per cent of $10,000). However Employee B's actual costs were $11,500. Only recovering $6,600 represents approximately 57 per cent of actual costs incurred.

Under an actual costs incurred approach:

Scenario 1: Employer A has succeeded on a claim against Employee B and has incurred legal costs of $11,500 (GST inclusive). Employer A is GST registered, so has actual costs of $10,000 given that they are able to claim the GST component back from Inland Revenue. Employee B is ordered to pay a contribution to costs of $6,600 (being 66 per cent of $10,000).

Scenario 2: Employee B has succeeded on a claim against Employer A and has incurred legal costs of $11,500 (GST inclusive). Employee B is not GST registered, so has actual costs of $11,500. Employer A is ordered to pay a contribution to costs of $7,590 (being 66 per cent of $11,500).

[20] It is immediately apparent that applying the *Wills* approach in Scenario 1 works favourably for a GST registered employer, but under Scenario 2 the starting point for the successful employee (who is not GST registered) is effectively 57 per cent, rather than the usual starting point of 66 per cent, of actual costs.

[21] With respect, I do not consider that a "modest" discretionary uplift adequately addresses the inequities that arise.14 In *Wills* it appears that an uplift of approximately 7.4 per cent was allowed, well short of what would have been achieved had the claimant been GST-registered.

[22] I consider that the objectives of clarity, consistency and certainty, and the

broader objectives of the Act, are best met by assessing the claimant party's net costs at stage one of the Court's inquiry (assessment of actual costs), consistently with the

13 At [19]

14 See *Wills* at [24].

established principle that a party is only entitled to claim the costs which it has actually incurred. If the claimant is GST registered, then the costs they have actually incurred is the amount exclusive of GST. If they are not GST registered, then the costs they have actually incurred is the amount inclusive of GST.

[23] No information is before the Court in relation to the defendant's GST position. However, as an active trading entity I assume that it is GST registered and that it has been in a position to recover that component of the costs it incurred in responding to the plaintiff's unsuccessful challenge. I accordingly put the GST component of the defendant's costs to one side.

[24] The actual (net) costs incurred by the defendant comprised the mediation costs (referred to above) and a $2,000 flat fee. It follows that the defendant incurred actual costs of $2,800.

Reasonable costs

[25] The costs incurred by the defendant in relation to the proceeding in this Court are plainly reasonable, and the plaintiff did not suggest otherwise. This leads to a starting point of $1850.

Without prejudice save as to costs settlement offers

[26] The defendant relies on two settlement offers to support its submission that there ought to be an uplift in costs. The plaintiff submits that full indemnity costs should not be awarded, but does not explain why that is so.

[27] Both offers were written on a "without prejudice save as to costs" basis. The first was made on 14 November 2014, and shortly after the parties had attended mediation. It was for the sum of $6,000, by way of compensatory payment under s 123(1)(c)(i) of the Act. The offer was rejected as being unrealistic in terms of quantum. The second offer was dated 12 March 2015 and came six days prior to the hearing. This offer was for an increased sum, of $8,460. The offer was also rejected

as again being too low and on the additional basis that it made no allowance for the

plaintiff's costs to date.

[28] The offers were clear as to their terms. Both were expressed as all-up offers for a compensatory sum. The issues had been well ventilated by the time the offers were made, having been through the Authority's investigative process. The plaintiff was well aware of the defendant's case and had had strong factual findings against him in the Authority, which were not at issue on the challenge. He was in a position to give the offers informed consideration and had the opportunity to take advice on them. The defendant clearly spelt out the consequences of non acceptance. The plaintiff would have been considerably better off had he accepted either offer.

[29] I have no difficulty concluding that the plaintiff's rejection of settlement was unreasonable, particularly rejection of the first offer which came at an early stage. Full contribution to the defendant's modest costs is appropriate in the circumstances.

Costs on costs

[30] The defendant seeks a contribution to its costs in seeking an order for costs. The plaintiff submits that such an order is unusual, but does not detail why an award ought not to be made in the present case. I see no reason in principle why a party who has been put to the expense of applying for costs should not be entitled to a reasonable contribution.15 Such a step is a necessary incident of the proceeding where costs have not been agreed. The defendant has had mixed success on its costs application. In the circumstances I consider that a reasonable contribution to costs would be $150.

Conclusion

[31] The plaintiff is ordered to pay a total contribution to the defendant's costs of

$2,950.

15 See *Booth v Big Kahuna Ltd*, above n 5 at [47]; *Scarborough v Micron Security Products Ltd*

[2015] NZEmpC 105 at [42].

[32] In addition the plaintiff is ordered to pay disbursements of $155.49, being reimbursement of travel expenses associated with attendance at mediation on

6 November 2014.

Christina Inglis

Judge

Judgment signed at 3.45 pm on 28 July 2015
