Employment Court of New Zealand

Naturex Limited v Rogers [2011] NZEmpC 9 (10 February 2011)

Last Updated: 21 February 2011

IN THE EMPLOYMENT COURT AUCKLAND

[2011] NZEmpC 9

ARC 87/10

IN THE MATTER OF a challenge to a determination of the

Employment Relations Authority

BETWEEN NATUREX LIMITED Plaintiff

AND KATE ROGERS Defendant

Hearing: by memoranda filed on 6, 20 and 30 September and 5 and 19 October

2010

Judgment: 10 February 2011

COSTS JUDGMENT OF JUDGE A D FORD

Issues

[1] On 4 August 2010 the plaintiff filed a challenge to a determination of the Employment Relations Authority (the Authority) seeking a hearing de novo. Twenty days later it filed a Notice of Discontinuance. On 6 September 2010 the defendant filed an application for costs. The plaintiff accepts that the Court has a discretion to award costs where there has been a withdrawal of a claim but it submits that in the particular circumstances of this case, where no statement of defence had been filed by the defendant, there should be no award of costs or expenses.

[2] The defendant alleges that the discontinuance was an acknowledgement that the challenge should never have been filed and she seeks an award of $2868.55 which she claims is two thirds of the actual costs and expenses she incurred within

the 20 day period prior to the filing of the discontinuance.

[3] The bulk of the claim is made up of costs allegedly incurred in connection with mediation and settlement negotiations. The principal issue, therefore, is whether it is appropriate in awarding costs to allow for such attendances.

Submissions

[4] The challenge related to a determination[1] of the Authority dated 12 July 2010 rejecting an application by the plaintiff to enforce a restraint of trade provision against the defendant, a former employee of the plaintiff‟s franchise holder. The Authority found that the plaintiff had no proprietary interest to be protected and that, therefore, the restraint of trade provision was not enforceable.

[5] In his written application seeking costs Mr Pool, on behalf of the defendant, submitted:

4. The defendant has incurred costs of $4302.88 (incl GST) as a result of the challenge.

5. The defendant‟s costs were incurred as follows:

(i) Roger Pool, solicitor - $3,459.13 (incl GST) @ $250 plus GST per hour, including: Telephone and email advice to client re challenge and settlement options, meeting with Kensington Swan re settlement options, instructions to S Dench, Employment Court telephone conference, advice to client, email offer to Kensington Swan, preparation and attendance at mediation, costs and incidental attendances.

(ii) Simon Dench, barrister - $843.75 (incl GST) @ $375 plus GST per hour, including: telephone advice in relation to options and Kensington Swan „stay‟ letter, telephone advice in relation to settlement, drafting proposed settlement terms and related follow up; liaison in relation to mediation, telephone advice in relation to costs in the Court, various incidental attendances.

6. The defendant seeks an award of two thirds of these costs; namely

$2,868.55 in accordance with the normal rule. The plaintiff issued the challenge, put the defendant to the above expense completely

unnecessarily and simply discontinued the proceeding. This did not occur pursuant to any agreement and the discontinuance is an

acknowledgement that the challenge should never have been filed.

[6] In response, Mr Drake submitted that in terms of step one of the "two-step approach" outlined by the Court of Appeal in *Binnie v Pacific Health Ltd*,[2] "the defendant‟s costs were not reasonably incurred." Mr Drake acknowledged the general principle that costs should follow the event and be awarded to the successful party but he submitted that there "has been no „event‟ in this matter." Specifically he noted that the defendant‟s costs breakdown did not include drafting documents in

preparation for the proceedings; that no documents had been filed in Court by the defendant and that the proceedings had been discontinued before the defendant had incurred the cost of preparing and filing a statement of defence.

[7] Mr Drake referred to *Trotter v Telecom Corporation of New Zealand Ltd*[3] as authority for the proposition that "costs of mediation could not be claimed because they were **not** costs of the actual proceedings and because parties owed it to each other to put some resources towards a genuine endeavour by way of mediation to settle a dispute." (emphasis added)

[8] Mr Drake submitted that the present case could "be distinguished from *Real Cool Ltd v Gunfield*[4] where the Court held that it is appropriate to include mediation costs when parties are directed to mediation." Counsel advised that in the present case there had been no direction from the Court in relation to mediation: "Rather, the parties agreed between themselves during a teleconference with the Court on

17 August 2010 that they would endeavour to settle the dispute by way of

mediation."

[9] Referring to step two in *Binnie*, namely, as counsel explained it, "after making an appraisal of all the relevant factors, decide at what level it is reasonable for the losing party to contribute", Mr Drake referred to *NZ Air Lines Pilots Assn IUOW v Registrar of Unions*[5] where the Court discussed the principles applicable in awarding costs and submitted that in reference to those principles, the plaintiff in the present case had not "unnecessarily or unreasonably added to the costs of the

defendant" in that the claim was withdrawn "following a mediation which settled

the substantive problem between the parties" and the plaintiff "s claim was "genuine

and not frivolous or vexatious."

[10] In reply, Mr Pool submitted that there was "no settlement" reached in mediation nor subsequent to mediation. He claimed that "the defendant‟s costs, including mediation, were incurred in the context of and as a result of the challenge proceedings" and he submitted that "mediation that occurs in the context of challenge proceedings can be distinguished from mediation that occurs prior to proceedings in the Employment Relations Authority."

[11] In a final memorandum, Mr Drake submitted:

The defendant‟s remark that „the defendant is unable to discern any basis on which a settlement might be alleged‟ is disingenuous. The parties agreed that the plaintiff would immediately file a notice of discontinuance withdrawing its proceedings, which it did. The only outstanding issue between the parties was costs in the Employment Relations Authority, which have now been resolved by a determination of the Authority dated 22

September 2010.[6]

[12] Mr Drake submitted that there was no distinction between mediation that occurs in the context of challenge proceedings and mediation that occurs prior to proceedings in the Authority.

[13] In a minute issued on 17 August 2010, following a teleconference that morning, Chief Judge Colgan noted that the restraint which was the subject of the proceeding was due to expire on 16 October 2010 which meant that even if a reasonably prompt fixture were allocated, it would be only shortly before the expiry of the restraint that the injunction proceedings sought to enforce. The minute then recorded:

3. The matter has been left on the following basis. The Registry will keep in reserve for this case the fixture dates of 14 and 15 September 2010. There will be a further telephone conference call with counsel at 9 am on **Tuesday 24 August 2010.** In the meantime, Mr Drake will attempt to arrange an urgent mediation or other form of alternate dispute resolution in cooperation with Mr Pool in an effort to resolve the need for a hearing of this challenge.

Discussion

[14] Mr Drake, quite properly, accepted that the Court has a discretion to award costs in cases where there has been a withdrawal of proceedings pursuant to cl 18 of sch 3 of the Employment Relations Act 2000 (the Act). His principal submission, however, was that this was not a case where such an approach should be adopted.

[15] Although there is no breakdown showing precisely how the time claimed is made up, it is clear that a significant portion of the defendant‟s claim for costs is based on time incurred by her solicitor and counsel in relation to mediation and settlement attendances with, apparently, the bulk of her solicitor‟s costs having been incurred in relation to the mediation itself. It was not suggested that Chief Judge Colgan had directed mediation pursuant to s 188 of the Act. On the contrary, Mr Drake submitted that the "parties were not directed by the Court to mediation."

[16] The concept of a claim for costs in relation to a mediation is something of an anomaly. The primary principle in relation to an award of costs is that costs follow the event which essentially means that they are awarded to the successful party. With mediation, however, there is no successful party. Mediation does not involve winners and losers. Rather, it is a structured process whereby the parties, with the assistance of a third party mediator, strive to bring the dispute to a negotiated end.

[17] Contrary to the submission made by Mr Drake, at [7] above, Chief Judge Goddard in *Trotter* held that costs in preparing for and appearing in a mediation were "very much costs of the proceedings" but His Honour was not prepared to allow them, observing that "the parties owe it to each other to put in some resource towards a genuine endeavour by way of mediation to settle the

dispute between them."[7]

[18] Neither counsel referred to any other authorities but in *Waugh v*

Commissioner of Police,[8] Chief Judge Goddard revisited his decision in *Trotter*

stating:

In *Trotter v Telecom Corp of NZ[9]* I disallowed professional costs in connection with mediation, holding that the parties owe it to each other to put in some resources towards a genuine endeavour by way of mediation to settle the dispute between them. However, that was a case under the Employment Contracts Act 1991 when mediation was voluntary. Now the position is quite different, the mediation is either required by the Authority or by the Court or both or is undertaken by the parties in anticipation of the certainty that it will be so required if not undertaken voluntarily. Mediation is thus a necessary part of almost every proceeding, if not every proceeding.

[19] In *Eniata v AMCOR Packaging (New Zealand) Ltd trading as AMCOR Kiwi Packaging,[10]* Judge Colgan (as he then was) expressed the view that the Employment Court did not have the power to award costs in respect of mediation.

[20] In *Lee v Minor Developments Ltd trading as Before Six Childcare Centre[11]*

Judge Shaw stated:

[15] There is no authority in the Employment Court for the awarding of costs of a judicial settlement conference although the Court has been reluctant to award the costs of mediation under the Employment Relations Act 2000.

[21] Judge Shaw went on to note:

[16] In *Simpson v BB's New Zealand Ltd,[12]* the High Court agreed that a request for costs of a judicial settlement conference was novel. It noted that such conferences are not included in the schedule of costs in the High Court Rules and held that this was a deliberate policy to encourage parties to attend and participate in settlement conferences without being concerned about adverse consequences and costs.

[17] I respectfully agree with that reasoning. While there may be exceptional cases where it would be appropriate to award

such costs I find that in the present case preparation for a judicial settlement conference and attending the conference does not form part of the actual and reasonable costs incurred for the purposes of quantifying an award of costs.

[22] Not having heard full argument on the issue (Mr Pool made no reference to the authorities), I am reluctant to express any definitive view as to whether the costs of mediation should be taken into account in an award of costs under cl 19 of sch 3

to the Act but, as indicated above, I do have some difficulties with the proposition.

[23] On the one hand, it could be argued that if the parties are going to be required by the Authority or by the Court or both to participate in mediation then it is only just that the successful party, after the final resolution of the case, should be entitled to recover an award of costs to reflect the real expenditure incurred during the mediation process. Indeed, it could be argued that the prospect of an award of costs for mediation might encourage the parties to reach a resolution at that stage so avoiding an Authority investigation or Court hearing. The possibility of a costs award may persuade the parties and counsel to put more of an effort into resolving the dispute at the mediation stage. Considerations of this type no doubt persuaded Chief Judge Goddard to make the obiter observations I have referred to.

[24] On the other hand, if costs are going to be allowed for mediation, I see practical difficulties for the Court, in terms of the provisions of the relevant regulations and the authorities, whenever it is required to analyse and rule upon a challenge or objection to such an award. One of my concerns, in this regard relates to regulation 68(2)(b) of the Employment Court Regulations 2000 which provides that in exercising its discretion under the Act to make an order as to costs, the Court "may not have regard to anything that was done in the course of the provision of mediation services."

[25] In *Waugh*, Chief Judge Goddard noted that regulation 68 "does not go so far as to preclude the Court from awarding costs of mediation and cannot be construed as overriding the jurisdiction of the Court to award costs conferred on it by cl 19 of sch 3 to the Act".[13] Accepting those observations, it can, nevertheless, hardly be said that the regulation facilitates the making of such an award.

[26] One of the tasks facing a Court in assessing an award of costs, recognised in *Binnie* at [22], is to determine whether the amount of actual costs and expenses claimed was reasonable and, if not, what figure should be substituted. Regulation

68(1) provides that the Court in exercising its discretion to make orders as to costs may have regard "to any conduct of the parties tending to increase or contain costs". If the costs of mediation were to be allowed and one of the parties recorded an objection based on the grounds that the other party"s conduct at mediation resulted in

an unnecessary increase in costs, how could a Court realistically determine that issue?

[27] In addition to the obvious problems resulting from the restrictive provisions of regulation 68(2)(b), the Court must also observe the important principle restated by the Court of Appeal in *Just Hotel Ltd v Jesudhass,*[14] that "the very nature of a mediation requires that, in principle, it be conducted on a confidential basis, with the parties encouraged to „lay bare their souls" for the purpose of facilitating a conciliation and resolution of the dispute".

[28] As I have noted earlier, it would seem from the costs narratives cited above that a significant portion of the defendant"s claim for costs in the present case relates to mediation and certain undefined matters involving a proposed "settlement". Whilst the parties and counsel are to be commended for exploring these options, on balance I am not persuaded, for the reasons stated above, that it is appropriate to award costs on account of the mediation and settlement attendances.

[29] I accept that the situation is likely to be different in a case such as *Gunfield* where a party fails to comply with a Court or Authority directed mediation order. In *Gunfield* the Authority had twice ordered mediation and on each occasion the employer failed to appear. In those circumstances, the Chief Judge determined that it was appropriate to award costs to Ms Gunfield, no doubt in recognition of the fact that the employer had put her to unnecessary expense.

[30] For completeness, I record that the scenario described in [29] does not support the submission made by Mr Drake in paragraph [8] above, namely, that the Court held in *Gunfield* "it is appropriate to include mediation costs when the parties are directed to mediation."

[31] It is up to an applicant to make out a claim for costs to the satisfaction of the Court. As I have already observed, the particulars provided in this case are deficient in that there is no breakdown showing time spent for attendances under the various heads of claim. The Court file, however, does record the judicial teleconference and

offers some insight into what it involved. For preparation and attendances relating to the judicial teleconference, I am prepared to allow the defendant costs in the sum of

$450. The defendant is also entitled to costs in connection with the preparation and filing of her application for costs and memoranda of submissions in support. Under this head I am prepared to allow the defendant an additional $300.

[32] For the reasons stated, I direct the plaintiff to pay to the defendant costs in the sum of $750.

A D Ford

Judge

Judgment signed at 10.30 am on 10 February 2011

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[1] AA 320/10, 12 July 2010
[2] [2003] NZCA 69; [2002] 1 ERNZ 438.
[3] [1993] NZEmpC 173; [1993] 2 ERNZ 935.
[4] AC 37A/09, 10 December 2009.
[5] [1989] 2 NZILR 550, (1989) ERNZ Sel Cas 304.
[6] AA 320A/10.
[7] At 937.
[8] [2004] NZEmpC 55; [2004] 1 ERNZ 450 at [162].
[9] [1993] NZEmpC 173; [1993] 2 ERNZ 935 at 937.
[10] AC 19A/02, 24 May 2002.
[11] AC 21/09, 24 April 2009.

[12] HC Wellington, CIV-2005-404-6877, 23 August 2007 per Andrews J.
[13] At [163].
[14] [2007] NZCA 582; [2007] ERNZ 817, [2008] 2 NZLR 210 at [35].
