Employment Court of New Zealand

Ong t/a Pharmacy 72 v Massie [2012] NZEmpC 162 (21 September 2012)

Last Updated: 6 October 2012

IN THE EMPLOYMENT COURT AUCKLAND

[2012] NZEmpC 162

ARC 29/12

IN THE MATTER OF a challenge to a determination of the

Employment Relations Authority

BETWEEN ALLAN ONG & NEENEE ONG T/A PHARMACY 72

Plaintiff

AND AEDENE JUNE MASSIE Defendant

Hearing: By submissions filed by the defendant on 15 August 2012; by the plaintiff on 28 August 2012 (unsigned) and 3 September 2012 (signed)

Judgment: 21 September 2012

JUDGMENT OF JUDGE B S TRAVIS

[1] On 8 August 2012 the plaintiffs filed a notice of discontinuance. That notice of discontinuance makes no mention of the matter of costs.

[2] Mr Tee, counsel for the defendant, has filed a memorandum seeking costs as of right on account of the discontinuance. In the memorandum the Court was advised that the plaintiffs have now filed an application in the Employment Relations Authority (the Authority) seeking to have the determination of 10 April 2012,[1] which led to the challenge, reopened. The memorandum states that the defendant's actual costs incurred on a solicitor/client basis are $1,530. No details of this sum are

provided. Mr Tee sought a costs award of $1,000 being two thirds of the costs

incurred.

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[3] The plaintiffs were given the opportunity to respond to the application for costs and did so on 28 August. The plaintiffs' memorandum states that they had requested a breakdown of costs from Mr Tee but had not received a reply. They claimed that they should not be held responsible for costs because they had no choice but to discontinue the proceedings due to a number of matters.

[4] They say it was their counsel who requested the change of name of the plaintiff in the second statement of claim from individuals to the name of the company "for tax purposes", but the new statement of claim was rejected by me and, according to their counsel, I had been "frosty and hostile" and "most likely to rule against" them.

[5] They claimed that their first statement of claim was detailed but was rejected by the Registry for being too long, and therefore they filed the brief second version, thinking they would have the chance to present the full details during the hearing.

[6] They claimed that I appeared to have made a decision against them before they had a chance to present the full details of the case and they were therefore denied a fair hearing by an independent and impartial Court which should have abided by the principles of natural justice.

[7] They also claimed to have received a "threatening letter" from Mr Tee that if they proceeded with the Court hearing, his costs would be in the vicinity of $20,000. They claimed that it was on the advice of the Chief of the Authority that they appealed to the Employment Court but that in the circumstances set out above they dared not proceed with the Court hearing.

[8] Whilst the defendant's memorandum gives no details of the costs incurred, I am required by the Court of Appeal decisions to which I will refer, to determine, first whether the costs incurred were actually and reasonably incurred. I have sufficient information from the unusual circumstances of this case to conclude that the defendant's actual costs were modest and reasonable. The following is a summary of those circumstances

[9] The plaintiffs brought their challenge in a statement of claim dated 7 May

2012. In relation to the challenge, the defendant was required to file a statement of defence , in reply to this first, lengthy, statement of claim.

[10] The plaintiffs then filed a second statement of claim on 12 June, which should have been described as "Amended Statement of Claim" in which their names were deleted from the intituling and replaced by the name "Families Pharmacy Ltd" (the company).

[11] The defendant was required to file a further statement of defence in which she expressly denied the allegation that the plaintiffs were officers of the company and alleged that they traded personally as Pharmacy 72.

[12] After the second statement of claim was filed, the matter was set down for a directions conference on Friday 6 July 2012. At that conference, counsel advised that he appeared for the plaintiff "Families Pharmacy Ltd".

[13] Mr Tee confirmed at the directions conference that it had not been asserted previously by Mr or Mrs Ong that the company was the defendant's employer.

[14] The Authority's determination made no mention at all of a limited liability company. It refers to the issue for determination which was whether Ms Massie, the defendant in the Employment Court proceedings, was unjustifiably dismissed from her employment with Mr and Mrs Ong. Ms Massie had brought her claim against Mr and Mrs Ong trading as Pharmacy 72.

[15] The first statement of claim did refer to Mr and Mrs Ong as being officers "of the company trading as Phamacy 72, as Business Manager and Pharmacist/Pharmacy Manager respectively", but does not plead that the company, which is not named, was Ms Massie's employer. The second statement of claim, pleads that the plaintiff is a duly incorporated company. The second statement of claim deleted much of the material contained in the first statement of claim but does not expressly state that the company was the employer.

[16] At the directions conference, after hearing from counsel, I found that the company was a stranger to these proceedings and could not be inserted in place of Mr and Mrs Ong unilaterally by the filing of an amended statement of claim.[2] I therefore struck out the amended statement of claim as a nullity, confirmed that the proceedings remained as originally intituled and that the current statement of claim was that filed by Mr and Mrs Ong personally.

[17] I recorded that counsel for the company sought the opportunity to re-plead the original statement of claim and, without objection from Mr Tee, concluded that this was clearly appropriate. I ruled that if Mr and Mrs Ong intended to proceed with their challenge, they were required to file and serve an amended statement of claim within 30 days.

[18] I cannot comment on what Mr and Mrs Ong may have been told by their counsel, but I accept, as Mr Tee pointed out in his memorandum, that at the directions conference I gave indications to counsel for the plaintiffs that their claim, as presently constituted, was unlikely to succeed. This was partly because of the Authority's determination which I will summarise shortly, but also because of the unilateral attempt without notice, to introduce the company, apparently as the defendant's employer, for the first time in the Court in the plaintiffs' second statement of claim. This could give rise to good faith issues.

[19] The Authority's determination found Mrs Ong accepted there had not been a valid trial period entered into with Ms Massie because Mrs Ong had misunderstood the rules relating to trial periods and confirmed that a trial period had not been agreed in writing, as required by s 67 of the Employment Relations Act 2000 (the Act). Mrs Ong also agreed that Ms Massie had not been provided with a written employment agreement despite several requests. That is contrary to s 65(1)(a) of the Act. The Authority found that Mr and Mrs Ong were unable to justify the defendant's dismissal in terms of s 103A of the Act for the following reasons: there was no investigation of the allegations against the defendant; she was not advised of the disciplinary nature of the meeting; she was not given any opportunity to provide

an explanation and the decision to dismiss had been predetermined. The Authority

found also that Mr and Mrs Ong had departed so far from the basic requirements of procedural fairness and the concept of natural justice as to render the dismissal of Ms Massie an unjustifiable dismissal.

[20] Because of these complicating aspects I find that the costs that have been incurred by Ms Massie appear to be reasonable.

[21] Mr Tee's claim for a costs recovery in the circumstances of approximately two thirds of the actual and reasonable costs incurred by Ms Massie accords with the principles laid down by the Court of Appeal in the trilogy of cases: *Binnie v Pacific Health Ltd*,[3] *Victoria University of Wellington v Alton-Lee*[4] and *Health Waikato Ltd v*

Elmsly.[5]

[22] The defendant has been put to considerable expense as a result of the discontinued challenge and is entitled to receive a reasonable contribution towards her costs on the usual principles.[6]

[23] I therefore order the plaintiffs to pay to the defendant the sum of $1,000 as a contribution towards her costs.

B S Travis

Judge

Judgment signed at 10am on 21 September 2012

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[1] [2012] NZERA Auckland 117.

[2] [2012] NZEmpC 104.

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

[4] [2001] NZCA 313; [2001] ERNZ 305 (CA).

[5] [2004] NZCA 35; [2004] 1 ERNZ 172 (CA).

[6] *Kelleher v Wiri Pacific Ltd* [2012] NZEmpC 98.
