Employment Court of New Zealand

Patel v OCS Limited [2014] NZEmpC 131 (23 July 2014)

Last Updated: 27 July 2014

IN THE EMPLOYMENT COURT AUCKLAND

[2014] NZEmpC 131

ARC 9/14

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
AND IN THE MATTER	of costs
BETWEEN	POOJA PATEL Plaintiff
AND	OCS LIMITED Defendant

Hearing:	On the papers, filed on 29 April, 23 and 26 May, and 6 June 2014
Appearances:	L Herzog, counsel for plaintiff S Langton and Ms Evans, counsel for defendant
Judgment:	23 July 2014

COSTS JUDGMENT OF JUDGE CHRISTINA INGLIS

[1] These proceedings involved a claim of unjustified dismissal and disadvantage by Ms Patel against her former employer, OCS Limited. The claim was heard on an urgent basis, and dismissed, for reasons set out in my earlier judgment.1 The parties were encouraged to seek agreement as to costs. It appears that while Mr Langton, counsel for the defendant, wrote to the plaintiff in an effort to reach agreement, no response was forthcoming. The defendant has filed extensive submissions and material in support of its application for costs against Ms Patel. While the plaintiff

has elected not to file submissions, an affirmation has been filed by the plaintiff,

focussing on her financial position.

1 *Patel v OCS Ltd* [2014] NZEmpC 49.

[2] The defendant seeks a substantial contribution to its costs, totalling $43,488. This equates to around three quarters of its actual costs incurred in defending the proceedings.

[3] Clause 19(1) of Sch 3 to the Employment Relations Act 2000 (the Act)

confers a broad discretion as to costs. It provides that:

The court in any proceedings may order any party to pay to any other party such costs and expenses ... as the court thinks reasonable.

[4] Regulation 68(1) of the Employment Court Regulations 2000 (the

Regulations) states 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.

[5] The discretion to award costs, while broad, is to be exercised in accordance with principle. The primary principle is that costs follow the event. 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.

[6] I am satisfied, based on the material before the Court, that the defendant incurred actual legal costs of $55,282.27 in respect of the plaintiff's challenge, excluding GST and disbursements. This represented a discounted rate.

[7] I turn to consider whether the costs incurred by the defendant were reasonable for the purposes of assessing an appropriate costs contribution.

[8] The defendant claims costs associated with the attendance of second counsel. While, as Mr Langton points out, there have been instances in which the Court has been prepared to include the costs associated with second counsel,2 that is not the invariable practice. Parties are, of course, entitled to counsel of their choosing, and to be represented by multiple counsel if they so wish, but the increased costs

associated with such a choice cannot automatically be visited on the unsuccessful

2 Citing *Air New Zealand Ltd v Kerr* [2013] NZEmpC 237 at [21] in support of this proposition.

party. Ultimately, the focus must be on what was reasonably required in the particular circumstances of each case. The matters at issue in these proceedings were not overly complex, from either a legal or factual perspective, and had already been the subject of a recent investigation in the Employment Relations Authority. I do not consider that the attendance of two counsel was reasonably required in the circumstances. Nor did the proceeding involve any interlocutory activity relevant to the costs calculus.

[9] The challenge was brought on for hearing (at the plaintiff's application) on an urgent basis.3 I accept that this would have increased the costs that might otherwise have been incurred by the defendant.

[10] The Court has previously had regard to costs under the High Court Rules in assessing reasonable costs in this jurisdiction. According to the calculations contained in Mr Langton's helpful submissions, a likely costs contribution under the High Court Rules would lead to a final figure of around $25,000.4 As Mr Langton acknowledges, a direct application of scale costs under the High Court Rules presents some difficulties. It incorporates a substantial allowance for preparation

time, including in relation to briefs of evidence, identification of issues, authorities and a common bundle. Much (although not all) of this work would already have been undertaken for the purposes of the Authority's investigation, which had taken place a short time before the challenge was heard in this Court.

[11] Standing back I consider that costs of around $30,000 would be reasonable, having regard to the particular circumstances, the nature of the proceedings and the steps reasonably required to respond to the plaintiff's claim. That leads to a starting point of $20,000.

[12] Mr Langton submits that there ought to be an uplift in costs to reflect the

plaintiff's rejection of a Calderbank offer made before the hearing. The defendant

seeks full costs after the Calderbank offer was declined, and a contribution to costs

3 The costs associated with plaintiff 's application for urgency, which was unsuccessfully opposed by the defendant, have been excluded from the defendant's claim.

4 That figure reflects a one third deduction, already built in to the High Court scale. This would lead to reasonable costs, under the High Court Rules, of $37,500.

on the usual basis prior to that date. This would lead to a contribution towards costs of around three quarters of costs actually incurred.

[13] It is well accepted that Calderbank offers should be taken into account as a factor in favour of the defendant if it makes an offer that would have been more beneficial to the plaintiff than the judgment subsequently obtained. A steely approach is required, for the policy reasons set out by the Court of Appeal in *Bluestar Print Group (NZ) Ltd v Mitchell*.5 Ultimately, Calderbank offers are a discretionary factor for the Court in determining an appropriate costs award. And, as in all matters, the Court is to exercise its jurisdiction in equity and good conscience.6

[14] The defendant made a Calderbank offer to the plaintiff on 4 March 2014. This was 14 days prior to the hearing. It offered to pay Ms Patel the sum of $15,000 compensation under s 123(1)(c)(i) of the Act, on the basis that Ms Patel discontinue her challenge. The components of the offer were set out in detail. The offer remained open until 5.30 pm on 5 March 2014. The plaintiff responded, through her counsel, within the specified timeframe, rejecting the offer and putting forward a counter-offer (which was itself declined). The plaintiff's response is not before the Court.

[15] The offer was made a reasonable time before the hearing. It remained open for only 24 hours, although it is apparent that this provided sufficient time to enable a considered response to be made. Had Ms Patel accepted the offer she would have been in a better position than she now finds herself in. There is nothing before the Court to suggest that the offer was reasonably declined. I conclude

that it was unreasonable for Ms Patel to decline the defendant's offer and that an increase in costs is justified on this basis.

[16] The plaintiff has filed an affidavit setting out details of her financial position. It is established that the ability of an unsuccessful party to pay an award of costs is a matter which can properly be taken into account if such payment would cause the

party undue hardship.7 It is equally well established that any claim of undue hardship must be supported by acceptable evidence, including details of the party's assets and liabilities, and income and expenditure.8

[17] Ms Patel says that she has no ability to meet any award of costs and that her financial situation is dire. Ms Patel resides in a house which is held in trust. She is the sole trustee. The debt/equity ratio in the house has not been identified. Ms Patel affirms that her only income is from casual employment but the "statement of affairs" document appended to the affirmation records that she is in receipt of no income. The defendant has pointed to a number of other issues with the material relied on by the plaintiff, including the absence of evidence relating to the loan repayments she says she is making and any other sources of household income.

[18] I am not satisfied, based on the material before the Court, that payment of a contribution to costs would cause undue hardship to the plaintiff, although I accept that it may present difficulties for her.

[19] In the circumstances I consider that a costs contribution of $25,000 is appropriate.

[20] The plaintiff is accordingly ordered to pay the defendant $25,000 by way of contribution to its costs on her unsuccessful challenge. The defendant does not seek payment for any disbursements and none are ordered.

[21] The defendant also seeks a contribution to its costs on this application, on the basis that the defendant has been put to the trouble of preparing submissions which would not have been necessary had the parties been able to reach agreement.

[22] The absence of a scale approach to costs in this jurisdiction provides greater scope for reasonable disagreement and, accordingly, the need to refer matters to the Court for determination. That is not the situation in the present case. The plaintiff appears to have failed to engage with the defendant on the issue of costs and the

defendant was accordingly obliged to seek a judgment from the Court. A

contribution to costs is appropriate in the circumstances, which I set at $750.

Judgment signed at 9 am on 23 July 2014

Christina Inglis
Judge
