Employment Court of New Zealand

Reynolds v Burgess CC5A/07 [2007] NZEmpC 82 (4 July 2007)

Last Updated: 21 July 2007

IN THE EMPLOYMENT COURT

CHRISTCHURCHCC 5A/07CRC 30/04

IN THE MATTER OF a challenge to a determination of the Employment Relations Authority

AND IN THE MATTER OF an application for costs

BETWEEN FRANCESCA REYNOLDS
Plaintiff

AND DEBORAH JANE BURGESS
Defendant

Hearing: By submissions received 23 March, 4 May and 18 May 2007

(Heard at Christchurch)

Judgment: 4 July 2007

COSTS JUDGMENT OF JUDGE A A COUCH

[1] This matter has a long and difficult history. The substantive issues were finally resolved in my judgment dated 2 March 2007 (CC 5/07), the only outstanding matter being the extent to which the plaintiff should contribute to the costs and disbursements incurred by the defendant in resisting the plaintiff's challenge.
[2] I have received detailed and helpful submissions on behalf of both parties. For the defendant, Mr Slevin filed an initial memorandum supplemented by further information I requested through the Registrar. Although the plaintiff appeared in person at the hearing, a memorandum of submissions relating to costs was filed on her behalf by counsel, Mr C J Mundy-Smith. In essence, the defendant seeks indemnity costs. The plaintiff resists that but does not suggest what level of costs she accepts is appropriate.
[3] The defendant was in receipt of legal aid throughout the proceedings. Normally a legally aided person is not permitted to recover more by way of costs than the amount of legal aid received. In this case, however, the solicitors for the defendant have obtained permission from the Legal Services Agency under s66 of the Legal Services Act 2000 to recover in excess of that amount. The manner in which that permission was given were somewhat unusual and I return to that issue later.
[4] The total grant of legal aid received by the defendant was $12,038.13. This included disbursements relating to the services and travel costs of an expert witness totalling $2,810.13. In addition, Mr Slevin's firm has rendered an invoice to the defendant for $6,372 by way of additional fees. As a result of an interlocutory order I made prior to

the hearing, the plaintiff has paid $400 which is acknowledged by the defendant. On this basis, Mr Slevin seeks an award of costs of $15,200 and reimbursement of disbursements totalling $2,810.13.

[5] The Court has a wide discretion in fixing costs but this must be exercised in a principled way. The relevant principles have been restated in recent decisions of the Court of Appeal, notably *Binnie v Pacific Health Limited* [2003] NZCA 69; [2002] 1 ERNZ 438. In paragraph [13] of that judgment, the Court of Appeal confirmed the fundamental principle "*that party and party costs should generally follow the event and amount to a reasonable contribution to costs actually and reasonably incurred*". Applying that principle involves a two step approach which the Court summarised as follows:

[14] The first step is to decide whether the costs actually incurred by the plaintiff were reasonably incurred. Adjustment must be made if they were not. The second step is to decide, after an appraisal of all relevant factors, at what level it is reasonable for the defendant to contribute to the plaintiff's costs. Potentially that level can be anywhere from 100 percent to 0 percent. A starting point at 66 percent is generally regarded as helpful in ordinary cases. Mr Taylor reflected common practice when he referred to this as the two-thirds rule. If such a starting point is adopted, careful attention must be given to factors said to justify an increase or a decrease.

[6] Applying these principles, the first step is to determine what costs were actually and reasonably incurred by the defendant. As to the costs actually incurred, this would seem at first sight to be the amount claimed by Mr Slevin. On closer examination of the documents provided as an annexures to Mr Slevin's memorandum, however, I do not think that this is so. The request by Mr Slevin's firm to the Legal Services Agency for approval under s66 of the Legal Services Act 2000 to receive payment for their work over and above the grant of legal aid was contained in a fax from Mr Slevin to the Agency dated 22 May 2006. After noting an intention to seek indemnity costs from the plaintiff and making an application for approval under s66, Mr Slevin concluded:

We have obtained Deborah Burgess' consent to making this application and wish to make it clear that we do not propose to recover any additional cost from her personally.

[7] It is clear from this statement that the invoice was not generated by the defendant's solicitors for the usual purpose of obtaining payment from their client. Rather, it was generated for the purpose of making a claim for payment by the plaintiff in excess of that which otherwise could be justified. As it was never intended that the defendant pay the amount of the invoice or any part of it, it cannot be said that the invoice represented costs actually incurred by the defendant.

[8] Although the invoices representing the grant of legal aid to the defendant were addressed to the Legal Services Agency and paid by that body, it is conventional and appropriate to regard those costs as having been incurred by the defendant for the purposes of assessing costs. Allowing for the $400 already paid by the plaintiff, the balance of those costs is $8,828. I regard that sum as the actual costs incurred by the defendant.

[9] As to whether this amount was reasonably incurred, I have no difficulty in finding that it was in the sense that it was not excessive. I say that initially on the basis that it must be presumed that the Legal Services Agency would not approve and pay excessive grants of legal aid.

[10] This is strongly supported by the figures provided by Mr Slevin. There is no doubt that the rates of payment approved by the Legal Services Agency are significantly less than those which counsel might otherwise charge and which would be considered reasonable. In this case, the gross hourly rate paid to the lead provider, Mr Nation, by the Legal Services Agency was $130 inclusive of GST. For a practitioner of his seniority and experience, a rate more than double that might not be considered unreasonable if he was retained on a private basis. Equally, the gross hourly rate paid for Mr Slevin's services was $110 per hour inclusive of GST. Mr Slevin advised me that his services are normally charged out at $150 plus GST per hour, a rate I would regard as eminently reasonable.

[11] On this basis, I find that costs of $8,828 were actually and reasonably incurred by the defendant.

[12] I turn then to the contribution which the plaintiff ought to be required to make to those costs. Applying the approach approved in *Binnie*, I adopt a starting point of two thirds of that amount and give careful attention to the factors which Mr Slevin submitted justified an increase in that level of contribution to 100 percent.

[13] Mr Slevin's primary submission was:

4. The two underlying principles relevant to the exercise of the Court's discretion to award costs are:

a. *The wrongdoer should pay the costs of the injured party unless good reason exists to the contrary; and*
b. *Court time is a valuable public resource, and should not be wasted. There should be disincentives to unwarranted proceedings and inefficient practices.*

Holden v Architectural Finishes Limited *[1997] NZHC 1669; (1997) 10 PRNZ 675*

[14] With respect, that is a deceptively brief summary of the principles enunciated by McGechan J in that case. As to the first principle, McGechan J qualified it by saying "*there is a threshold rule that costs nevertheless will be a "reasonable contribution" only, and not a total recovery*". In discussing these principles, McGechan J also went on to say at the foot of page 680 of the report that it will be rare for a contribution of 10 or 20 percent to be reasonable

and that "a *90 percent or 80 percent contribution, virtually the total, may be regarded likewise.*".
[15] Mr Slevin also relied on specific aspects of the plaintiff's conduct of her case in support of his submission that an unusually high level of contribution to her costs should be awarded in this case. These were:

a) the plaintiff's failure to monitor her address for service and maintain proper communication with the Court which prolonged the interlocutory phase of this matter.

b) The plaintiff's failure to comply with directions and to prepare for the hearing scheduled to begin on 8 May 2006, resulting in that fixture having to be abandoned, as detailed in my judgment of 10 May 2006.

c) The plaintiff's failure to comply with subsequent directions regarding the disclosure of documents to counsel for the defendant.

d) The plaintiff's failure to respond to invitations from Mr Slevin to consent to the introduction of uncontentious evidence.

d) The plaintiff's refusal to cooperate in preparation of the case for hearing and, in particular, her insistence in having the defendant's expert witness travel from Wellington before consenting to her report being received.

[16] There is undoubtedly weight in each of these points made by Mr Slevin. On behalf of the plaintiff, Mr Mundy-Smith submitted that "*leeway ought to be given to the conduct of parties in representing themselves*" and that, to the extent that the plaintiff had prolonged the conduct of the case or increased the costs of the defendant by the manner in which she conducted her case, she should be treated "*with more leniency than would the conduct of a case by counsel*".
[17] As a general statement, there is some scope for Mr Mundy-Smith's submissions but that can go only a very small way in mitigation of the conduct of the plaintiff in this case. Notwithstanding my acceptance that the plaintiff has been affected by significant health and personal issues at times, she has been consistently uncooperative and frequently unreasonable in her dealings both with the Court and with Mr Slevin. This is a factor which must be reflected in the extent of contribution to the defendant's costs.
[18] Mr Slevin also sought to rely on two other factors. Firstly, he submitted that I should take into account the plaintiff's admitted failure to pay holiday pay which she conceded has been owing for 5 years. I decline to do that. The defendant was awarded interested on the arrears of holiday pay which the plaintiff was ordered to pay. That is sufficient to deal with the matter. I note also that the purpose of an award of costs is to reimburse the successful party, not to punish the unsuccessful party.
[19] Finally, Mr Slevin submitted that the plaintiff's case was based on an employment agreement which she knew to have been forged and that, accordingly, the challenge should never have been pursued. I understand the basis on which that submission is made but it goes too far. While I accepted the uncontested evidence of the two expert document examiners that the signature on the agreement attributed to the defendant was unlikely to have been written by her, that is really as far as the matter went. I made no finding of fact that the plaintiff had forged the signature of the defendant, nor did I conclude that the plaintiff was actually aware that the signature was not that of the defendant. I decided the matter on the basis of the reliability rather than credibility.
[20] On this basis, I do not accept Mr Slevin's submission that issues relating to the authenticity of the signatures on the employment agreement justify an award of indemnity costs to the defendant on their own. It can properly be said, however, that once the report of the second document examiner was available, the plaintiff's case was significantly weakened and, by continuing to a full scale hearing, she took the risk that she would have to contribute to substantially increased costs for the defendant.
[21] Taking all aspects of the matter into account, I order the plaintiff to pay the defendant $7,500 by way of costs. The plaintiff is also ordered to pay the defendant $2,810.13 in full reimbursement of her disbursements.

A A Couch
Judge

Judgment signed at 4.00pm on 4 July 2007