Employment Court of New Zealand

Rittson-Thomas t/a Totara Hills Farm v Davidson [2013] NZEmpC 88 (23 May 2013)

Last Updated: 4 June 2013

IN THE EMPLOYMENT COURT WELLINGTON

[2013] NZEmpC 88

WRC 15/12

IN THE MATTER OF a challenge to a determination of the

Employment Relations Authority

AND IN THE MATTER OF an application for costs

BETWEEN MICHAEL RITTSON-THOMAS T/A TOTARA HILLS FARM

Plaintiff

AND HAMISH DAVIDSON Defendant

Hearing: By memoranda of submissions filed on 11 April and 8 May 2013

Appearances: Gary Tayler, advocate for plaintiff

Sachi Govender, counsel, and Piers Hunt, advocate for defendant

Judgment: 23 May 2013

COSTS JUDGMENT OF CHIEF JUDGE G L COLGAN

[1] The defendant is entitled to costs on the plaintiff's unsuccessful challenge and this supplementary judgment determines the amount of those costs and disbursements.

[2] Although the defendant, through counsel, invokes solely the High Court Rules (and these can be a useful guideline), cl 19 of Schedule 3 to the Employment Relations Act 2000 (the Act) gives the Court a broad discretion to both award costs and to fix the amounts of orders.

[3] Originally, the parties were represented by their advocates, Mr Tayler for the plaintiff, and Mr Hunt for the defendant. Such was the level of personal animosity and invective between the two advocates that Mr Hunt elected to engage counsel to represent Mr Davidson to enable the dispute to be dealt with on its merits. That was

a reasonable and helpful strategy for which Mr Davidson is entitled to be

compensated. Regrettably, but inevitably, the exchanges between the advocates were put before the Court and I have to say that Mr Tayler's correspondence was, in parts and at best, unwarranted and unprofessional.

[4] Mr Govender submits that at least some of the issues dealt with on the challenge were unique. That is true in the sense that the Court has not determined previously the employment related obligations under the KiwiSaver legislation but this is not a complex issue and was determined as a matter of interpretation of the parties' employment agreement rather than of

the legislation.

[5] The defendant seeks costs of $37,511.50 and an uplift of at least 25 per cent on this sum.

[6] Mr Govender has submitted that the defendant's efforts to settle the litigation before hearing should be taken into account in determining costs in Mr Davidson's favour.

[7] As Mr Tayler has pointed out, forcefully, the defendant has not provided the Court with any detail of his actual legal costs to enable an assessment to be made of their reasonableness and, thereby, to determine a contribution to such reasonable costs. This is the longstanding approach to costs' questions, both directed by the Court of Appeal and followed by the Employment Court in practice.

[8] In late November 2012, that is about three months before the hearing, Mr Davidson proposed a settlement of the proceedings for the sum of $6,000. This was rejected by Mr Rittson-Thomas in mid-December 2012 but a counter-offer was made by the plaintiff to the effect that Mr Davidson's cross challenge could be withdrawn and the matter should continue only on the basis of Mr Rittson-Thomas's non-de novo challenge. This counter-proposal was rejected by Mr Davidson on

17 December 2012. In late January 2013 Mr Rittson-Thomas made an offer in full and final settlement of $5,000 accompanied by advice that the plaintiff might seek an adjournment of the case to fly to London to visit his ailing father. The plaintiff's offer was also interwoven with what Mr Davidson took to be a threat of litigation

against the defendant's wife in the Tenancy Tribunal accompanied by allegations of

criminal offending by the defendant unconnected to this litigation.

[9] This offer of settlement was responded to by the defendant on 31 January

2013 and contained a counter-proposal by the defendant to accept the sum of $7,500 (the entire amount ordered by the Employment Relations Authority) to settle the matter.

The plaintiff's response

[10] Mr Tayler, advocate for the plaintiff, in written submissions dated 8 May

2013, submits that the defendant's claim for costs is so defective as to make it impossible for the Court to give Mr Davidson any award. In particular, Mr Tayler submits that the Court should not have recourse at all to the High Court Rules but must, rather, apply cl 19 of Schedule 3 to the Act as directed by the judgments of the Court of Appeal in *Victoria University of Wellington v Alton-Lee, Binnie v Pacific Health Ltd* and *Health Waikato Ltd v Elmsly*.[1]

[11] Mr Tayler was critical of the defendant's failure to support his claim with details of the costs incurred and the basis for them. Citing the judgment of this Court in *Foai v Air New Zealand Ltd*,[2] Mr Tayler relied on the following passage of that

judgment:[3]

It is up to claimants to make out their claims for costs and the Court should not be left to speculate or to try and fill in the gaps when insufficient particulars are provided.

[12] Mr Tayler submitted that it is fatal to the defendant's application that he has not disclosed his actual legal costs of representation incurred. That is said to be a repetition of the same failure in respect of Authority costs where Mr Davidson is said

to have relied solely on the Authority's daily tariff methodology.

[13] Mr Tayler likewise rejects any suggestion by the defendant that costs should be used to censure the plaintiff's conduct of his case and, in particular, by Mr Tayler as his advocate. Mr Tayler submits that despite repeated judicial directions, Mr Davidson's advocate, Mr Hunt, failed or refused to comply with those directions for a period of four months during which time four amended statements of defence were filed and threats of litigation, both veiled and actual, were made against Mr Tayler personally. Mr Tayler submits that although these have amounted to nothing, the hearing of the challenge was delayed unnecessarily. The advocate points out that Mr Hunt eventually removed all references to personal accusations against the plaintiff's advocate and to associated remedies after what Mr Tayler described as the filing of "a rather disproportionately angry and somewhat hysterical memorandum". Mr Tayler submitted that on 17 October 2012 the Court had issued a minute that was "highly critical" of Mr Hunt, including recommending that Mr Hunt step aside as a representative before doing so and instructing counsel.

[14] Next, Mr Tayler submits that emails attached to the defendant's application for costs are not admissible because they were "offers made on a *"without prejudice"* basis". Mr Tayler distinguishes offers made simply "without prejudice" (inadmissible even now) and those made on a "without prejudice as to costs" basis which are now admissible. The latter are said to be specifically referred to in reg 68 of the Employment Court Regulations 2000 but, in reliance on the judgment in *Just*

Hotel Ltd v Jesudhass,[4] the advocate submits that the offers made simply "without prejudice" are inadmissible.

[15] I interpret the "without prejudice" label attached to the offers as being one intended to be in the fuller form of "without prejudice except as costs" and not simply what would be the unusual and largely meaningless literal "without prejudice". The offers were made not only in an attempt to settle the proceedings but also, as in most cases where these are made, to bring the pressure on the offeree of knowing that if the offer is not accepted it may later be raised when determining costs.

[16] I note that the total of monetary relief awarded to Mr Davidson exceeds significantly the last amount on which he indicated to the plaintiff he would be prepared to settle. Mr Davidson's award should take account of his preparedness to settle for less and Mr Rittson-Thomas's rejection of that offer.

[17] Dealing with the defendant's claim for an uplift of costs, Mr Govender referred to the High Court Rules permitting this. The preferable analogy is, however, the direction of the Court of Appeal in employment cases that the nominal starting point is a figure of two-thirds of costs actually and reasonably incurred but which can be increased by way of uplift. No grounds for uplift are contained in Mr Govender's submissions. They simply say: "It is submitted that the Court should impose at least a 25 per cent surcharge by way of increase costs on the above normal costs." The "above normal costs" are those calculated by reference to the High Court Rules (although I do not accept that even if these were applicable, the calculations are correct) amounting to $37,511.50.

[18] In the absence of any information about the defendant's costs of representation, I am driven to estimating what would be a reasonable level of contribution to reasonable costs for this hearing which occupied 2.5 days in court and which takes account of the offers to settle that were not accepted by the plaintiff.

[19] I fix the costs payable by the plaintiff to the defendant in the sum of $15,000.

[20] Although recording in this judgment the extraordinary conduct between advocates that they have shown the Court in their correspondence, there is no suggestion in those letters and emails that they were writing for their clients' benefits. Rather, the antipathy appears to have been personal to the advocates but no less unprofessional and to be deprecated. In these circumstances I consider it will be unfair to burden one party financially with the consequences of his advocate's personal conduct so that the award I make does not include any punitive element.

Judgment signed at 2 pm on Thursday 23 May 2013

GL Colgan
Chief Judge

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[1] *Victoria University of Wellington v Alton-Lee* [2001] NZCA 313; [2001] ERNZ 305 (CA); *Binnie v Pacific Health Ltd* [2003] NZCA 69; [2002] 1 ERNZ 438 (CA); *Health Waikato Ltd v Elmsly* [2004] NZCA 35; [2004] 1 ERNZ 172 (CA).

[2] [2013] NZEmpC 50.

[3] At [8].

[4] [2007] NZCA 582; [2007] ERNZ 817 (CA).
