Employment Court of New Zealand

Safe Air Limited v Walker CC 8A/09 [2009] NZEmpC 120 (4 December 2009)

Last Updated: 11 December 2009

IN THE EMPLOYMENT COURT

CHRISTCHURCHCC 8A/09CRC 8/09CRC 10/09

IN THE MATTER OF challenges to determinations of the Employment Relations Authority

AND

IN THE MATTER OF an application for costs

BETWEEN SAFE AIR LIMITED
Plaintiff

AND PHILIP TERENCE WALKER
Defendant

Hearing: Memoranda received 3 and 28 September and 27 October 2009

Judgment: 4 December 2009

COSTS JUDGMENT OF JUDGE A A COUCH

[1] Since Mr Walker was dismissed in February 2009, there have been two determinations of the Authority and two decisions of the Court arising out of his personal grievance. In my second, substantive decision dated 7 August 2009 (CC 8/09), I concluded by inviting the parties to confer about costs on all aspects of the litigation and, if unable to resolve them by agreement, to provide memoranda.
[2] Mr Cleary and Mr Hardy-Jones both filed memoranda. I was also provided with an affidavit of Mr Walker as to his means. While those documents were detailed and helpful, certain issues remained unclear. I therefore asked counsel to provide supplementary memoranda on specific issues which they both did on 27 October 2009.
[3] I am informed that the Authority did not determine costs in relation to the matter. It therefore falls to me to decide costs in relation to all aspects of the matter.
[4] For the plaintiff, Mr Cleary seeks costs of $3,000 for the proceedings before the Authority. For the proceedings before the Court, he seeks $14,000 for costs and $699.22 for disbursements.
[5] For the defendant, Mr Hardy-Jones submits that costs should lie where they fall in all respects.
[6] The principles generally applicable to awards of costs in the employment institutions are well known. In the Authority, a daily tariff approach is usually adopted with most awards in the range of $2,000 to $2,500 per day of investigation meeting. In the Court, the usual starting point is two-thirds of the costs actually and reasonably incurred, with that sum being adjusted up or down according to the circumstances of the case and the manner in which it was conducted. In both jurisdictions, an overriding consideration is the ability of the unsuccessful party to pay without undue hardship.
[7] In the Authority and in the Court there were two distinct aspects of the proceedings: the substantive claim of unjustifiable dismissal and the application for stay of the orders made by the Authority. As regards the substantive claim, the Authority found in favour of Mr Walker. On the challenge to that determination, I decided the matter in favour of Safe Air. Both the original application for stay made to the Authority and the challenge to that determination in the Court were unsuccessful. Mr Cleary submits that no costs order should be made in relation to either of these aspects of the proceedings. He says: *"Although the plaintiff was unsuccessful here neither application*

would have been necessary had the Authority been correct in its determination." I do not accept that reasoning. It was a conscious choice by the plaintiff to apply for a stay of proceedings and then to challenge the Authority's determination in that regard. Those were steps the plaintiff did not have to take. In both cases, Mr Walker was put to the expense of defending the applications. Costs in relation to those applications should follow the event just as they should in respect of the substantive matter.

[8] Dealing firstly with the substantive proceedings before the Authority, the investigation meeting was completed in 1 day. Mr Cleary described the proceedings as *"relatively straightforward involving no discovery or other interlocutory matters"* and that the only unusual aspect of the case was the volume of emails requiring consideration. Mr Hardy-Jones does not disagree. In such circumstances, I regard the sum of $3,000 sought as appropriate.

[9] Against that must be offset an amount of costs in favour of Mr Walker on the application to the Authority for a stay. It appears the Authority's investigation of this application was done by telephone conference with counsel together with memoranda and affidavits filed on behalf of the parties. A reasonable sum to allow Mr Walker for responding to such an application is $750.

[10] Combining these figures, I would make an award of $2,250 in favour of the plaintiff for costs incurred in the Authority.

[11] Turning to the proceedings before the Court, the first aspect of them dealt with was the challenge to the Authority's refusal to grant a stay (CRC 10/09). This was dealt with on the papers, being affidavits and memoranda of counsel. Mr Hardy-Jones says that the value of work done for Mr Walker in relation to that aspect of the matter was a little over $2,000. I find that reasonable and, although Mr Walker has not actually been invoiced yet for those costs, I see no reason in the context of this case to depart from a starting point of two-thirds of that amount. For costs incurred in relation to CRC 10/09, I would allow Mr Walker $1,400.

[12] The actual costs incurred by the plaintiff in relation to the substantive challenge were $19,206 being for 58.2 hours of counsel's time at $330 per hour. The first question must be the extent to which these costs were reasonably incurred.

[13] This case was of considerable importance to the plaintiff as it was the first case to be decided out of a series of dismissals for similar reasons. The plaintiff was justified in retaining capable and experienced counsel such as Mr Cleary and I find that his rate of $330 per hour was not unreasonable for counsel of his ability.

[14] As to the time spent on the matter, I must take into account the work already done in order to present the plaintiff's case to the Authority. I accept, however, that the range of issues before the Court was wider than that before the Authority, including disparity of treatment compared to other staff disciplined as part of the same overall investigation which led to Mr Walker's dismissal. To support that aspect of the claim, Mr Hardy-Jones sought and was granted disclosure of a very large volume of emails sent by other employees. Changes in the emphasis of other aspects of the case for Mr Walker also necessitated changed or additional evidence to that provided to the Authority. The hearing itself took one and a half days. Overall, I find the time spent on the matter at the upper end of the range of what was reasonable but, having regard to the importance of the matter to the plaintiff, within that range.

[15] On this basis, I find the whole of the costs incurred by the plaintiff to have been reasonably incurred. On that basis, I take as a starting point an award of costs of $12,800.

[16] I turn now to factors affecting whether that starting point ought to be adjusted up or down. Mr Cleary suggested that the manner in which the claim of disparity made on behalf of Mr Walker was advanced caused some unnecessary work to be done for the plaintiff. Given the urgency sought by the plaintiff and the amount of work required by both parties to have the matter ready for trial at short notice, I think this criticism is unwarranted and do make any adjustment for that reason. Rather, I agree with Mr Hardy-Jones' submission that both parties conducted the proceeding in an appropriate manner.

[17] Mr Hardy-Jones submitted that a factor which ought to reduce the amount of any award of costs is that this was a test case, at least for the plaintiff. In relation to this submission, I asked Mr Cleary to provide information about the outcomes of other related cases. He informs me that, of 13 other personal grievances arising out of circumstances related to those of Mr Walker, four were settled prior to judgment in this case and one since. Mr Hardy-Jones informs me that, following judgment in this case, two other former employees of the plaintiff withdrew claims they had made.

[18] Regardless of numbers, I am satisfied that the outcome of this case will have assisted the plaintiff considerably in resolving some of the other cases arising out of the same investigation. Whether that assistance takes the form of other cases being withdrawn or a prompt settlement, the plaintiff will have benefited. As noted earlier, I have taken this into account in assessing the importance of this matter to the plaintiff and in my conclusion that the amount of costs incurred by the plaintiff was reasonable. Equally, I find it is a factor which properly reduces the amount of costs the defendant in this case ought to pay. On this account, I would reduce the sum of $12,800 by half to $6,400.

[19] In addition to costs, the plaintiff seeks reimbursement of disbursements totalling $699.22 inclusive of GST. Very properly, this claim has been limited to expenditure which was truly necessary and was out of pocket. I would award the whole of this amount less the GST component which the plaintiff will have already recovered. This makes a sum of $621.53.

[20] This leads me to an overall award in favour of the plaintiff of $7,250 for costs and $621.53 for disbursements.

[21] The factor relied on most heavily by Mr Hardy-Jones was the ability of Mr Walker to pay any award of costs which might be made. The established test is whether payment would impose undue hardship on the party required to make payment. The adverb "undue" is important. It is not enough that payment might result in hardship. To be an effective factor, it must be established that undue hardship would result if payment were required.

[22] I have been provided with an affidavit in which Mr Walker sets out the joint financial position of himself and his partner, Ms Molloy. At first sight, the figures provided for assets and liabilities suggest they are insolvent in that their liabilities exceed their assets. The liabilities, however, include a debt of more than $165,000 to a trust of which Mr Walker is a potential beneficiary. The trust was settled by Mr Walker's parents and Mr Walker does not say whether he has sought financial relief or assistance from that trust.

[23] The documentation also shows that other debts totalling more than $220,000 are guaranteed by a company called Walker Properties 2008 Limited, of which Mr Walker and Ms Molloy are the sole shareholders and directors. This company is not mentioned in Mr Walker's affidavit. Its role in their financial affairs and the value of the shares in the company are unclear. All that is clear is that their bank has seen fit to take a guarantee of their debts from the company.

[24] Amongst the assets listed by Mr Walker are four motor vehicles with a total value of nearly $64,000. These include a 1968 Dodge Charger valued at $40,000 and a 1972 Valiant Charger valued at $19,500. There are two outstanding loans for motor vehicles totalling less than $40,000. This suggests that there is a substantial amount of equity in these vehicles. Mr Walker says that the Dodge is not currently saleable but, even if this is so, one or more of the other vehicles could be sold.

[25] The income and expenditure information provided by Mr Walker suggests that the wages earned jointly by Mr Walker and Ms Molloy exceed their regular outgoings by $265 per month. This is described as the amount available to them for *"discretionary spending."* It is notable that the expenditure figures include a Sky television subscription of $70 per month which cannot be considered an essential outgoing. More importantly, the figures include losses on an investment rental property of $800 per month. Mr Walker says that the rental property is currently on the market but has yet to be sold. The documentation also suggests that borrowings on this property equal or exceed its value. As soon as this property is sold, however, Mr Walker and Ms Molloy will have a substantial excess of income over expenditure.

[26] Overall, I am not persuaded that payment of an award of just under $8,000 would cause Mr Walker undue hardship.

[27] The defendant is ordered to pay the plaintiff $7,250 for costs and $621.53 for disbursements.

A A Couch

Judge
Signed at 4pm on 4 December 2009