Employment Court of New Zealand

Sealord Group Limited v Pickering [2015] NZEmpC 158 (17 September 2015)

Last Updated: 23 September 2015

IN THE EMPLOYMENT COURT CHRISTCHURCH

[2015] NZEmpC 158

CRC 42/13

IN THE MATTER OF a challenge to a determination of the

Employment Relations Authority

BETWEEN SEALORD GROUP LIMITED Plaintiff

AND AARON PICKERING Defendant

Hearing: (on the papers by memoranda filed on 10 July and 6 August

2015 and affidavits filed on 10 July 2015)

Counsel: P Kiely, counsel for the plaintiff

A Sharma, counsel for the defendant

Judgment: 17 September 2015

COSTS JUDGMENT OF JUDGE A D FORD

Introduction

[1] In my substantive judgment of 27 May 2015, at the request of the parties, I reserved the issue of costs.1 Ms Sharma, counsel for the defendant, has now filed a formal application for an award of costs on behalf of the defendant, Mr Pickering. In summary, she seeks a 50 per cent contribution towards Mr Pickering's actual costs which are said to total $92,291, plus GST. Certain other items are also claimed. In response, Mr Kiely, counsel for the defendant, submitted that $20,000 is an appropriate contribution for the plaintiff to make towards the defendant's costs on the

de novo challenge.

[2] At all material times the defendant, Mr Pickering, was the bosun on a fishing vessel, the FV Will Watch, which operated out of Mauritius in the Indian Ocean.

1 *Sealord Group Ltd v Pickering* [2015] NZEmpC 76 at [89]- [90].

The plaintiff (Sealord) was responsible for the recruitment and management of the vessel's New Zealand sourced crew. At the end of 2012, Mr Pickering brought a claim in the Employment Relations Authority (the Authority) alleging that in September 2010 he had been unjustifiably dismissed by Sealord. In response, Sealord maintained that Mr Pickering had been an independent contractor. The Authority upheld Mr Pickering's claim and in a determination dated 12 August 2013, awarded him $71,973.86 on account of lost remuneration and $8,000 as

compensation for hurt and humiliation.2

[3] Sealord then challenged the whole of that determination in this Court and there was a cross challenge by Mr Pickering. In my substantive judgment, I upheld Mr Pickering's principal claim that he had been an employee of Sealord and had been unjustifiably dismissed but I reduced his remedies significantly, awarding

$16,871.53 for lost remuneration and $15,000 for hurt and humiliation. The remedies were then reduced further by 30 per cent on account of Mr Pickering's contributory conduct, giving a net award of $22,310.07.3

[4] Sealord also challenged a subsequent determination of the Authority dated

9 January 2014 awarding costs to Mr Pickering in respect of the Authority investigation.4 I will deal first with that part of the claim.

Costs in the Authority

[5] In its cost determination the Authority ordered Sealord to pay Mr Pickering:5

• $7,822 in legal costs;

• reimbursement of the $71.56 filing fee; and

• $1,425 towards Ms Tapper's professional fees.

[6] The $7,822 was made up of the usual daily tariff of $3,500 for a two-day investigation meeting; $322 as a contribution towards the costs of submissions the

2 *Pickering v Sealord Group Ltd* [2013] NZERA Christchurch 161.

3 *Sealord Group Ltd v Pickering*, above n 1.

4 *Pickering v Sealord Group Ltd* [2014] NZERA Christchurch 2.

5 *Pickering v Sealord Group Ltd*, above n 4.

Authority Member had invited counsel to make at the end of the investigation and

$500 as a contribution towards the costs submissions made by Ms Sharma.

[7] Sealord objects to the two contributions ordered towards counsel's submissions by the Authority. The Authority explained its reasoning for including those particular items in its costs award and I have not been persuaded that it acted inappropriately in so doing.

[8] Mr Kiely also challenged the award of $1,425 made by the Authority on account of Ms Tapper's professional fees. Ms Tapper was one of Mr Pickering's witnesses. Mr Kiely claimed that her fees were "unnecessarily and unreasonably incurred." Mr Kiely made a similar submission to the Authority and in its costs determination dated 9 January 2014, the Authority noted that while Ms Tapper's

figures were not wholly relied upon, her evidence was useful.6 It also specifically

held that her claimed costs were reasonable. In those circumstances, I do not propose to interfere with the Authority's award under this head.

[9] Ms Sharma cross-challenged in respect of the Authority's costs award submitting that Mr Pickering was entitled to an increase in the daily tariff to his costs on account of the fact that he had to address "a raft of 11th hour unsubstantiated claims raised by Sealord, and which were unfounded".

[10] The Authority was better placed than this Court to determine the merits or otherwise of Ms Sharma's contentions in respect of the "11th hour unsubstantiated claims". I have not been persuaded that it erred in its approach of applying the accepted notional daily tariff in the way that it did. Both the challenge and cross-challenge in respect of the Authority's costs award are, therefore, dismissed.

Costs on the de novo challenge

[11] As noted in a number of recent decisions, under cl 19(1) of sch 3 of the

Employment Relations Act 2000 (the Act) and reg 68(1) of the Employment Court

6 *Pickering v Sealord Group Ltd*, above n 4, at [29]-[30].

Regulations 2000 (the Regulations), the Court has a broad discretion in fixing costs.7

That discretion must always be exercised according to principle. The relevant principles are well established and were not disputed in the present case.8 The Court looks to determine what would be reasonable costs for the successful party in conducting the particular litigation in question and then decides what, in all the circumstances, would be a reasonable contribution for the unsuccessful party to make towards those costs. Normally a 66 per cent contribution of the reasonable costs so determined is regarded as fair and reasonable but that percentage contribution may need to be adjusted upwards or downwards depending upon the

circumstances.

[12] As noted above, Ms Sharma advised that Mr Pickering had incurred costs in connection with the challenge amounting to $92,291 plus GST. Detailed timesheets were provided and counsel submitted that the costs claimed on the challenge were reasonably incurred. Mr Kiely put forward several reasons why Sealord disputed that proposition and submitted that a more appropriate figure for reasonable costs would be "approximately $82,000.00".

[13] Having considered the respective submissions and the costs particulars provided, I consider that Mr Kiely's concession is fair and realistic and, as a starting point, I accept that reasonable costs in conducting the six-day substantive hearing would be $82,000.

The Calderbank offers

[14] Sealord made two Calderbank offers dated 27 August 2014 and

9 September 2014 respectively. Mr Kiely submitted that in neither case did the remedies awarded to Mr Pickering exceed the amount offered to settle. Mr Kiely noted that while the Court of Appeal had concluded that the normal effect of a successful Calderbank offer was to reverse the costs position, it was Sealord's

submission in the present case that no order should be made in relation to costs

7 *Rodkiss v Carter Holt Harvey Ltd* [2015] NZEmpC 147 at [54] and *Hoff v The Wood Lifecare*

(2007) Ltd [2015] NZEmpC 156 at [4].

8 *Victoria University of Wellington v Alton-Lee* [2001] NZCA 313; [2001] ERNZ 305 (CA) at [48]; *Binnie v Pacific*

Health Ltd [2003] NZCA 69; [2002] 1 ERNZ 438 (CA) at [14] and *Health Waikato Ltd v Elmsly* [2004] 1 ERNZ

172 (CA).

incurred after the date of the offer.9 Mr Kiely submitted that, "essentially those costs relate to final preparation for the hearing and attendance at the hearing itself."

[15] The hearing was due to commence on 15 September 2014. Sealord's first Calderbank offer dated 27 August 2014 was made up of $13,500 compensation for hurt and humiliation, $25,000 for lost remuneration (with deduction for tax) and a total of $11,500 as a contribution towards Mr Pickering's legal costs to date, including costs in the Authority. The offer remained open for acceptance until

5.00 pm on Tuesday, 2 September 2014, unless extended by Sealord. The final sentence of the letter of offer stated:

If this timeframe presents any difficulty in terms of contacting Mr Pickering because he is overseas please advise us so that the deadline may be extended to allow Mr Pickering a full opportunity to consider this offer.

[16] Mr Pickering was at sea when that offer was received and Ms Sharma sought an extension of the deadline until Friday, 5 September 2014. The extension was granted. By letter dated 5 September 2014, Mr Pickering rejected Sealord's offer and made his own Calderbank offer, seeking amounts in total greater than the amounts awarded by the Authority.

[17] By letter dated 9 September 2014, Sealord increased its Calderbank offer, increasing the compensation for hurt and humiliation to $15,000, the amount offered for lost remuneration was increased to $35,000 and the contribution towards legal costs was increased to $25,000. That offer was rejected in a letter from Ms Sharma dated 12 September 2014.

[18] As noted in *Rodkiss*, in ascertaining whether a final judgment exceeded the value or benefit of a Calderbank offer, it is necessary to compare the quantum of the judgment, combined with any likely order as to costs as at the date of the settlement offer, with the value or benefit of the offer itself.10 Putting to one side the tax deduction referred to which there was no evidence of and which I consider is not a

relevant factor in the exercise, the value of Sealord's first Calderbank offer was

9 *Bluestar Print Group (NZ) Ltd v Mitchell* [2010] NZCA 385, ERNZ 446, at [24].

10 *Rodkiss v Carter Holt Harvey Ltd*, above n 6, at [34]-[37].

$50,000. That figure is then to be compared with the quantum of the judgment

($22,310.07) plus the likely costs award as at the date of the offer.

[19] In his submissions, Mr Kiely referred to correspondence from Ms Sharma, showing that Mr Pickering's pre-offer costs amounted to $43,255. Mr Kiely did not challenge that figure as such but he calculated that on a percentage basis it would equate to an amount of $38,500 against his suggested reasonable costs figure of

$82,000.

[20] Accepting that analysis, the quantum of the judgment ($22,310.07) plus costs of $38,500 totalled $60,810.07. As that figure exceeded the value of the first Calderbank offer, it means that the offer is not relevant to this costs award exercise.

[21] The value of Sealord's second Calderbank offer dated 9 September 2014, however, was for $75,000 which means that had Mr Pickering accepted that offer he would have been significantly better off than he was in proceeding with the Court hearing.

[22] Ms Sharma's response to that proposition, however, was that the offer was not made within a reasonable time before the hearing which is the requirement in reg 68(1) of the Regulations dealing with the Court's discretion as to costs.

[23] Sealord's second Calderbank offer was dated Tuesday, 9 September 2014 and the offer remained open for acceptance until 1.00 pm on Friday, 12 September 2014, unless extended. Ms Sharma received the letter at 3.30 pm on Tuesday, 9 September

2014 but she was unable to attend to it immediately because she was involved in a mediation that afternoon. She forwarded the letter to Mr Pickering the following day.

[24] The problem was that Mr Pickering was no longer available. He explained his unusual situation in an affidavit to the Court:

8. In preparation of the Court hearing, I had to take a two week trip off on no pay so that I could attend it. As the main breadwinner this was a real concern for me and my partner Audrey. After thinking about it long and hard, I made plans to go hunting in the Marlborough Sounds,

(the Sounds) the week before the hearing as a means of getting food on the table for my family, and to tide us over the hearing week. Audrey and I have a blended family, and one child between us. Two of our children are in their teens and this makes for a hefty food bill on our very limited income. As I saw it out of necessity a hunting trip was the best way to deal with our living situation, at a time when I could not draw an income to provide for my family. As the main provider, my first priority is to the welfare of my family, and that includes food on the table.

9. On Tuesday 9 September I waited until about 15:00 hours before deciding to leave for the Sounds. I figured that if I had not heard from Sealord by this late stage, my counter-offer was not going anywhere. Audrey was aware that she had authority to act on my behalf, if she could not get in contact with me. At the end of the day it would have been a lot more straightforward for me if Sealord had presented its offer sooner than later, because by this late stage I felt like I was between a rock and a hard [place]. We simply did not have the income to survive on Audrey's small wages for two weeks, and yet based on Sealord's treatment of me I could not be certain that I would even hear back at such a late stage. I felt that with the hearing so close it was hard to think that Sealord was treating it seriously.

10. I am a regular hunter and fisher in the Sounds. While I tend to carry my cell phone with me, service in the region is unreliable, with many dead spots which you can't be certain of when you are in the bush. However, it is no different to me being at sea, where the same situation applies. When I did not hear anything from Audrey by late afternoon I just assumed that my counter offer had been declined by Sealord at that late stage. I felt sceptical about the whole situation. It was no different to my offer in the Authority, where Sealord rejected it without any counter offer being made.

11. ... When I got home on Saturday evening, (13 September 2014), Audrey told me about Sealord's later offer and that she couldn't get hold of me. She told me that she did not feel confident to accept the offer on my behalf without first talking to me. Therefore, Ms Sharma was instructed to reject the offer late on Friday 12 September 2014.

12. Clearly hindsight is a good thing, but I feel that Sealord should have made the settlement offers to me well beforehand, which would have given me a proper opportunity to consider everything that was at stake rather than to wait until the 11th hour. ...

[25] A supporting affidavit was filed by Mr Pickering's domestic partner, Ms Audrey Craig, who described how at the relevant time she was working the early morning shift at PAK'nSAVE in Richmond, Nelson. In reference to the second Calderbank offer Ms Craig deposed:

4. Our home computer received Sealord's 9 September 2014 letter on

10 September 2014. I don't remember reading it until late morning. I

tried to contact Aaron but as I suspected by that time he was out of

phone range. I contacted Ms Sharma to explain the situation to her. Despite trying to make further contact with Aaron a number of times around the family, he was out of phone range. On late Friday

12 September, I contacted Ms Sharma and told her we would have to refuse the offer of 9 September.

[26] It is not usual practice for the Court to receive affidavits in support of costs but, responsibly, they were not objected to by Mr Kiely on this occasion and I consider that the passages cited above were highly relevant to the Court's consideration of the second Calderbank offer.

[27] As noted above, Ms Sharma submitted that the Calderbank offer of

9 September 2014 was not made within a reasonable time in terms of reg 68(1) of the regulations. That provision states:

68 Discretion as to costs

(1) 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.

[28] Mr Kiely took issue with Ms Sharma's submission noting that in *Health Waikato Limited v Van der Sluis*, the Court of Appeal considered 12 days was "ample" for appreciation of that offer.11 In *Van der Sluis* the Court of Appeal stated:12

The offer was made, effectively, 24 February 1995. The trial proper did not begin until 9 March 1995. (The peculiar voir dire can be disregarded.) There were 12 clear days between those dates. Trial preparation already was advanced ... We think 12 days was ample for a fair appreciation and decision upon the $10,000 (repeated) offer.

[29] In the present case, there were effectively only four clear days between the making of the offer on the afternoon of Tuesday, 9 September 2014 and the commencement of the trial on Monday, 15 September 2014. In all the circumstances, I do not consider it can be said that Sealord's 9 September Calderbank offer was, in terms of reg 68(1), made a reasonable time before the

hearing. Although it is not a requirement under the Regulations, Mr Pickering was

11 *Health Waikato Ltd v Van der Sluis* [1997] ERNZ 236 9CA), at 245.

12 *Health Waikato Ltd v Van der Sluis,* above n 10, at 245.

able to demonstrate that he had been prejudiced by the lateness of the offer. For these reasons, I do not consider the second Calderbank offer to be relevant to the costs award the Court is now called upon to make.

Interlocutory matters

[30] Sealord has claimed costs in respect of four interlocutory matters. The first was an application for an urgent stay of payment of the Authority award. I agree with Ms Sharma, however, that the application for an urgent stay could have been avoided by Sealord had it taken steps earlier to respond to Mr Pickering's enforcement action. The second interlocutory matter was an application made on behalf of Mr Pickering for leave to file a statement of defence and cross-challenge out of time. Sealord was awarded costs on that application. The third interlocutory matter was an unsuccessful application by Mr Pickering for an order requiring Sealord to pay into Court interest on the remedies awarded by the Authority. Again, Sealord was awarded costs on that application. The final matter was an unsuccessful application by Mr Pickering for leave to admit affidavit evidence from certain witnesses.

[31] I accept that Sealord is entitled to costs on the final three interlocutory matters described. Mr Kiely seeks a contribution in the sum of $750 in relation to each application which, he notes, "is significantly less than the actual costs incurred." I accept that submission and award Sealord a total sum of $2,250 under this head.

Goods and Services Tax (GST)

[32] Mr Pickering claims GST on the costs awarded to him on the basis that GST is not recoverable by him as an individual not registered for GST purposes. Mr Kiely disagreed with the assertion that GST should be paid on the costs awarded noting that the historical approach of the Court has been to exclude GST from cost awards is in keeping with the High Court's general approach of GST neutrality.

[33] For the reasons mentioned in *Rodkiss*, I prefer the High Court's neutral approach to GST and I decline to make any specific award under this head.13

Disbursements

[34] The issues in contention under this head of claim related to Ms Tapper's fees which amounted to $2,340. Mr Kiely submitted that Ms Tapper's evidence was neither necessary nor reasonable. He also noted that the invoice included a charge of

$1,800 for "*preparation of evidence and attendance and adjudication"* which counsel submitted could not be justified as Ms Tapper gave the same evidence in Court as she had given in the Authority.

[35] Ms Sharma was critical of Sealord for allegedly failing to provide all relevant information to enable Mr Pickering to calculate his future loss of earnings claim. It seems to me, however, that accurate evidence was available, through one of Sealord's witnesses, to enable Mr Pickering's lost remuneration to be correctly calculated. If there were any doubts or uncertainties about that issue then it was up to Ms Sharma to make further pre-trial inquiries or seek appropriate disclosure but, for some reason, those matters were not pursued. The Court obtained no assistance from Ms Tapper in relation to the lost remuneration claim but in my substantive judgment I was at pains to point out that no criticism could be levelled at Ms Tapper in relation to the evidence she presented because I am satisfied that, throughout, she would have been acting under instructions in the matter.

[36] For the reasons explained, I decline to make any award in respect of

Ms Tapper's fees.

Interest

[37] Mr Pickering sought accrued interest on the amount awarded by the Authority which had been paid into Court in an interest-bearing account pending the outcome

of the substantive proceeding. On his behalf Ms Sharma submitted:

13 *Rodkiss v Carter Holt Harvey Ltd*, above n 6, at [45]-[49].

... as the successful party in the Authority, Mr Pickering was entitled to the use of the remedies awarded him up to judgment day, (27 May 2015). Therefore, if Mr Pickering had invested the funds on his own accord, he would have been entitled to accrued interest up until judgment day.

[38] Ms Sharma's submission is correct in so far as it goes but the reality is that the Authority's determination has now being replaced by the substantive judgment of this Court. Had the Authority's award been paid out to Mr Pickering, Sealord would no doubt have sought an appropriate refund of interest in its pleadings. As the funds were instead paid into a Crown interest-bearing account the Court, in keeping with its equitable jurisdiction, is now able to ensure a just result through this costs award exercise. Mr Pickering is entitled to interest accrued on the amount of $22,310.28 which he was awarded by the Court. The balance of the accrued interest is to be paid to Sealord.

Costs on application

[39] Ms Sharma has sought a contribution of $3,500 towards, "the considerable time in the filing of this application, and the time spent in attempting to resolve the matter with Sealord, all to no avail, but not without the real possibility to do so."

[40] I accept that counsel is entitled to a contribution in respect of her costs submissions which were helpful to the Court but I do not accept that it is appropriate for such costs to include attendances between counsel in endeavouring to resolve the issue of costs without further reference back to the Court. I consider that it would be completely unproductive for the Court to become involved in such an exercise which would almost inevitably require the Court to try and make some assessment of where the blame lay between counsel for failing to reach agreement on the issue.

[41] I allow $1000 as a contribution under this head.

Conclusions

[42] In my substantive judgment, I made the point that any award of costs would need to take account of the fact that on its challenge, Sealord had a large measure of

success in relation to remedies.14 To their credit, both counsel accept that Sealord's

measure of success in this regard can best be provided for by a reduction in the usual

66 per cent starting point to a 50 per cent contribution. I agree with that approach.

[43] In summary, Mr Pickering is awarded costs (rounded up) in the sum of

$48,070 made up as follows:

Authority costs and disbursements: $9,318.56

Costs on the de novo challenge:

(50 per cent of $82,000) $41,000

Sub-Total $50,318.56

Less allowance on interlocutories: - $2,250.00

Total: $48,068.56

[44] In addition, Mr Pickering is entitled to accrued interest earned on $22,310.28 of the monies paid into Court. The balance of interest accrued is to be paid out to Sealord. The Registrar is to arrange for these payments to be made.

A D Ford

Judge

Judgment signed at 11.30 am on 17 September 2015

14 *Sealord Group Ltd v Pickering,* above n 1, at [89].
