Employment Court of New Zealand

Shanmuganathan v Powernet Limited [2015] NZEmpC 160 (17 September 2015)

Last Updated: 23 September 2015

IN THE EMPLOYMENT COURT CHRISTCHURCH

[2015] NZEmpC 160

EMPC 285/2014

IN THE MATTER OF a challenge to a determination of the

Employment Relations Authority

BETWEEN KANA SHANMUGANATHAN Plaintiff

AND POWERNET LIMITED Defendant

Hearing: (on the papers by submissions filed on 27 July and 11 August

2015)

Counsel: M Thomas, counsel for the plaintiff

J Copeland, counsel for the defendant

Judgment: 17 September 2015

COSTS JUDGMENT OF JUDGE B A CORKILL

[1] In my substantive judgment of 2 July 2015 I found that the decision of PowerNet Limited (PowerNet) that serious misconduct had occurred warranting demotion was not justified, and that Mr Shanmuganathan's personal grievance was accordingly established.1 I then ordered Mr Shanmuganathan to be reinstated which would take effect on a date to be determined following mediation and the filing of submissions and the Court's consideration of those. The order of reinstatement would be subject to conditions which would apply when Mr Shanmuganathan was reinstated to his former role. I held that no order of financial remedies was, in the circumstances, appropriate.

[2] Thereafter, the parties attended mediation and filed a joint memorandum as to conditions which had been agreed in the course of that process. Accordingly, in a

1 *Shanmuganathan v PowerNet Ltd* [2015] NZEmpC 104.

further judgment of 28 July 2015 I made an order for reinstatement of Mr Shanmuganathan to the role of System Control Manager, subject to eight conditions.2 I indicated that I would deal with issues as to costs thereafter.

[3] Mr Shanmuganathan through his counsel, Ms Thomas, applied for costs in two respects.

[4] The first related to costs in the Employment Relations Authority (the Authority). In its costs determination,3 the Authority ordered Mr Shanmuganathan to pay PowerNet costs in the sum of $5,000. Having regard to the outcome in the Court, Mr Shanmuganathan sought to have that order set aside, and an order made that PowerNet pay him $5,000.

[5] Secondly, costs in the Court were sought. It was submitted by Ms Thomas that Mr Shanmuganathan incurred costs of $23,529 GST inclusive, 66 per cent of which are sought. An order for a full recovery of disbursements was also sought.

[6] For PowerNet, Ms Copeland, opposed these applications. Ms Copeland submitted that the Court did not have jurisdiction to consider the Authority's costs. In relation to the Court's costs, she submitted that the notional starting point, being

66 per cent of reasonable costs, should be reduced to reflect the lack of success which Mr Shanmuganathan had in the Court in that he did not recover financial remedies; and because PowerNet unnecessarily incurred costs in attending the Court-appointed mediation; she submitted that a Calderbank offer had been made offering Mr Shanmuganathan promotion to Outage Planning Manager, subject to conditions similar to those which were ultimately negotiated at mediation and which were then incorporated as conditions of the Court's order of reinstatement.

[7] I begin by considering the position with regard to the Authority. I do not accept Ms Thomas' submission that the Court does not have jurisdiction to consider the issue of costs in the Authority. Such a possibility is well established. In *PBO*

(formerly Rush Security Limited) v Da Cruz, a full Court stated:[4]

2 *Shanmuganathan v PowerNet Ltd* [2015] NZEmpC 125.

3 *Shanmuganathan v PowerNet Ltd* [2014] NZERA Christchurch 197.

4 *PBO (formerly Rush Security Limited) v Da Cruz* [2005] NZEmpC 144; [2005] ERNZ 808.

[12] Clause 19 of sch 3 confers wide discretionary powers on the Court to award costs.

19 Power to award costs

(1) The Court in any proceedings may order any party to pay any other party such costs and expenses (including expenses of witnesses) as the Court thinks reasonable.

(2) The Court pay apportion any such costs and expenses between the parties or any of them as it thinks fit, and may at any time vary or alter any such order in any such manner as it thinks reasonable.

[13] We find that the words "in any proceedings" refers to proceedings in both the Authority and the Court. If an award of costs by the Authority is challenged or is relevant to a challenge, it is open to the Court to adjust the Authority's costs award if the outcome of the substantive case in the Court warrants that.

[8] In the Authority's determination of 2 October 2014,5 it found that the

applicant's demotion was unjustified and disadvantaged him. It ordered payment of

$1,875 gross in lost wages and compensation in the sum of $2,000. However, the applicant's application for reinstatement was declined. In its costs determination6 the Authority was required to consider a submission that an order for indemnity costs should be made against Mr Shanmuganathan, because a Calderbank offer had been made which was more beneficial to him than the amount contained in the Authority's determination. The Authority was not persuaded that it was appropriate to order

indemnity costs, but did conclude PowerNet was entitled to costs. There had been a one-day investigation meeting where matters were not factually or legally complex. The normal daily tariff of $3,500 was increased by $1,500 having regard to the Calderbank offer. Mr Shanmuganathan was accordingly ordered to pay PowerNet costs in the sum of $5,000.

[9] In the Court, there has been a different outcome.7 Mr Shanmuganathan did succeed in obtaining an order of reinstatement, although I was not persuaded he should receive any financial remedies.

[10] Having regard to the principles outlined in *Da Cruz*, I consider that the award of costs made by the Authority is relevant to the challenge. Whereas the Authority

declined to make an order for reinstatement, the Court was persuaded that such an

5 *Shanmuganathan v PowerNet Ltd* [2014] NZERA Christchurch 153.

6 *Shanmugnathan v PowerNet Ltd*, above n 3.

7 *Shanmuganathan v PowerNet Ltd*, above n 1.

order should be made. This has always been the primary remedy sought by Mr Shanmuganathan, and it is appropriate in light of the outcome which has been reached in the Court, for the Court to consider the possibility of setting aside the Authority's determination as to costs, and to award Mr Shanmuganathan costs.

[11] However, I do not accept Ms Thomas' submission that the amount Mr Shanmuganathan should receive in respect of costs in the Authority is $5,000. The Calderbank offer made by PowerNet prior to the investigation meeting is now irrelevant, since

it involved a monetary offer, but did not offer reinstatement. I consider the correct approach is to set aside the Authority's determination as to costs, and to order PowerNet to pay the sum of $3,500 to Mr Shanmuganathan, being the normal daily tariff adopted by the Authority.

[12] I turn now to consider the position as to costs in the Court. It is well established from Court of Appeal decisions that the Employment Court is required first to determine whether costs incurred by a successful party were reasonably incurred, and then after an appraisal of all relevant factors, decide at which level it is reasonable for the unsuccessful party to contribute to the successful party's costs. Sixty-six per cent is generally regarded as a starting point, although the Court has a discretion to consider whether there are factors justifying an increase or a decrease,

given the discretionary nature of the assessment.8

[13] As neither party raised any issues as to GST, I adopt the approach which I described as GST neutral in *Wills v Goodman Fielder New Zealand Limited*;9 such is the usual practice of the High Court.10

[14] Net of GST, Mr Shanmuganathan's invoiced costs were $17,341.90. Ms Copeland helpfully provided invoices which confirm the amount that PowerNet

incurred for the purposes of the challenge. Having regard to my assessment of both

8 *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); and *Belsham v Ports of Auckland Ltd* [2014] NZCA 206, [2014] ERNZ 66.

9 *Wills v Goodman Fielder New Zealand Ltd* [2015] NZEmpC 30 at [23]- [24].

10 *Burrows v Rental Space Ltd* [2001] NZHC 770; (2001) 15 PRNZ 298 (HC). This approach has also been confirmed in the Court of Appeal: *Thoroughbred & Classic Car Owners' Club (Inc) v Coleman*, unreported, CA 203/93, 25 November 1993 at 2-3.

sets of invoices, and to the time devoted to the resolution of the challenge both by way of preparation and during the hearing, as well as attendances following the hearing, I am satisfied that the amount charged to Mr Shanmuganathan is an appropriate starting point for the purposes of the costs application.

[15] The real issue is whether there should be a reduction from 66 per cent of those costs, for the reasons advanced by Ms Thomas.

[16] The leading case with regard to the position where there is mixed success is found in dicta of the Court of Appeal in *Elmsly* where the following observations were made:11

[39] It is not usual in New Zealand for costs to be assessed on an issue by issue basis, albeit that it is common enough, where both parties had a measure of success at trial, for no order as to costs to be made. The reluctance to assess costs on an issue by issue basis probably stems from the reality that in most cases of partial success it is not practical to separate out from the total costs incurred by the parties what was incurred in relation to the individual issues before the Court.

[40] The result of the present case was that [the respondent] was awarded relief and it would appear (given that there was no *Calderbank* letter) that he had to go to Court to receive that relief. Conventional practice (probably influenced by the way in which the old payment in rules used to operate) has been to regard a plaintiff in this situation as having an entitlement to costs. While this is no doubt a simplistic and not entirely logical approach, it is reasonably straightforward to apply. Further, it is not unjust to defendants, providing Judges are prepared to react appropriately where there has been a *Calderbank* offer. In any event, whatever the merits of the current costs practice, there is nothing out of the ordinary in the conclusion of the Judge that [the respondent] was entitled to costs.

[17] Subsequently the same Court stated in *White v Auckland District Health*

*Board:*12

[46] It has been recognised by this Court however that where the parties have achieved mixed success, it is not necessarily easy to determine who won the case so as to be entitled presumptively to costs. In such cases, where both parties have achieved a measure of success at trial it may be appropriate for no order for costs to be made: *Health Waikato Ltd v Elmsly*

... at [35].

11 *Elmsly*, above n 8.

12 *White v Auckland District Health Board* [2008] NZCA 451, [2008] ERNZ 635. See also *Smith v*

Life to the Max Horowhenua Trust [2011] NZEmpC 7 at [15].

[18] Noting the comment that sometimes it is not practical to separate out from total costs incurred by parties what was incurred in relation to individual issues, I observe that it is possible in this instance to recognise that Mr Shanmuganathan had significant success in obtaining the order for reinstatement. That he did not obtain financial remedies was as a result of the application of s 124 of the Employment Relations Act 2000 (the Act), which provides that the remedy should be reduced if there is contributing behaviour by the employee. In this case, the application of s

124 of the Act was straightforward. I agree that there should be some reduction to reflect the fact that Mr Shanmuganathan did not succeed in obtaining such remedies, but since relatively little time was devoted to this issue at the trial, it should be modest.

[19] The second point raised by Ms Thomas relates to the question of whether costs of the Court-ordered mediation were unnecessarily incurred by PowerNet. There are two factors relating to this issue.

[20] The first is that no claim was made by Mr Shanmuganathan for the cost of his counsel's attendance at mediation; that was an appropriate position to take; since there was no inclusion of costs relating to the mediation in the plaintiff's claim for costs, I do not consider it necessary to reduce the quantum of Court-ordered costs further for that factor.

[21] The second point relates to the fact that the Calderbank offer proposed reinstatement not to Mr Shanmuganathan's former role of System Control Manager which was the order being sought from the Court, but to another role. That offer was made on 17 June 2015, after the substantive hearing, and before the Court's judgment was issued. It was declined with Ms Thomas indicating that Mr Shanmuganathan wished to receive the Court's judgment. Mr Shanmuganathan in fact obtained an order of reinstatement to System Control Manager. The position to which Mr Shanmuganathan was reinstated was of more benefit to him than was the position which was offered on a Calderbank basis. Then it was appropriate for the parties to attend mediation to facilitate constructive discussion on the question as to how the employment relationship would be conducted following reinstatement.

Accordingly, I do not consider there should be a reduction of costs to reflect the fact

PowerNet attended mediation.

[22] Standing back, I consider that Mr Shanmuganathan should be awarded costs which are determined by taking 50 per cent of the fair and reasonable costs, as assessed earlier. That is, he should be paid the sum of $8,670.95.

[23] Finally, I deal with the claim for disbursements. No issue is taken as to those by Ms Thomas. In fact three of them, being forms and incidentals, toll calls, and photocopying and printing were included in Mr Shanmuganathan's invoices which have already been considered. I allow the remaining two, a filing fee and a hearing fee totalling $1,206.24.

[24] In summary, therefore, I make the following orders:

a) The costs determination of the Authority is set aside, which means Mr Shanmuganathan should be reimbursed the sum of $5,000 which he paid to PowerNet in respect of that determination.

b) PowerNet is to pay Mr Shanmuganathan costs in the Authority in the sum of $3,500.

c) PowerNet is to pay Mr Shanmuganathan costs in the Court in the sum of $8,670.95, and disbursements of $1,206.24.

B A Corkill

Judge

Judgment signed at 2.45 pm on 17 September 2015