Employment Court of New Zealand

Smartlift Systems Limited v Armstrong [2021] NZEmpC 107 (8 July 2021)

Last Updated: 15 July 2021

IN THE EMPLOYMENT COURT OF NEW ZEALAND CHRISTCHURCH

I TE KŌTI TAKE MAHI O AOTEAROA ŌTAUTAHI

[2021] NZEmpC 107
EMPC 419/2019

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
AND IN THE MATTER	of an application for costs
BETWEEN	SMARTLIFT SYSTEMS LIMITED Plaintiff
AND	BROCK ARMSTRONG First Defendant
AND	GRAEME HAIKA Second Defendant

Hearing:	(on the papers)
Appearances:	L Mathieson, advocate for plaintiff R Thompson, advocate for defendants
Judgment:	8 July 2021

COSTS JUDGMENT OF JUDGE B A CORKILL

Introduction

[1] This judgment resolves costs issues arising from the various steps taken in this proceeding, both before and at the hearing of the result of the plaintiff's non-de novo challenge. Two aspects of that challenge were disallowed, and only partially allowed in respect of a third issue.1

1 *Smartlift Systems Ltd v Armstrong* [2021] NZEmpC 66.

[2] At the conclusion of my judgment, I reserved costs, inviting the parties to discuss these. I indicated a timetable for any necessary application.

[3] A consensus on costs was not able to be achieved. The defendants have now brought an application arguing in essence that costs should follow the primary event, and that on a 2B analysis, a suitable award is $32,504; that disbursements of $2,388.49 should also be met; and that there should be an uplift of 30 per cent, on both costs and disbursements, making a total of $45,360.23, in light of offers made to settle both the defendants' claims, and, after hearing, their costs. The claim for disbursements was subsequently withdrawn; the amended claim therefore totalled $42,971.74.

[4] The plaintiffs' position is that the amount claimed is excessive, that the Court should take into account the partial success which the company achieved, and that it should also take into account the fact it was necessary for the Court to adjourn the original hearing because of a needless problem caused by one of the defendants' advocates.

Background

[5] In order to resolve the various issues, it is necessary to say something about the procedural background.

[6] Smartlift Systems Ltd's (Smartlift) challenge related to a determination of the Employment Relations Authority which dealt with issues arising from a decision to terminate the employment of Mr Armstrong and Mr Haika on the grounds of redundancy.2

[7] Mr Armstrong and Mr Haika both claimed that Smartlift unjustifiably dismissed them, alleging substantive and procedural flaws. The Authority found that the restructure was substantially justified, but there were procedural errors. Accordingly, remedies were awarded. The company challenged the procedural findings made against it and the extent of remedies awarded.

2 *Armstrong v Smartlift Systems Ltd* [2019] NZERA 592 (Member van Keulen).

[8] The proceedings in the Court started life when Smartlift filed its statement of claim on 13 November 2019; on the same day it applied for a stay of proceedings, which if granted would prevent enforcement of the monetary orders made by the Authority. An amended application was filed on 19 November 2019 and served thereafter on the defendants.

[9] Mr Armstrong and Mr Haika filed a statement of defence within the period allowed for doing so, on 17 December 2019. On the same day they filed an application for leave to file a notice of opposition to the amended application for stay out of time, as it was at that point realised the latter document had not been filed within 14 days of service of the notice of application.

[10] For reasons I set out in a minute of 1 April 2020, and subsequently recorded in an interlocutory judgment, I granted leave for the filing of the notice of opposition.3

[11] That meant the way was clear for an opposed application for stay of proceedings to be heard. I considered submissions filed by the representatives on the papers and concluded that Smartlift should make a payment into Court on a staged basis.4 This outcome largely reflected the position taken by the defendants, who had argued there should be a payment into Court.

[12] A two-day hearing was then set down to commence on 10 September 2020. Unfortunately, it was necessary to adjourn the fixture. A witness who was to be called for the plaintiff had been contacted directly by one of the representatives for the defendants, Mr Thompson, notwithstanding the fact that the plaintiff was represented. For reasons I outlined in a detailed minute at the time, the witness became stressed and did not attend the Court to give evidence. He provided an affidavit to the Court confirming the circumstances.

[13] As well as adjourning the fixture, I timetabled the filing of evidence and submissions as to these events, before making any findings. I also directed that

3 *Smartlift Systems Ltd v Armstrong* [2020] NZEmpC 80 at [5].

4 At [25].

bundles of documents which had been filed in the Authority should be filed in the Court so as to be able to assess the merits of assertions the Authority had erred.

[14] I then received an affidavit from Mr Thompson, and submissions from both parties. I was provided with an audio copy of the relevant conversation between Mr Thompson (who had recorded it) and the witness, along with a transcript. After considering all the materials filed, I issued a further minute indicating that the conversation that had occurred between Mr Thompson and the witness had been inappropriate because there was a risk of it being interpreted as an unjustified attempt to challenge anticipated evidence; improper pressure had been placed on the witness. However, I accepted that Mr Thompson's assurances he had not intended to breach his ethical obligations, and that he strives to apply standards of the Code of Conduct of the Employment Law Institute of New Zealand of which he is a member.

[15] I also directed that Mr Thompson not cross-examine the witness when called at the resumed hearing; this step was to be taken by the second representative for the defendants, Mr McDonald.

[16] Ultimately, the hearing took place on the date which was subsequently arranged, 16 February 2021. I record that under the directions which had been given by the Court, the witness in question was able to give his evidence without difficulty.

Legal framework

[17] The starting point for the assessment of costs is cl 19 of sch 3 of the Employment Relations Act 2000 (the Act). It confers a

broad discretion. Regulation 68(1) of the Employment Court Regulations 2000 also deals with costs. It provides that, 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 at a reasonable time prior to the hearing, to settle all or some of the matters at issue between the parties.

[18] It is well established that the primary principle is that costs follow the event.5 The discretion to award costs must be exercised judicially, and in accordance with principles.

[19] Finally, the Court's Guideline Scale as to Costs may be a factor in the exercise of the Court's discretion.6

Analysis

[20] In this instance, I consider the appropriate way forward is to undertake a correct 2B assessment of costs for a successful party, and then consider factors which may increase or decrease the resultant figure.

[21] Attached to this judgment is a schedule setting out the amounts claimed for the defendants, and the Court's rulings with regard to each claimed step.

[22] The resultant figure provides a starting point of $22,705.7

[23] Next, I consider the factors which the Court should take into account when assessing a reduction of this figure. There are two:

a. The first relates to the aborted first hearing. Plainly, there should be a reduction for costs thrown away as far as the plaintiff is concerned, and to take into account the subsequent memorandum which was filed by the representative for the plaintiff in connection with the issues the Court had to resolve. A related factor raised by the representative for the defendants was that the fact of the adjournment meant there was a proper opportunity to ensure that all necessary documents were before the Court at the resumed hearing and that this was of real benefit to the Court. I do not think this factor neutralises the extent of any reduction as Mr Thompson argued, because it would have been possible for those

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

6. "Employment Court of New Zealand Practice Directions" <www.employmentcourt.govt.nz> at No 16.

7 Nine and a half days at $2,390 per day.

documents to have been made available to the Court, after a short adjournment for that purpose on the first hearing day.

b. The plaintiffs succeeded partially on the third issue. That too is a factor which supports a reduction of the starting point figure.

[24] Using the approach adopted under the Guideline Scale, I deduct two days to reflect these factors.

[25] I turn now to the question of any increase. For the purposes of this possibility, it is necessary to consider the two offers which were made for the defendants to settle the proceeding and subsequently, costs issues.

[26] The defendants offered to settle the case for $8,800 on 19 August 2020, well before the first hearing date. At the time, the plaintiff's representative, when rejecting the offer, stated that vindication of the plaintiff's reputation was an important reason for proceeding with the hearing.

[27] In my view, the rejection of the offer was unreasonable. The defendants succeeded to a substantially greater extent by obtaining awards totalling $18,000, and vindication of reputation was not achieved.

[28] Mr Thompson submitted there should be uplift of 30 per cent. I consider the appropriate figure is 10 per cent.

[29] To this point, using the figure of $22,705 as the starting point, the balance after taking into account the decreases referred to earlier, and allowing for the increase just mentioned, is $24,975.

[30] A further offer was made after the hearing to settle costs on 18 May 2021, for

$20,000 plus GST, a total of $23,000.

[31] It was unreasonable to reject that offer. The costs incurred by the defendants for preparing a memorandum of costs would have been avoided. I increase the

contribution to costs by 0.5 of one day producing a final total for costs totalling

$26,170.

[32] Mr Thompson submitted the defendants' actual costs were in excess of $56,500 plus GST. In the absence of any information as to the basis of this figure, no sensible cross-check of the scale assessment with the actual costs incurred can be made.

Result

[33] The plaintiff is to pay the defendants $26,170 as a contribution to their costs.

B A Corkill Judge

Judgment signed at 3.45 pm on 8 July 2021

Schedule

Item		Days	Court's Rulings	Reasons
1	Commencement of defence to challenge by defendants	2	1.5	As per Guideline Scale
28	Filing of interlocutory application for filing out of time	0.6	-	Application made as a result of error on part of defendants' representative
30	Filing of written submissions	1.0	-	Application made as a result of error on part of defendants' representative
11	Preparation for first directions conference for application	0.4	0.4	Allowed
13	Appearance at first or subsequent directions conference for application	0.2	0.2	Allowed
29	Filing of opposition to stay of execution of determination	0.6	0.6	Allowed
30	Filing of written submissions to stay of execution of determination	1.0	1.0	Allowed
34	Obtaining judgment	0.3	0.3	Allowed
11	Preparation of first directions conference	0.4	-	Already claimed
12	Filing memorandum for first or subsequent directions conference	0.4	-	Already claimed
13	Appearance at first directions conference	0.2	-	Already claimed
36	Defendants preparation of briefs	2.0	2.0	Allowed
38	Defendants preparation of list of issues, agreed facts,	1.0	-	These steps not taken by defendants

	authorities and common bundle			
39	Preparation for hearing	2.0	2.0	Allowed
40	Appearance at hearing for principal representative	1.0	1.0	Allowed
41	Appearance for second representative (50 per cent of allowance for appearance for principal representative)		0.5	Allowed
			9.5 days	