Employment Court of New Zealand

T & L Harvey Limited v Duncan [2010] NZEmpC 36 (31 March 2010)

Last Updated: 9 April 2010

IN THE EMPLOYMENT COURT

CHRISTCHURCH [2010] NZEMPC 36CRC 5/09

IN THE MATTER OF a challenge to a determination of the Employment Relations Authority

AND

IN THE MATTER OF a claim for costs

BETWEEN T & L HARVEY LIMITED
Plaintiff

AND LEANNE DUNCAN
Defendant

Hearing: By memoranda received 17 and 28 December 2009 and 22 January 2010

Judgment: 31 March 2010

COSTS JUDGMENT OF JUDGE A A COUCH

[1] In my substantive decision of 20 November 2009[1], I invited the representatives of the parties to confer about costs with a view to agreement but with the option of submitting memoranda if they were unable to agree. Both Mr Norris and Ms Ironside have now submitted memoranda.
[2] On behalf of Ms Duncan, Mr Norris seeks an award of costs of $16,723.70 or, alternatively, $21,086.11. The first amount is said to be the total costs actually incurred by Ms Duncan in relation to the proceedings before the Court. The second amount is said to be her "total out of pocket expenses".
[3] Relying on a *Calderbank* offer made in August 2009, Ms Ironside's primary submission is that the defendant's claim for costs should be disregarded and, instead, an award of costs should be made in favour of the plaintiff. Alternatively, she submits costs should lie where they fall. As a second alternative, Ms Ironside submits that the quantum of costs claimed by the defendant is unjustified and ought to be greatly reduced.
[4] Clause 19(1) of Schedule 3 to the Employment Relations Act 2000 confers on the Court a broad discretion to make orders as to costs but, as with all such discretions, it must be exercised judicially and in accordance with principle. The key principles applicable to the Court's discretion to award costs have been set out by the Court of Appeal in three very well known decisions: *Victoria University of Wellington v Alton-Lee[2]*, *Binnie v Pacific Health Ltd[3]* and *Health Waikato Ltd v Elmsly.[4]*
[5] The fundamental purpose of an award of costs is to recompense a party who has been successful in litigation for the cost of being represented in that litigation by counsel or an advocate. A useful starting point is two-thirds of the costs actually and reasonably incurred by that party but that proportion may be adjusted up or down according to the circumstances of the case and the manner in which it was conducted. Ability to pay is also a factor to be taken into account.
[6] The defendant's claim for costs was supported by a series of invoices and time sheets attached to Mr Norris' memorandum. These covered the period from 18 March 2009 until 20 November 2009. For attendances during that period, the defendant was charged a total of $13,003 plus GST for the time of Mr Norris and Mr Witt. She was also charged $777.93 plus GST for disbursements. I accept that these documents accurately record the costs and

disbursements actually incurred by the defendant during the period to which they relate.
[7] The next issue is the extent to which those costs were reasonably incurred in relation to the proceedings before the Court. The first observation which must be made is that some of the costs claimed were incurred before the proceedings in the Court were commenced on 7 April 2009. On that ground, costs totalling $805 plus GST must be excluded.
[8] The second issue which arises is that the defendant incurred significant costs in relation to an application made on her behalf by Mr Norris to strike out the proceedings. That application was made on the grounds that the plaintiff was not a party to the proceedings before the Authority and therefore had no standing to challenge the Authority's determination. The application was founded on a fundamental misunderstanding of the nature of corporate personality and had no possible chance of success. The costs incurred by the defendant associated with that application were not reasonably incurred and must be disregarded. From the time sheets provided by Mr Norris, it appears that this included virtually all of the attendances for which the defendant was charged prior to August 2009. Allowing for some of the unspecified attendances being in relation to the proceedings generally, I find that this requires a further $1,400 plus GST to be disregarded.
[9] I note here that Mr Norris apparently did not charge the defendant for his time attending the telephone conference with me on 24 June 2009 or for subsequently preparing the statement of defence. While that is curious, it is entirely a matter between Mr Norris and his client. There is no scope for awarding a contribution to costs not actually incurred.
[10] The next issue I address is that the defendant was charged for the appearance of Mr Witt as a second advocate at the hearing on 19 and 20 November 2009. She was also charged for meetings between Mr Norris and Mr Witt on several occasions. Parties to litigation are entitled to engage competent representation of their choice and it is appropriate that a successful party be recompensed for the reasonable cost of such representation. Equally, it is open to a party to engage two representatives or to otherwise devote additional resources to the matter over and above that reasonably required. Where a party chooses to do that, however, he or she cannot expect to recover from an unsuccessful opponent any contribution to the extra cost incurred. This was a relatively straightforward case which did not require more than one advocate. I find that this requires a further $2,800 plus GST to be disregarded.
[11] Making these deductions, the balance of the costs actually incurred by the defendant is slightly under $8,000 plus GST. Mr Norris' charge out rate was $140 plus GST per hour. That is not unreasonable for a professional advocate of reasonable skill and experience. At that rate, $8,000 represents a little over 57 hours of work by Mr Norris in relation to this matter. The defendant's case was fully prepared in the course of the Authority's investigation and little work was required to prepare it for presentation to the Court. The plaintiff's case had, however, been expanded by the introduction of several new witnesses. This would have required Mr Norris to spend some time considering that evidence and preparing cross examination. There were no significant legal issues in the case. Rather, it involved simply the application of established principles to the facts as they emerged from the evidence. The hearing, including delivery of an oral judgment, took two days. In the absence of any evidence suggesting that an unusual amount of time was required to prepare and conduct the case, I find that no more than 40 hours was reasonable. On that basis, I find that the costs which were actually and reasonably incurred by the defendant were no more than $5,600 plus GST or $6,300. That suggests a starting point for an award of costs of $4,200.
[12] I turn then to the question of whether that figure ought to be adjusted up or down to reflect the circumstances of the case and the manner in which it was conducted. The circumstances of the case must include any offers of settlement made in the course of the proceedings. In this case, the plaintiff relies on an offer it made in a letter from Ms Ironside to Mr Norris dated 5 August 2009.
[13] In order to put that offer in context, it is necessary to review the essential events prior to the letter being sent:

a. In its determination dated 10 March 2009[5], the Authority ordered the plaintiff to pay the defendant "$5,000.00 compensation pursuant to s.123(1)(c)(i) of the Employment Relations Act 2000" and "$8,034.00 (gross) compensation pursuant to s.123(1)(b) and s.128(2) of the Employment Relations Act 2000".
b. On 7 April 2009, the plaintiff commenced proceedings in the Court by filing a statement of claim challenging the whole of the Authority's determination.
c. On 20 April 2009, the Authority issued a further determination[6] in which it ordered the plaintiff to pay the defendant $2,500 by way of costs.
d. On 29 April 2009, Mr Norris filed on behalf of the defendant an application to strike out the plaintiff's claim on the grounds that the plaintiff had not been a party in the proceedings before the Authority.
e. On 21 May 2009, Ms Ironside filed on behalf of the plaintiff a notice of opposition to that application to strike out.
f. On 24 June 2009, I conducted a telephone conference with Mr Norris and Ms Ironside. After some discussion, Mr Norris accepted that the application to strike out the proceedings was ill-conceived and elected to withdraw it. I then directed the defendant to file a statement of defence by 1 July 2009. I also directed the

parties to further mediation.

g. A statement of defence was filed on 30 June 2009.
h. Mediation appears to have taken place on 30 July 2009 but did not resolve matters.

[14] Against that background, the plaintiff made an offer of settlement in Ms Ironside's letter to Mr Norris dated 5 August 2009, the essential terms of which were:

(a) The bank [sic] will pay Ms Duncan $8,000.00 pursuant to section 123(1)(c)(i) ERA 2000. This sum includes $5,000.00 as awarded by the Authority and a further sum of $3,000 being approximately 50% of the net sum for lost wages awarded by the Authority under s123(i)(b) and s128. ...

(b) The bank [sic] will pay $2,500 towards Ms Duncan's legal costs upon receipt of a GST invoice from you.

(c) The plaintiff will not seek costs on the defendant's failed strike out application in the Employment Court.

...

(f) The offer is inclusive of all costs down until the date of acceptance.

(g) This offer will remain open until Friday, 7 August, 4.00pm. ...

[15] In a letter to Ms Ironside dated 11 August 2009, Mr Norris rejected the offer made by the plaintiff and made a counter-offer of settlement for $20,572.87. This counter-offer was not accepted by the plaintiff and the matter proceeded to a hearing on 19 November 2009.

[16] Following the decision in *Calderbank v Calderbank*,[7] "written offers without prejudice save as to costs" have played an important role in litigation. They encourage claimants to accept reasonable offers of settlement and thereby avoid the offeror incurring the costs of an unnecessary trial. Under the High Court Rules, such offers are provided for in rule 4.10 and their effect is set out in rule 14.11:

14.11 Effect on costs

(1) The effect (if any) that the making of an offer under rule 14.10 has on the question of costs is at the discretion of the court.

(2) Subclauses (3) and (4)—

(a) are subject to subclause (1); and

(b) do not limit rule 14.6 or 14.7; and

(c) apply to an offer made under rule 14.10 by a party to a proceeding (**party A**) to another party to it (**party B**).

(3) Party A is entitled to costs on the steps taken in the proceeding after the offer is made, if party A—

(a) offers a sum of money to party B that exceeds the amount of a judgment obtained by party B against party A; or

(b) makes an offer that would have been more beneficial to party B than the judgment obtained by party B against party A.

(4) The offer may be taken into account, if party A makes an offer that—

(a) does not fall within paragraph (a) or (b) of subclause (3); and

(b) is close to the value or benefit of the judgment obtained by party B.

[17] The Employment Court is not bound by the High Court Rules but I have regard to them as a source of principle.

[18] Offers made in the course of litigation are also dealt with in the Employment Court Regulations 2000. Regulation 68 provides:

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.

(2) Under subclause (1), the Court—

(a) may have regard to an offer despite that offer being expressed to be without prejudice except as to costs; but

(b) may not have regard to anything that was done in the course of the provision of mediation services.

> [19] Further guidance about the manner in which *Calderbank* offers should be taken into account in the exercise of the Court's discretion as to costs is to be found in several decisions of the Court of Appeal. In *Aoraki Corporation Ltd v McGavin*[8], the Court said:

The discretion as to costs is a judicial one to be exercised according to what is reasonable and just to both parties and the public interest in the fair and expeditious resolution of disputes requires that full weight be given to the extent to which costs were properly incurred subsequent to the non-acceptance of an offer of settlement at a figure above the amount eventually awarded in the litigation.

> [20] This view was amplified in *Health Waikato Ltd v Elmsly9* where the Court of Appeal referred to "steely responses by the Courts where plaintiffs do not beat Calderbank offers" being "in the broader public interest".
> [21] It is appropriate when the Court is invited to take account of a *Calderbank* offer to consider first whether it was clearly made and whether it was made at a time which gave the recipient sufficient opportunity to consider it before the costs of preparation for trial were incurred.
> [22] I am satisfied that the offer contained in Ms Ironside's letter of 5 August 2009 was made at an appropriate time. The parties had just completed further mediation and the matter had yet to be set down for hearing. I infer from this that neither party had then started preparation for hearing.
> [23] I am also satisfied that the offer was made clearly. It was in writing and was expressly recorded as being made without prejudice save as to costs. The terms of the offer were payment to the defendant of $8,000 as compensation and a further $2,500 as costs. Those sums were expressed to be inclusive of all costs incurred by the defendant to the date of acceptance. The letter did mistakenly refer in two places to the offer being made by "the bank" but, in the context of the letter as a whole, it was clear that the offer was made by the plaintiff.
> [24] What is not so clear is whether the offer exceeded the value to the defendant of the remedies she was ultimately awarded by the Court. Those remedies were compensation of $5,000 together with $4,230 gross as reimbursement of lost income. The defendant also remained entitled to the award of $2,500 costs made by the Authority.
> [25] $5,000 of the offer of $8,000 compensation met the award made by the Court. The issue, therefore, is whether the offer of a further $3,000 compensation met or exceeded the benefit to the defendant of $4,230 gross as reimbursement of income.
> [26] Both Mr Norris and Ms Ironside addressed this issue by providing me with the opinion of an accountant. Those opinions differed substantially because they were based on different assumptions as to the appropriate tax code applicable to the defendant. In both cases, however, the opinions were based on the amount of tax deductible at source and neither addressed the total amount of tax ultimately payable on the money by the defendant. A proper calculation of that amount requires information about the defendant's other taxable income for the current tax year. That information was not provided but I infer from the evidence I heard that her total income for this tax year will not exceed $48,000. On that basis, the sum ordered by way of reimbursement would be taxable at the rate of 21 per cent which equates to $888.30. This would result in the net value to the defendant of the reimbursement being $3,341.70.
> [27] It follows from this that the $8,000 compensation offered fell a little short of the value to the defendant of the remedies awarded to her by the Court.
> [28] As to costs, the offer of $2,500 satisfied the award made by the Authority and which was sustained by the Court. The sufficiency of the offer in this regard, therefore, turns on whether, at the time the offer was made, the defendant was justly entitled to a contribution to the costs she incurred while the proceedings were before the Court.
> [29] As I have noted above, almost all of the costs actually incurred by the defendant in relation to the Court proceedings prior to 5 August 2009 were associated with the application to strike out the plaintiff's claim. The defendant could not have been entitled to a contribution to those costs.
> [30] On the other hand, the plaintiff incurred costs in responding to the application to strike out to which it would have been entitled to a contribution. Ms Ironside has not quantified what those costs were and, instead, relies on the High Court Rules to submit that the plaintiff should receive an award of $960 costs in respect of that application. On balance, I find that the plaintiff would have been entitled to an award of $500 costs on that application.
> [31] What this means is that the overall monetary value to the defendant of the offer made on 5 August 2009 was slightly higher than the value to her of the remedies finally awarded.
> [32] In some cases, an important factor in deciding the weight to be given to a *Calderbank* offer is whether there are other non-monetary factors involved. In particular, there have been a number of cases in which the courts have decided that a desire for vindication made it reasonable for a party to refuse an offer which equalled or exceeded the monetary remedies ultimately obtained. In this case, there are no such factors. The defendant had the benefit of the Authority's determination which included a public statement that she had been unjustifiably

dismissed. The plaintiff's offer did not seek to disturb that aspect of the determination.

[33] That being so, I find that the defendant's rejection of the offer made in Ms Ironside's letter of 5 August 2009 was unreasonable. Applying the guidelines expressed by the Court of Appeal in the judgments referred to earlier, I must give this considerable weight in the overall exercise of my discretion as to costs.

[34] A final factor I take into account is that, although the plaintiff was unsuccessful in its challenge to the conclusion that the defendant had been unjustifiably dismissed, it was successful to an extent in having the remedies reduced.

[35] Ms Ironside submits that I should give effect to the *Calderbank* offer contained in her letter of 5 August 2009 by ordering the defendant to contribute to the costs incurred by the plaintiff after that offer was rejected. While I have seriously considered that option, I have come to the view that it would not be just in all the circumstances of this case. Rather, I accept Ms Ironside's first alternative submission that costs and disbursements should lie where they fall.

Comment

[36] In my substantive decision, I said:

[45] I reserve the question of costs. Compared to the Authority's determination, Ms Duncan has obtained somewhat less by way of remedies but in terms of the substantive issue, the plaintiff has been unsuccessful. In my view, Ms Duncan is entitled to a reasonable contribution to the costs she has incurred in very largely resisting the plaintiff's challenge.

[37] That observation was made without knowing that the defendant had received a *Calderbank* offer which had been unreasonably rejected. In light of that offer, the conclusion I reach is necessarily different.

[38] In making the defendant's claim for costs in the Authority, Mr Norris disclosed that he had rendered invoices for $15,430.78 for his services in that jurisdiction. In his memorandum to the Court, Mr Norris recorded that the additional amount the defendant has been charged since the proceedings in the Authority concluded is $16,723.70. Thus, the total amount the defendant has been charged for representation in her personal grievance is $32,154.48. That sum is entirely out of proportion to the modest size and straightforward nature of the defendant's claim and is, on the face of it, unjustifiable. Although she has succeeded in her claim, the defendant is more than $20,000 out of pocket and has only a pyrrhic victory. Unfortunately, however, that is not a matter within the jurisdiction of this Court to address.

Conclusion

[39] There will be no order for costs or disbursements.

A A Couch

Judge

Signed at 3.00 pm on 31 March 2010.

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[1] CC 19/09
[2] [2001] NZCA 313; [2001] ERNZ 305
[3] [2003] NZCA 69; [2002] 1 ERNZ 438
[4] [2004] NZCA 35; [2004] 1 ERNZ 172
[5] CA 28/09
[6] CA 28A/09
[7] [1975] 3 All ER 333
[8] [1998] NZCA 88; [1998] 1 ERNZ 601 at 625

9 [2004] NZCA 35; [2004] 1 ERNZ 172 at 183
