Employment Court of New Zealand

Thorne v Rolton [2020] NZEmpC 14 (26 February 2020)

Last Updated: 3 March 2020

IN THE EMPLOYMENT COURT OF NEW ZEALAND CHRISTCHURCH

I TE KŌTI TAKE MAHI O AOTEAROA ŌTAUTAHI

[2020] NZEmpC 14
EMPC 377/2018

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
AND IN THE MATTER	of an application for costs
BETWEEN	LANCE THORNE Plaintiff
AND	JOHNATHON ROLTON Defendant

Hearing:	On the papers
Appearances:	No appearance for plaintiff K Murray, advocate for defendant
Judgment:	26 February 2020

COSTS JUDGMENT OF JUDGE K G SMITH

[1] Lance Thorne unsuccessfully sought to challenge a determination of the Employment Relations Authority that he unjustifiably dismissed Johnathon Rolton.1

[2] Costs arising from Mr Thorne's challenge were reserved. The parties have been unable to reach agreement about them and Mr Murray, who is Mr Rolton's advocate, has applied for an order by memorandum. Mr Thorne did not make any submissions in reply.

1 *Thorne v Rolton* [2019] NZEmpC 171.

[3] The Court has a discretion to award costs.2 That discretion must be exercised in the interests of justice and in accordance with established principles. The discretion may take into account conduct tending to increase or contain costs.3 Since 1 January 2016, the Court has used a Guideline Scale to assist in exercising this discretion.4 The purpose of that scale is to support, so far as possible, the policy objective that costs are predictable, consistent and can be expeditiously dealt with.5

[4] This proceeding was provisionally classified as falling under Category 2, Band B according to the Court's Guideline Scale. That classification is appropriate, and it is confirmed. Using Category 2, Band B, Mr Murray adopted a method where steps provided for in the scale were claimed and adjusted up or down based not on applying the specified daily rate in the scale, but by disclosing the actual time said to have been taken for each step, multiplied by his hourly charge out rate. That method created a hybrid result; for some steps in the proceeding the amount sought was less than the scale would have allocated, in others it was more. The calculation was:

Step from Schedule 4	**Claimed**
Commencement of defence to challenge	$ 3,600

Preparation for case management meeting	$ 600
Appearance at case management meeting 4 April 2019	$ 300
Preparation for case management meeting held on 14 May 2019	$ 300
Attendance at case management meeting 14 May 2019	$ 300
Preparation for case management meeting held on 20 June 2019	$ 300
Attendance at case management meeting 20 June 2019	$ 300
Preparation for first directions conference on 27 June 2019	$ 600
Filing memo for first or subsequent directions conference	$ 1,200
Appearance at first or subsequent directions conference	$ 300

2 Employment Relations Act 2000, sch 3 cl 19.

3 Employment Court Regulations 2000, reg 68(1).

4. Employment Court Practice Directions at 16 (<www.employmentcourt.govt.nz/legislation-and- rules>).

5 *Xtreme Dining Ltd v Dewar* [2017] NZEmpC 10 at [25].

Preparation of bundle	$ 1,800
Preparation of written submissions	$ 1,200
Defendant's preparation of brief of evidence	$ 1,800
Preparation for hearing	$ 1,200
Appearance at hearing for sole or principal	$ 1,200

[5] Using this approach Mr Murray calculated that the Guideline Scale, if applied, would produce a figure of $13,800 and he sought 66 per cent of that, which would be

$9,108. There was no explanation for reducing the claim on this basis. In any event, there is a difficulty in this methodology, not only because it departs from a conventional use of the scale, but the amount sought has not been properly added up. Totalling each of the steps claimed in Mr Murray's memorandum produces $15,000 (excluding the amount claimed for preparation of the costs memorandum, discussed later). That figure, however, is incorrect and needs to be adjusted because it includes claims for steps that were misconceived or otherwise require further consideration.

[6] The first adjustment to the corrected claim is to remove all references to case management. The Court did not convene any case management conferences and no step taken in the proceeding could be said to have approximated that process.

[7] The second adjustment is to the claim for preparing the bundle of documents, because the amount sought is too high in the circumstances. The bundle was modest, consisting of a copy of the employment agreement, a one-page handwritten note recording the termination of employment, a one-page photocopy of income tax information, five pages of wage and salary information and a copy of the relevant parts of the employment agreement Mr Rolton has with his new employer. I consider that

$500 better reflects an appropriate amount for this step.

[8] Further adjustments are required to the claim for preparing the defendant's brief of evidence and attendance at the hearing. Mr Rolton gave evidence but called no other witnesses and his brief of evidence was only five pages long. Mr Thorne's evidence was brief and, while he called two witnesses, their briefs of evidence were half a page each. The hearing, including submissions, was concluded within a

morning. I consider it is just to allow $800 for preparing the evidence and a further

$1,000 for attendance at the hearing.

[9] Making these adjustments reduces the potential award from $15,000 to

$10,400. Standing back to assess this revised calculation, in light of what was required of the parties in this litigation, I consider an award of that amount would be excessive and, therefore, unjust. On a pragmatic basis, a fair award is $8,000.

[10] The next issue is whether an uplift is appropriate either to some higher amount or to a full indemnification as sought by Mr Murray. Mr Thorne did not conduct his challenge in a way that could be said to have unnecessarily increased Mr Rolton's costs or otherwise failed to contain costs. There is no basis on which an uplift could be justified, let alone one that would fully indemnify Mr Rolton.

[11] Finally, Mr Murray sought $1,800 as a contribution towards preparing the application for costs. No explanation was provided for claiming this amount. Given the reasonably straightforward exercise involved, the amount claimed is too high, but some allocation of costs is appropriate. The amount of $750 is fixed for costs of preparing the memorandum seeking costs.

Outcome

[12] Mr Thorne is to pay the following sums to Mr Rolton:

(a) Costs of this proceeding of $8,000; and
(b) A further sum of $750 for the costs of preparing the application for costs.

Judgment signed at 4.50 pm on 26 February 2020

K G Smith Judge
