



Employment Court of New Zealand

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Tones v 3D1 Limited AC 44B/07 [2007] NZEmpC 153 (4 December 2007)

Last Updated: 15 December 2007

IN THE EMPLOYMENT COURT

AUCKLANDAC 44B/07ARC 89/06

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

AND

IN THE MATTER OF an application for costs

BETWEEN MATTHEW LANCE TONES

Plaintiff

AND 3D1 LIMITED

Defendant

Hearing: Written submissions received 18 October 2007

Judgment: 4 December 2007

COSTS JUDGMENT OF JUDGE C M SHAW

Background

[1] On 19 September 2007 a judgment was issued^[1] in which Mr Tones's claim to have been an employee of 3D1 Limited was dismissed.

[2] The parties were unable to resolve costs by agreement and the defendant had 21 days to file submissions. By agreement this was extended to 17 October 2007. On 18 October 2007 a faxed memorandum of submissions as to costs on behalf of the defendant was filed in which it sought costs for both its successful application for security of costs against the plaintiff and for the substantive hearing. The plaintiff had 14 days to reply.

[3] When Mr Young, for the plaintiff, advised he had not received a copy of the submissions, they were re-faxed to him on 25 October 2007. Mr Young protested that as he had not received the original within time the submissions should be struck out, however after discussions with the Registrar of the Court, Mr Young, who was having difficulties contacting his client, sought an extension to file his reply to the costs submissions by 12 November 2007. On 13 November 2007 he advised the Registrar that he had a medical problem but would file in the following day or so. On 16 November 2007 he said his client would need to swear an affidavit and sought an extension to 21 November 2007. No affidavit has been received by the Court as at the date of this decision nor any explanation as

to the reasons for further delay.

[4] Mr Matheson, for the defendant, unsurprisingly has protested the delays and objected to the extensions. It is now apparent that the plaintiff and/or his advisors have been prevaricating. He had two representatives appear for him in Court and it is surprising that at least one of them could not attend to this matter. No further extensions will be granted.

Application for costs

[5] Mr Matheson submits that this is a case where full indemnity costs should be awarded to the defendant because the challenge was totally lacking in merit. He relied on part of the judgment which reads:

[48] ...There is no merit in Mr Tones's allegation that he was ever an employee or even treated as an employee. Mr Tones went into his professional relationship with 3D1 with his eyes open and was prepared to be deceptive about taking legal advice. The reasons he gave in evidence for claiming he was an employee had an air of unreality about them. The agreement was not a sham.

[49] I agree with the conclusions reached by the Employment Relations Authority. This challenge had no prospect of success.

[6] The defendant's costs from the end of the Authority investigation amount to \$9,627.80. This comprises \$7,875 for all attendances (including \$562.50 for dealing with the costs issue) and \$1,752.80 disbursements. The disbursements include travel and accommodation costs for Mr and Mrs Adams and their counsel who are from New Plymouth.

[7] Mr Matheson has attached invoices to substantiate these costs which I find are entirely reasonable.

[8] Mr Tones filed two affidavits in opposition to the security for costs application. From those I find that he is single, without dependents, and is not impecunious. At the beginning of 2007 he was working on a short term contract in Australia but regards New Zealand as his home. He had no liabilities such as hire purchases, bank loans, or credit card debt. He listed his total assets, including cash on hand, at \$49,500.

Indemnity costs

[9] Rule 48C of the High Court Rules provides that the Court may order an award of indemnity costs to cover the actual costs, disbursements, and witness expenses reasonably incurred by any party.

[10] Rule 48C(4) sets out a number of grounds upon which the Court may order a party to pay indemnity costs. Of these Rule 48C(4)(a) is applicable in this case. Indemnity costs may be ordered if the party has acted vexatiously, frivolously, improperly, or unnecessarily in commencing, continuing, or defending a proceeding or a step in a proceeding.

[11] This is one of the rare cases in which indemnity costs are warranted. It is a proceeding that was unnecessarily commenced. It was a completely unmeritorious challenge which should not have been made in the first place. On that basis, the plaintiff is ordered to pay to the defendant company the full costs incurred by it since the Authority decision namely \$9,627.80.

[12] The Employment Court currently holds \$4,544 which was ordered to be paid into Court by the plaintiff as a result of the security for costs application. \$2,000 of this is held on account of costs in relation to the Employment Court proceedings. The balance of \$2,544 relates to the costs awarded by the Authority. I order that \$2,544 is released to the defendant representing the award of costs granted to it by the Authority. The remaining \$2,000 is to be released to the defendant as part payment of the present award of costs. The plaintiff is therefore to pay to the defendant the balance of \$7,627.80.

C M Shaw
JUDGE

Judgment signed at 10.15am on Tuesday 4 December 2007

[\[1\]](#) *Matthew Lance Tones v 3D1 Limited* AC 44A/06, 19.09.07