Employment Court of New Zealand

Tradefog Global Co Limited v Bartholomeusz [2017] NZEmpC 62 (18 May 2017)

Last Updated: 22 May 2017

IN THE EMPLOYMENT COURT CHRISTCHURCH

[2017] NZEmpC 62

EMPC 209/2016

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
AND IN THE MATTER	of an application for costs
BETWEEN	TRADEFOG GLOBAL CO LIMITED First Plaintiff
AND	TRADEFOG INTERNATIONAL LIMITED Second Plaintiff
AND	CHRISTOPHER DAVID BARTHOLOMEUSZ Defendant

Hearing:	On the papers filed on 28 March and 20 April 2017
Appearances:	D Beard, counsel for plaintiffs M McDonald, advocate for defendant
Judgment:	18 May 2017

COSTS JUDGMENT OF JUDGE K G SMITH

Introduction

[1] In my judgment of 8 March 20171 the plaintiffs' challenge to a determination of the Employment Relations Authority (Authority)2 was dismissed. Costs were reserved.

[2] The parties have not been able to reach an agreement about costs and the defendant has now applied for an order.

1 *Tradefog Global Co Ltd v Bartholomeusz* [2017] NZEmpC 24.

2 *Bartholomeusz v Tradefog Global Co Ltd* [2016] NZERA Christchurch 120.

TRADEFOG GLOBAL CO LIMITED v CHRISTOPHER DAVID BARTHOLOMEUSZ NZEmpC CHRISTCHURCH [2017] NZEmpC 62 [18 May 2017]

Background

[3] This proceeding was an unsuccessful challenge to a procedural determination by the Authority. The Authority decided to join the second plaintiff, Tradefog International Ltd, to an existing proceeding which the defendant had commenced against the first plaintiff, Tradefog Global Co Ltd.

[4] In a Minute dated 28 August 2016 Chief Judge Colgan issued directions requiring a preliminary issue to be addressed about whether the plaintiffs were prohibited from bringing their challenge by s 179(5) of the Employment Relations Act 2000 (the Act). A timetable was directed for the exchange of submissions. Pending resolution of that preliminary issue the defendant was excused from filing his statement of defence.

[5] Both parties filed submissions on the preliminary issue. The defendant was successful and the challenge by both plaintiffs was dismissed.

This application

[6] The defendant has applied for what is described in Mr McDonald's submissions as "indemnity costs". Those costs were detailed in a tax invoice, a copy of which was attached to Mr McDonald's submissions. The defendant incurred fees of $5,500 plus GST of $825, for a total of $6,325. No disbursements were itemised in that tax invoice and Mr McDonald's submissions did not refer to any. No information was provided by Mr McDonald about the GST status of the defendant and his ability to seek to recoup any GST that might have been paid.

[7] The defendant is seeking an order that the plaintiffs pay him his actual costs. The basis for that claim is that the defendant has been put to significant expense in defending a challenge which "clearly had no merit from its inception."

[8] Mr McDonald acknowledged that costs on this basis are rare. However, he did not refer to any authorities to support this claim or to explain why the amount claimed is reasonable to award, beyond the defendant having succeeded and one

reference to the possibly premature nature of the challenge in brief email correspondence with Mr Beard, counsel for the plaintiffs.

[9] Mr McDonald's submissions did refer to the Court's guideline scale of costs applicable from 1 January 2016. He submitted that the scale did not clearly provide for costs in a situation where a challenge was dismissed before the defendant was required to file a statement of defence. He also referred to his view that there was no appropriate comparison in sch 3 to the High Court Rules.

[10] There were no submissions providing any alternative claim for costs if indemnity costs were not awarded.

[11] Mr Beard's first submission was that the Court should defer determining costs pending the outcome of the Authority proceedings. In the alternative, he submitted that any award ought to be modest.

[12] Mr Beard also submitted that, if the Court's guideline scale did not expressly cover the situation in this proceeding, the High Court Rules provide a time allocation for costs where written submissions have been prepared. He relied on sch 3, items

24 and 40, and an allocation of a half-day for Band A proceedings. On that basis he calculated a costs award of $740.

[13] Finally, Mr Beard made the point that the purpose of costs is to compensate the successful party not to punish the unsuccessful party.

Discussion

[14] The power to award costs is contained in cl 19 of sch 3 to the Act which reads:

19 Power to award costs

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

(2) The court may 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 such manner as it thinks reasonable.

[15] Under reg 68 of the Employment Court Regulations 2000 the Court has power to uplift or contain costs.

[16] Prior to the introduction of the Court's guideline scale the assessment of costs

was undertaken by considering the criteria in three well-known cases.3

[17] If the Court does not apply its guideline scale, those cases require that the first step is to determine whether the costs actually incurred by the successful party were reasonably incurred and then to determine the level at which the unsuccessful party should make a contribution to them. Those cases also support a 'rule of thumb' of two-third being allocated for costs before considering any uplift.

[18] I accept that the defendant is entitled to an award of costs having been successful. The issue is how much that award should be, given the defendant's attendances were confined to preparing submissions before any other steps were required to be taken.

[19] Mr Beard's criticism of the claim for indemnity or actual costs is that the costs claimed are unreasonable. He submitted the reasonableness of those costs cannot be determined without supporting information such as Mr McDonald's timesheets which have not been provided. Attempting to illustrate that the costs were unreasonable, Mr Beard undertook a calculation in which he divided fees charged to the defendant by the number of pages in the defendant's submissions on the preliminary issue and produced a dollar value per page.

[20] The illustration is a frail one. It does not take account of the content or quality of the submissions themselves or otherwise reflect a principled approach to determining costs.

[21] Mr Beard's next submission was that the defendant's costs were unreasonable because work required on the preliminary issue was a repetition of submissions made to the Authority. I do not agree. The defendant was required to respond to

detailed submissions about the preliminary issue. While that may have necessitated

3 *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).

a review of what occurred in the Authority attention still had to be given to the legal issues about s 179(5) of the Act and that was not repetitious.

[22] I do not agree that the approach taken by Mr Beard to an assessment of the reasonableness of these costs is appropriate. However, I also do not accept the circumstances of this proceeding justify an award of indemnity costs, meaning full reimbursement to the defendant of the professional fees he has incurred.

[23] In *Bradbury v Westpac Banking Corp* the Court of Appeal referred to non- exclusive categories of circumstances in which indemnity costs have been awarded:4

(a) the making of allegations of fraud knowing them to be false and the making of irrelevant allegations of fraud;

(b) particular misconduct that causes loss of time to the court and to other parties;

(c) commencing or continuing proceedings for some ulterior motive;

(d) doing so in wilful disregard of known facts or clearly established law;

(e) making allegations which ought never to have been made or unduly prolonging a case by groundless contentions, ...

[24] None of the grounds argued for on the defendant's behalf falls within the categories in *Bradbury* or come anywhere close to them. The most that might be said about the proceeding is that it was premature and misconceived but those factors alone are insufficient to justify this level of award. Mr McDonald did send an email to Mr Beard before the challenge was filed in which he suggested that it might be premature, but that correspondence did not contain any analysis of the legal propositions involved.

[25] That email does not support an award of actual costs, or indemnity costs as

Mr McDonald has called them.

[26] I do not accept that it is appropriate to defer costs pending the outcome of the Authority proceedings. There is no reason for this decision to be delayed; the Court would not gain any advantage or insight into an appropriate award of costs by

waiting for the Authority to complete its investigation. It should be noted, for

4 *Bradbury v Westpac Banking Corp* [2009] NZCA 234, [2009] 3 NZLR 400 at [29].

completeness, that the items in sch 3 to the High Court Rules referred to by Mr Beard relate to certain interlocutory steps and trial preparation and may not be relevant to this situation.

[27] While Mr McDonald's submissions for indemnity costs were overly optimistic, Mr Beard's alternative submissions are also optimistic. I accept that the guideline scale does not easily apply to this case and, in the exercise of my discretion, I consider it is appropriate to take an approach referred to in *Alton-Lee, Binnie* and *Elmsly*.5 I accept that the costs incurred were reasonable and that they have been paid by the defendant. However, the defendant's submissions, while helpful, were straight-forward but not complex or likely to have been time-

consuming to prepare. There are no features warranting an uplift. In my judgment the appropriate sum to award the defendant is $4,000.

[28] There was no application for costs associated with preparing the application for costs.

[29] There is no reason why the award of costs should not be made against the plaintiffs jointly and severally.

Conclusion

[30] The plaintiffs are to pay costs to the defendant, jointly and severally, of

$4,000.

KG Smith

Judge

Judgment signed at 2.30 pm on 18 May 2017

5 Above, n 3.