



Employment Court of New Zealand

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Tse v Cieffe (NZ) Ltd WC4A/09 [2009] NZEmpC 76 (16 June 2009)

Last Updated: 23 October 2009

IN THE EMPLOYMENT COURT

WELLINGTONWC 4A/09WRC 32/08

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

BETWEEN RAEWYN TSE
Plaintiff

AND CIEFFE (NZ) LTD
Defendant

Hearing: By memoranda of submissions filed on 20 May, 2 and 4 June 2009

Judgment: 16 June 2009

COSTS JUDGMENT OF JUDGE C M SHAW

[1] The defendant seeks awards of indemnity costs for preliminary proceedings in both the Employment Relations Authority (ERA) and the Court where it had successfully defended its position that the plaintiff was not an employee.

[2] The plaintiff opposes such awards and submits that costs should lie where they fall.

Background

[3] When the plaintiff's engagement with the defendant came to an end the defendant brought proceedings against the plaintiff in the District Court to recover money allegedly owed by her to the company.

[4] The plaintiff objected to the District Court's jurisdiction to hear that case and the proceedings have since awaited the outcome of the plaintiff's application to the Authority and this Court.

Indemnity costs

[5] In a memorandum, counsel for the defendant submitted that indemnity costs are appropriate because it has unnecessarily been put to the cost of two hearings. It says its actual costs in the Authority were \$32,973 and \$40,650 in the Court.

[6] It is the case for the defendant that the evidence that the plaintiff and the defendant were in an independent contracting relationship was irrefutable and that the plaintiff brought her case in an attempt to redefine the relationship in order to escape the District Court proceedings.

[7] The defendant also submitted that in defending the case it had to review the entire relationship between it and the plaintiff including a review of all documents produced in the course of the relationship. This meant that it unnecessarily incurred significant legal fees.

[8] I conclude that the present case is not appropriate for an award of indemnity costs. There are no mandatory criteria for deciding whether to grant indemnity costs but relevant considerations include whether the losing party's case was wholly lacking in merit and whether it had acted reprehensibly in pursuing its stance.^[1] The plaintiff's case was not strong but cannot be said to have been entirely without merit. There was some outward appearance of the plaintiff being integrated into the business which needed to be considered before a decision could be reached.

[9] The plaintiff pursued her case vigorously in both the ERA and the Court but not in a reprehensible manner and certainly not in a way that would attract the almost punitive imposition of indemnity costs.

Costs in the Authority

[10] The Authority's investigation meeting lasted just under a day. In the absence of an award of indemnity costs, the defendant seeks an award based on the usual daily tariff applied by the Authority. The plaintiff submits that the Court should award two-thirds of that tariff.

[11] There is no justification for reducing the daily rate normally awarded by the Authority by one-third. That is a guideline for assessing costs in the Court and does not apply as a rule of thumb to costs in the Authority which ultimately has the discretion to award costs within its own framework.

[12] I order that the plaintiff is to pay the sum of \$4,000 to the defendant as a contribution to its costs in the ERA.

Costs in the Court

[13] The defendant acknowledged that its actual costs were at the high end of fees generally charged for a preliminary matter but they were reasonable as there was a significant amount of information the defendant was required to put together to defend the proceedings.

[14] Counsel for the defendant did not attach any evidence to the written submissions on costs showing how its costs were made up although in its memorandum in reply counsel submitted that the full breakdown of all costs were available on request by the plaintiff or the Court.

[15] Such a request should not be necessary. It is a long-standing and well known requirement that a party applying for costs must provide all relevant information in support of that application at the time it is made.^[2]

[16] In any event, counsel for the plaintiff attached to his memorandum as to costs copies of the defendant's invoices from its solicitors. The plaintiff argued that there was no significant information in those invoices from which a finding that costs were reasonably incurred could be made. I agree with that submission.

[17] Each of the defendant's invoices was for a defined account period and gave an account summary. This comprised a sum for "*Professional fees*" another for "*Office Services*" and a third for "*Disbursements*". The invoices contained no particulars of work done or of disbursements incurred.

[18] In order for the Court to assess the reasonableness of fees incurred it must have sufficient evidence of how the claimed costs were made up. Failure to provide such evidence means that the *Binnie* methodology of awarding a contribution based on a percentage of reasonable costs incurred cannot be applied. In the present case the plaintiff submitted that some of the costs incurred by the defendant may have related to the District Court proceedings. This allegation was not denied in the defendant's memorandum in reply and it is therefore unclear what costs were actually incurred by it on the preliminary matter before this Court as opposed to other matters.

[19] Because of this uncertainty and the lack of specific information, costs will be awarded according to the High Court scale of costs on a band 2B basis. In recognition of the large amount of documentary evidence necessarily produced by the defendant I will allow costs for second counsel at 50 percent of the daily recovery rate. The Court costs awarded to the defendant will be \$11,280 made up as follows:

- Statement of defence \$3,200
- Teleconference call-over \$480
- Preparation of evidence \$1,600
- Preparation for hearing \$2,400
- Hearing costs – 1.5 days \$2,400
- Second counsel \$1,200

TOTAL \$11,280

[20] As there were no particulars of how the disbursements were incurred no award is made for these.

[21] In reaching this decision I have had regard to the ability of the plaintiff to pay an award of costs. She is in work and has some assets. I am satisfied that while she may have some difficulty she is able to meet these obligations which arise from this judgment.

Summary

[22] The plaintiff is ordered to pay the defendant:

1. \$4,000 costs in the ERA
2. \$11,280 costs in the Employment Court

C M SHAW

JUDGE

[1] *Binnie v Pacific Health Ltd* [2003] NZCA 69; [2002] 1 ERNZ 438 (CA)

[2] *Progressive Meats Ltd v Meat & Related Trades Workers Union of Aotearoa Inc* WC 1A/08, 9 May 2008

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