Employment Court of New Zealand

Weston v Advkit Para Legal Services Limited [2013] NZEmpC 6 (1 February 2013)

Last Updated: 18 February 2013

IN THE EMPLOYMENT COURT WELLINGTON

[2013] NZEmpC 6

WRC 42/09

IN THE MATTER OF a challenge to a determination of the

Employment Relations Authority

AND IN THE MATTER OF an application for costs

BETWEEN JACQUELINE WENDY WESTON Plaintiff

AND ADVKIT PARA LEGAL SERVICES LIMITED

Defendant

WRC 32/10

AND IN THE MATTER OF an application for rehearing

AND IN THE MATTER OF an application for costs

BETWEEN ADVKIT PARA LEGAL SERVICES LIMITED

Plaintiff

AND JACQUELINE WENDY WESTON Defendant

Hearing: By memoranda of the defendant filed on behalf of Mrs Weston on 30

November 2010, 27 October and 23 December 2011, 15 February and

27 September 2012

On behalf of Advkit filed on 13 December 2010

Appearances: John Gwilliam, counsel for plaintiff

Graeme Ogilvie, counsel for defendant

Judgment: 1 February 2013

COSTS JUDGMENT OF JUDGE B S TRAVIS

JACQUELINE WENDY WESTON V ADVKIT PARA LEGAL SERVICES LIMITED NZEmpC WN [1

February 2013]

[1] This judgment deals with Mrs Weston's application for costs in her successful challenge,[1] her successful defence to Advkit Para Legal Services Ltd's (Advkit) application for rehearing[2] and subsequent matters relating to costs.

[2] In my interlocutory judgment of 15 December 2011[3] I dealt with the application by Mrs Weston for a costs order against the director, Douglas Dixon- McIvor, who, at that stage, had been struck off the Companies Register on 24 August

2011.

[3] Subsequent to that judgment, I received a fourth memorandum from Mr Gwilliam counsel for Mrs Weston, filed on 23 December 2011, advising that as Mr Dixon-McIvor was adjudicated bankrupt in the High Court at Wellington on 8

November 2010, there was little point in having him joined for the purposes of a

costs' award. Mr Gwilliam sought a final determination as to costs against Advkit.

[4] I issued a minute on 20 January 2012 advising that whilst I was sympathetic to that request, in view of the costs to which Mrs Weston had been put in pursuing her successful challenge and defending the application for a rehearing, because of the earlier advice that Advkit was struck off the Companies Register, it appeared that Advkit was now a nullity against which no order for costs could be made. I noted that it has been known for a party seeking redress against a deregistered company to apply for its re-registration, but if there was no prospect of recovery from the company, it was unlikely that the expense of such an application would be warranted.

[5] Mr Gwilliam responded by a memorandum filed on 15 February 2012 asking for the Court to make a formal order, although appreciating the difficulty of its enforcement. Inquiries were being made as to whether the company, although struck off, might still have assets.

[6] I responded by a minute of 28 February 2012, addressing again the issue of whether the company was a nullity against which no order for costs could be made.

I noted the effect of liquidation in s 248 of the Companies Act 1993 which prevents the Court continuing with proceedings against a company in liquidation or in relation to its property, unless the liquidator agrees. I invited Mr Gwilliam to address the legal method by which the Court could still proceed to order costs in the circumstances.

[7] Unfortunately that minute did not appear to have been drawn to the attention of counsel.

[8] Mr Gwilliam filed his final memorandum on 27 September 2012, still seeking for a costs order to be made. He submitted that, even though the company had been struck off the register, it still existed and that an application could be made at any time to restore the company to the Register, should assets to be found to which any judgment of costs order could be enforced. He gave, as an example, garnishee proceedings that were taken through the District Court by Mrs Weston which did produce some funds as a result of a decision of Judge Thomas in the District Court at

Wellington on 15 June 2012[4]. He submitted that there were no liquidators appointed

to give or refuse consent and inquiries into Advkit's assets were still ongoing.

[9] Although I have considerable reservations as to whether it is appropriate to issue an order for costs against a company that is no longer on the Register, I will accede to Mr Gwilliams's request.

[10] Mr Gwilliam's first costs memorandum was filed on 30 November 2010 and it set out in considerable detail the costs that had been incurred to that date by Mrs Weston. Mr Gwilliam sought indemnity costs in favour of Mrs Weston of

$16,167.27 which included disbursements of $739.02. He submitted that the following factors supported indemnity costs;

(a) The failure of Advkit to meet timetables and to provide wage records in a timely fashion;

(b) that the investigation meeting before the Employment Relations Authority (the Authority) had to be adjourned at the last minute at Advkit's request;

(c) the costs were further increased by the need for her own counsel to engage in correspondence concerning Mr Dixon-McIvor's alleged ill-health and the actions of his associate;

(d) in the Court proceedings there was a need to obtain urgent instructions concerning evidence which was regarded as objectionable and which led to a direction from the Court that the affidavit in question sought to be filed by Advkit should not be read;

(e) while the matter was set down for a one day hearing, it did not finish because of extra witnesses that Advkit called which further added to Mrs Weston's costs.

[11] Alternatively, he submitted that costs be awarded by analogy in accordance with the 2B scale set out in the District Court Rules which Mr Gwilliam advised would produce a total of $15,064.02.

[12] Mr Ogilvie, who then represented Advkit, filed submissions in opposition on

13 December 2010. He noted that the costs included a mediation meeting, which the Employment Relations Authority had consistently advised should not be recoverable. He submitted that the photocopying charges were excessive and that the costs in the Authority should be awarded on the normal basis of a daily rate of up to $3,000. He submitted that there was no basis for indemnity costs for the following reasons:

(a) The failure to meet timetables were as the result of a significant illness of Mr Dixon-McIvor and that affidavits and medical reports were submitted to support these matters;

(b) he accepted there was a delay in getting wage records from Advkit's accountant but as soon as these were available they were supplied to the plaintiff;

(c) that the additional evidence called by Advkit was necessary to answer evidence from the plaintiff;

(d) as to the preparation time for the Court, he submitted that briefs of evidence and submissions had already been prepared for the Authority and meant that they required little redrafting for the Court hearing. He submitted that the time involved sought on behalf of Mrs Weston was plainly excessive and claimed that the hours shown were overstated and could not be justified.

[13] There the matter rested, because at about the same time Advkit applied for a rehearing.

[14] Since that time, Mrs Weston had been put to further expense in the sum of

$2,680.40, details of which were provided by Mr Gwilliam in a second memorandum as to costs filed on 27 October 2011. As additional reasons why an indemnity order was sought, Mr Gwilliam referred to what he described to as the behaviour of Mr Dixon-McIvor in respect of some of the potential witnesses approached by him to support Advkit's application for a rehearing. These actions necessitated Mrs Weston herself having to obtain affidavits. He referred to the failure of Advkit to meet deadlines proposed by the Court, complained of the use of hearsay evidence and hearsay statements, referred to evidence of a peripheral nature, on which I commented adversely in the judgment, and submitted that they all justified indemnity costs.

Discussion

[15] I am not persuaded that the analogy of the District Court Rules should apply as the Employment Court has a very wide jurisdiction to deal with costs, which has

been dealt with in three leading Court of Appeal cases.[5] Those cases indicate that the

starting point of two-thirds of the actual reasonable costs is appropriate and then any factors which have exacerbated costs to uplift the amount can be considered by the Court.

[16] Whilst I consider that there are some aspects which would justify uplifting costs in the present case, because the conduct of Advkit did put Mrs Weston to unnecessary additional expenses, I am not persuaded that indemnity costs would be appropriate. There was force in Mr Ogilvie's submission on this point. I will, however, increase the percentage from 66 percent to 80 percent of actual and reasonable costs incurred.

[17] I have examined the material provided by Mr Gwilliam to determine whether the legal costs actually incurred by Mrs Weston were reasonable, including, as they do, the attendances in relation to Advkit's unsuccessful application for rehearing.

[18] There are some costs sought that are not normally recoverable, for example, the costs of mediation in the Authority. The amount sought for costs in the Authority considerably exceeded the more usual daily allowance. They also show attendances on ACC matters and preparing a victim's report, no doubt in relation to the assault on Mrs Weston. Taking into account the more usual daily allowance in the Authority I allow a total of $3,500 for the attendances in the Authority. The disbursements, which largely appear to cover office overheads, I allow at a total of $70 to mainly cover travelling expenses and some photocopying.

[19] Turning to the costs in the Employment Court, the substantive hearing took one day plus additional submissions. I am prepared to allow 80 percent of the total fees incurred of $6,780 (excluding GST) in the sum of $5,424. I have excluded GST in accordance with the usual principles.[6] As to disbursements I allow the binding of the bundle of documents at $59.12, photocopying at $40, travelling

expenses at $43.40 and a service fee of $67.50 making a total of $5,634.02.

[20] Finally I turn to the subsequent attendances relating to the application for rehearing. I am satisfied that the fees of $2,296 (excluding GST) are reasonable and allow 80 percent of those fees, in the sum of $1,836.80. I also allow another $500 for subsequent attendances in relation to costs, giving a total $2,336.80 plus disbursements of $40, giving a total $2,376.80.

[21] This gives a grand total of $11,580.82. I order Advkit to pay to Mrs Weston this amount as a contribution towards her costs.

BS Travis
Judge

Judgment signed at 10.30am on 1 February 2013

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[1] [2010] NZEmpC 140.
[2] [2011] NZEmpC 117.
[3] [2011] NZEmpC 171.

[4] *Weston v Advkit Para Legal Services Ltd* DC Wellington CIV-2012-085-000157, 15 June 2012.

[5] *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) and *Health Waikato Ltd v Elmsly* [2004] NZCA 35; [2004] 1 ERNZ 172.

[6] See *Burrows v Rental Space Ltd* [2001] NZHC 770; (2001) 15 PRNZ 298.
