Employment Court of New Zealand

Allen Chambers Limited v Pelabon [2019] NZEmpC 94 (6 August 2019)

Last Updated: 10 August 2019

IN THE EMPLOYMENT COURT OF NEW ZEALAND WELLINGTON

I TE KŌTI TAKE MAHI O AOTEAROA TE WHANGANUI-A-TARA

[2019] NZEmpC 94
EMPC 176/2018

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	ALLEN CHAMBERS LIMITED AND GEORGE ALLEN CHAMBERS Plaintiffs
AND	FLORIAN PELABON Defendant

Hearing:	On the papers
Appearances:	G Chambers as representative for Allen Chambers Ltd, and in person B Laracy, advocate for the defendant
Judgment:	6 August 2019

COSTS JUDGMENT OF JUDGE B A CORKILL

Introduction

[1] On 18 April 2019, the Court dismissed the plaintiff's de novo challenge to a determination in which compliance orders had been granted against them, and a company with which they were associated; this was subject to one variation only as to timing, so as to ensure the timeframe for payment of the outstanding judgment sum ($10,824.07) would be made within a reasonable period after the issuing of the judgment.1

1 *Allen Chambers Ltd v Pelabon* [2019] NZEmpC 45 at [5] and [61].

[2] The Court also ruled that since the plaintiffs had failed in their challenge, costs should follow that event. Subsequently, Mr Pelabon filed an application for the Court to fix quantum; and that is opposed by Allen Chambers Ltd (ACL), and Mr Chambers.

[3] In his summary, Mr Laracy has submitted for Mr Pelabon:

a. Costs should be paid under Category 2, Band B of the Employment Court's Guideline Scale as to Costs (the scale).2 He assessed these as totalling $19,847.
b. In essence, the plaintiffs' challenge never had a chance of success. A Calderbank offer had been made which referred to this point; it also stated that unless the judgment debt was paid in full by a particular date, indemnity costs would be sought.
c. The bringing of the challenge was simply a delaying tactic to avoid payment.

d. GST was sought, since Mr Pelabon is not registered for GST.

[4] In summary, Mr Chambers submitted for ACL and himself:

a. The amount sought was excessive. It exceeded the amount for which the defendant was actually liable. A generous award would be $3,920. Moreover, Mr Pelabon had been represented on a contingency basis.
b. The attendances were excessive for what was involved in resisting the challenge on a fairly narrow point; furthermore, Mr Laracy had acknowledged he had not appeared in the Employment Court previously, and the plaintiffs should not be required to subsidise a practitioner if inexperienced.

2. Employment Court Practice Directions at 18 <www.employmentcourt.govt.nz/legislation-and- rules>.

c. Reference was made to various aspects of the background of Mr Pelabon's claim, which it was argued should be taken into account.

[5] For Mr Pelabon, the following response was given in reply:

a. The Court should focus on the complexity of the case, rather than the ability and experience of the representative.
b. In response to a submission that costs, if awarded according to scale, would provide a windfall, it was accepted that an indication had been given by Mr Laracy to Mr Chambers of actual costs, which, with regard to Employment Court attendances (including attendances relating to an interlocutory matter),3 totalled $10,595.83 plus GST.

c. It was also confirmed that the challenge had been brought on a "contingency basis"; I infer that the contingency related to the question of whether the challenge would be successfully resisted, which it was.

Principles

[6] The Court has a wide discretion when dealing with costs, sourced from cl 19 of sch 3 of the Employment Relations Act 2000, which states:

19 Power to award costs

(1) The court in any proceedings may order any party to pay 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 fit.

[7] The discretion is to be exercised judicially and according to principle. In many cases, application of the scale will achieve equity between the parties. That scale reflects the normal approach that two-thirds of costs actually and reasonably incurred by a successful party may be awarded, subject to any increase or decrease which may be just in the particular circumstances.

3 *Allen Chambers Ltd v Pelabon* [2018] NZEmpC 114.

Discussion

[8] The issue for resolution by the Court is one of quantum of costs.

[9] I start with a consideration of scale issues. I agree that the case is one where Category 2, Band B would potentially apply. However, I do not agree that all of the items referred to by Mr Laracy should be approved. My revised assessment is as follows:

Item 2	Commencement of defence to challenge	1.5
Item 11	Preparation for first directions conference	0.4
Item 13	Appearance at directions conference	0.2
Item 30	Preparation of written submissions for interlocutory application	1
Items 36, 38 and 39	Preparation for hearings4	2.5
Item 40	Appearance at hearings (two occasions)	1
Item 42	Other steps – clarification issue with regard to company's Registration	0.5
	TOTAL (days):	**7.1**

[10] The total amount thereby produced is $15,833.30.

[11] For the purposes of this case, it is useful to set out the principles that apply to a determination of costs, when using the High Court scale. Those principles are described in r 14.2 of the High Court Rules 2016, and may usefully be considered under reg 6 of the Employment Court Regulations 2000:

14.2 Principles applying to determination of costs

(1) The following general principles apply to the determination of costs:

(a) the party who fails with respect to a proceeding or an interlocutory application should pay costs to the party who succeeds:
(b) an award of costs should reflect the complexity and significance of the proceeding:

4. No briefs, lists of issues or authorities were filed; I have assessed a fair figure for preparation for the two hearing days at 2.5 days.

(c) costs should be assessed by applying the appropriate daily recovery rate to the time considered reasonable for each step reasonably required in relation to the proceeding or interlocutory application:
(d) an appropriate daily recovery rate should normally be two- thirds of the daily rate considered reasonable in relation to the proceeding or interlocutory application:
(e) what is an appropriate daily recovery rate and what is a reasonable time should not depend on the skill or experience of the solicitor or counsel involved or on the time actually spent by the solicitor or counsel involved or on the costs actually incurred by the party claiming costs:
(f) an award of costs should not exceed the costs incurred by the party claiming costs:
(g) so far as possible the determination of costs should be predictable and expeditious.

(2) Despite subclause (1)(f), costs for legal professional services provided in relation to a proceeding may be awarded to a party under this Part even though the services are provided under a conditional fee agreement.
(3) In subclause (2), **conditional fee agreement** means an agreement under which a party to a proceeding and a person who provides legal professional services agree that the party to the proceeding is liable for payment of some or all of the person's fees and expenses depending on the outcome of the proceeding.

[12] The various factors are self-explanatory, but I emphasise that an appropriate rate, and what is reasonable time, do not depend on the skill or experience of the representative involved, or on time actually spent. Costs may be awarded even although there is a conditional fee agreement.

[13] However, the award should not exceed costs actually incurred. In this case, the amount produced by reference to the scale exceeds Mr Pelabon's actual liability for costs. Accordingly, it is not appropriate to utilise the scale.

[14] In the particular circumstances, I consider that the appropriate starting point is to take 66 per cent of the indication given as to actual costs, that is, $6,993.24, exclusive of GST. In my view, no adjustment is needed for questions of experience or time taken, having regard to the principles outlined above.

[15] However, these should be an increase to reflect the fact that the hearing had to be adjourned part-heard because Mr Chambers did not fully comply with the Court's

order, that independent evidence was to be filed as to an alleged restructuring.5 This direction had been made because Mr Chambers had not participated in the Employment Relation Authority's (the Authority) investigation process in good faith. His failure to produce this evidence extended the hearing unnecessarily, and increased Mr Pelabon's costs. An increase from 66 per cent of actual costs to 80 per cent is accordingly appropriate, being $8,476.66.

[16] I am not satisfied that the submission made by Mr Laracy as to a Calderbank offer should result in any adjustment. First, indemnity costs are not sought. Second, the offer was not in fact one to compromise the judgment sum. It was merely a request for immediate payment on the basis that the plaintiffs withdraw the challenge, and thus avoid enforcement. This offer should be placed to one side for cost purposes.

[17] Mr Chambers' reference to matters of history in this proceeding, which gave rise to determinations of the Authority which were not challenged, are not relevant to this Court's exercise of its discretion as to costs in connection with the challenge it was required to resolve.6

Conclusion

[18] I conclude that ACL and Mr Chambers, jointly and severally, must pay Mr Pelabon the sum of $9,748. This includes GST for which Mr Pelabon is not registered.

B A Corkill Judge

Judgment signed at 3.00 pm on 6 August 2019

5 *Allen Chambers Ltd v Pelabon*, above n 1, at [20]-[22].

6 *Pelabon v Zumo Retail Nelson Ltd* [2017] NZERA Wellington 101.
