Employment Court of New Zealand

Asian Business Yearbook Limited v Leung [2012] NZEmpC 21 (17 February 2012)

Last Updated: 24 February 2012

IN THE EMPLOYMENT COURT AUCKLAND

[2012] NZEmpC 21

ARC 24/11

IN THE MATTER OF a challenge to a determination of the

Employment Relations Authority

BETWEEN ASIAN BUSINESS YEARBOOK LIMITED

First Plaintiff

AND PRESTIGE PROPERTY PUBLICATION LIMITED

Second Plaintiff

AND FOOK KUEN LEUNG Defendant

Hearing: Memorandum filed by the defendant on 23 September 2011

Judgment: 17 February 2012

COSTS JUDGMENT OF JUDGE B S TRAVIS

[1] On 16 September 2011, Mr Pollak, counsel for the plaintiff companies, filed a notice of discontinuance, noting that there may be an issue of costs between the parties. The plaintiff companies' challenge had been set down for a two day hearing, commencing on 3 October 2011, the matter having been previously adjourned at the request of counsel for the defendant from a hearing set down to commence on 25

July 2011.

[2] Ms Darroch, counsel for the defendant, filed a memorandum as to costs on 23

September 2011. She referred to the Court's broad discretion as to costs in cl 19(1)

of Schedule 3 of the Employment Relations Act 2000 and three Court of Appeal

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decisions *Binnie v Pacific Health Ltd*,[1] *Health Waikato Ltd v Elmsly*,[2] and *Victoria University of Wellington v Alton-Lee*.[3] The memorandum annexes an account addressed to the defendant covering 18 hours of attendances at $120 per hour. It also includes, as a disbursement, a return air ticket for the defendant to travel from Hong

Kong to Auckland, of $2,908. The total invoice, including the airfares, other disbursements and GST amounts to $5,408 and the defendant seeks that full amount.

[3] The amount sought is said to represent the reasonably incurred costs of the defendant and the hours of work undertaken to prepare for an anticipated two day hearing. Because the defendant is said to be no longer resident in New Zealand, extra

time was required to correspond by email. Ms Darroch drew attention to reg

68 of the Employment Court Regulations 2000 which states that the Court, in exercising its discretion, may have regard to the conduct of the parties tending to increase or contain costs. She submitted that this is an appropriate case for the Court to award full costs to the defendant, for the following reasons:

a) the defendant was successful in his claim before the Employment

Relations Authority;

b) the plaintiff's case lacked substantive merit to succeed in a de novo

hearing;

c) at a late stage in the proceedings, five months after filing the statement of claim and only two weeks out from the hearing date, the plaintiff filed a notice of discontinuance; and

d) as a consequence of the plaintiff pursuing this matter the defendant was put to significant expense and inconvenience in preparing his defence which was made more difficult because he was no longer resident in New Zealand.

[4] The memorandum concludes by saying that this is a case where the costs should follow the event and the defendant should receive a contribution towards his

costs associated with defending and attending the matter.

[5] The plaintiffs were invited to respond within 28 days to the defendant's memorandum as to costs. The counsel for the plaintiffs, Mr Pollak, advised that despite a number of attempts to contact the plaintiffs, he had been unable to do so but acknowledged that the defendant was entitled to "some costs".

[6] In accordance with the directions given by the Chief Judge for the conduct of these proceedings, the defendant was required to file and serve briefs of evidence of his intended witnesses not later than three weeks before the start of the hearing. A brief of evidence was duly filed on 9 September, 7 days before the filing of the notice of discontinuance. The brief of evidence appears to cover the same material which is canvassed by the Authority in its determination of 14 March 2011 and, on its face, it is unlikely that the defendant incurred substantially increased costs in having to re-prepare and then file a new brief.

[7] Although the discontinuance was filed late, I am not persuaded that that alone justifies an award of indemnity costs. Instead, I commence with the usual starting point, endorsed by the three Court of Appeal decisions above, that the defendant would be entitled to two thirds of the reasonable costs incurred. In spite of the likelihood that there was some duplication, the costs sought are modest, as is the hourly rate, and I award the defendant two thirds of the fee of $2,160 excluding GST in the sum of $1,440 together with the disbursements sought of $16.00.

[8] I turn now to consider the claim for the reimbursement of the entire costs of the defendant's aborted travel. There is no clear indication whether those costs were recoverable by the defendant, or whether they could be applied towards other travel. Both the invoice addressed to the defendant and his brief of evidence give Auckland addresses and make no mention of overseas residency. The grounds for the adjournment were that the defendant was required to be in Indonesia to oversee the shipment and arrival of goods associated with his business interests. This does not assert overseas residence.

[9] In these circumstances, if the defendant has elected to reside overseas at a time when he was pursuing litigation in New Zealand, the costs of attending a

hearing should not be visited upon the plaintiffs. I therefore disallow the claim for travel expenses.

[10] In summary therefore, the plaintiffs are ordered to pay as a contribution

towards the defendant's costs the total sum of $1,456.

B S Travis

Judge

Judgment signed at 2.15pm on 17 February 2012

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[1] [2003] NZCA 69; [2002] 1 ERNZ 438.
[2] [2004] NZCA 35; [2004] 1 ERNZ 172.
[3] [2001] NZCA 313; [2001] ERNZ 305.