



Employment Court of New Zealand

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Barry v Anoop Investments Limited AC19A/08 [2008] NZEmpC 59 (21 July 2008)

Last Updated: 28 July 2008

IN THE EMPLOYMENT COURT

AUCKLANDAC 19A/08

ARC 4/07

IN THE MATTER OF de novo challenge to determination

BETWEEN CHRISTOPHER BARRY

Plaintiff

AND ANOOP INVESTMENTS LIMITED

Defendant

Hearing: By memoranda filed by the plaintiff on 15 July 2008
and in reply from the defendant on 8 July 2008

(Heard at Auckland)

Appearances: Matthew Young, advocate for plaintiff

Mohammed Khan, counsel for defedant

Judgment: 21 July 2008

SECOND INTERLOCUTORY JUDGMENT OF JUDGE B S TRAVIS

[1] In my judgment of 3 June 2008 I granted leave for the defendant to file and serve a statement of defence out of time. I awarded costs in favour of the plaintiff to indemnify him for the reasonable expenses he has had to incur as a result of the defendant's failure to file a defence in a timely manner. There is still an outstanding issue as to costs and I recorded the following:

[35] At the hearing I requested the plaintiff file a memorandum setting out the actual and reasonable costs and disbursements he has incurred as a result of the defendant's failure to file the statement of defence in a timely manner. The plaintiff's advocate filed a memorandum in regards to indemnity costs stating that they total \$9,534.38 plus disbursements of \$224.25. I am not yet satisfied that these costs are reasonable and have been actually incurred by the plaintiff. Further the defendant has not had the opportunity of addressing the plaintiff's memorandum.

[36] If the matter does not settle I will issue a supplementary judgment establishing the quantum of those costs and disbursements which the defendant will be directed to pay, notwithstanding the outcome of the challenge.

[2] On 8 July 2008 Mr Khan filed a memorandum in opposition to the plaintiff's advocate's claim for indemnity costs. Mr Khan submitted that the application for leave was straightforward and did not require the extent of time which the plaintiff's advocate states he had spent in response to the application. For example, the plaintiff's advocate had claimed \$3,750 for research and preparation. Mr Khan submitted that at most two hours for research and preparation would have been sufficient. He observed that from the plaintiff's advocate's memorandum it is extremely difficult to establish the rates at which the plaintiff's advocate has charged out his time, for there appears to be different rates for different attendances. Mr Khan also submitted that the filing of the statement of claim, the amended statement of claim, the service of these documents and liaising with the Court registry were all part and parcel of the normal Court process and the only matters which the plaintiff can properly claim are those which he has expended as a result of the application for leave by the defendant. He submitted that any costs that had been incurred other than those which arose because of the fault on the part of the defendant in not filing the statement of defence in time, should not have been claimed.

[3] Mr Khan also noted that the interlocutory application by the plaintiff which attempted to prevent the affidavit of Gurpreet Singh, was without merit and did not further the plaintiff's claim. He also submitted that the plaintiff's claim for costs was unrealistic and unreasonably high in light of the defendant's continued endeavour to amicably settle the plaintiff's claim.

[4] Mr Kahn submitted that as the defendant had already been ordered to pay to the plaintiff \$1,000 as a contribution towards the actual and reasonable costs incurred as a result of the defendant's failure to file a statement of defence that should be regarded as sufficient in all the circumstances.

[5] Mr Young responded on 15 July. He observed that the original statement of claim was served on the defendant's solicitors who had apparently acknowledged service but then took no steps. Because that service was not in accordance with the [Employment Court Regulations 2000](#), the plaintiff was required to re-serve his statement of claim which he did some months later. Mr Young is claiming all of the costs involved in the first attempted service, and the second service, which was successful but which did not produce a statement of defence within the time required by the Regulations. He claims that the \$3,750 amount covered the period from June 2007 forward and included preparation relating to at least 24 telephone calls, 3 conferences, 5 memoranda, 12 items of correspondence, 3 affidavits, a notice of opposition, an interlocutory application and his attendance at the hearing of the leave application. He claimed that most documents were on the Court file. He submitted that the costs involved were individually detailed and broken down in his previous memorandum and were on the basis of his charge out rate at \$250 an hour. He submitted the costs presented were realistic indemnity costs that the plaintiff has incurred.

[6] I am still not satisfied that that is so. There is no copy of any account that was actually rendered and paid by the plaintiff for which indemnity is sought.

[7] I accept Mr Kahn's submission that the indemnity costs should relate solely to the events subsequent to the proper service upon the defendant of the plaintiff's statement of claim in accordance with the Regulations and therefore they cannot be backdated to June 2007. As my order stated, I awarded indemnity costs for the reasonable expenses the plaintiff has incurred as a result of the defendant's failure to file its statement of defence in time. As best as I can ascertain from the material supplied by Mr Young the plaintiff will be fully indemnified for those reasonable costs if I increase the \$1,000 awarded in my judgment to the total sum of \$2,000 inclusive of disbursements. I so order.

[8] I decline Mr Young's request to make an order for the immediate payment of the \$2,000 costs because of the co-operative manner in which the defendant has now been acting and the payment that it has already made on account.

B S Travis
Judge

Second Interlocutory Judgment signed at 12.45pm on 21 July 2008