Employment Court of New Zealand

Briggs-Barron v Ladbrook Law Limited [2016] NZEmpC 118 (14 September 2016)

Last Updated: 20 September 2016

IN THE EMPLOYMENT COURT AUCKLAND

[2016] NZEmpC 118

EMPC 347/2015

IN THE MATTER OF	an application for a declaration under section 6(5)
AND IN THE MATTER	of an application for costs
BETWEEN	DEBRA JANE BRIGGS-BARRON Plaintiff
AND	LADBROOK LAW LIMITED Defendant

Hearing:	On the papers filed on 22 April, 13 May, 22 August, and 6 and 7 September 2016
Appearances:	J Bremner, counsel for plaintiff J Appleby, counsel for defendant
Judgment:	14 September 2016

COSTS JUDGMENT OF JUDGE CHRISTINA INGLIS

[1] The defendant has applied for costs following the discontinuance of the plaintiff 's claim in this Court. Despite the discontinuance, costs remain outstanding and efforts to resolve the issue have been unsuccessful.

[2] The starting point is sch 3, cl 19 of the Employment Relations Act 2000. It confers a broad discretion as to costs, providing that:

(1) The court in any proceedings may order any party to pay to any other party such costs and expenses ... 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 reasonable.

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[3] Regulation 68(1) of the Employment Court Regulations 2000 also deals with costs. It provides that, in exercising the Court's discretion under the Act to make orders as to costs, the Court may have regard to "any conduct of the parties tending to increase or contain costs...".

[4] The discretion to award costs, while broad, is to be exercised judicially and in accordance with principle. The primary principle is that costs follow the event.1

The usual starting point in ordinary cases is 66 per cent of actual and reasonable costs. From that starting point, factors justifying

either an increase or a decrease are assessed.2 It is well established that a discontinuing plaintiff is generally liable to pay costs to the defendant up to the date of the discontinuance. I see no reason to depart from the usual approach to costs in this case.

[5] The plaintiff has filed two brief memoranda, opposing any award of costs. Issues are raised as to the extent to which the defendant has incurred any legal costs. It is also said that any determination as to costs in this Court should be deferred pending the outcome of a claim now before the Employment Relations Authority. In the alternative it is submitted that costs should lie where they fall.

[6] As to the deferral point, I do not consider it necessary or desirable to delay deciding costs. The proceedings in the Court have been discontinued and outstanding issues in relation to costs in this forum ought to be concluded at this juncture.

[7] Mr Appleby was employed by, as well as being a shareholder and director of, the defendant. The defendant seeks costs relating to his attendances. As I have said, the plaintiff takes issue with this.

[8] While a self-represented litigant is generally only entitled to claim disbursements, a self-represented lawyer may be entitled to claim both

disbursements and costs. A threshold applies. They must be a qualified lawyer and

1 *Victoria University of Wellington v Alton-Lee* [2001] NZCA 313; [2001] ERNZ 305 (CA) at [48].

2 *Binnie v Pacific Health Ltd* [2003] NZCA 69; [2002] 1 ERNZ 438 (CA) at [14].

they must hold a current practising certificate.3 Mr Appleby has confirmed both of these prerequisites.

[9] The defendant submits that its actual legal costs were $4,848. It is apparent from a perusal of the material now before the Court that this represents the total amount, including costs associated with seeking a contribution to costs. The defendant's actual legal costs up to the date on which the notice of discontinuance was served on it amount to $2736. It is that figure which is relevant.

[10] I turn to consider whether such costs are reasonable. While the claim did not progress to a substantive hearing, the defendant was required to take a number of steps prior to the date of discontinuance. These included consideration of the statement of claim, drafting a statement of defence and counterclaim, consideration of the plaintiff 's statement of defence to the counterclaim, preparation for and attendance at a telephone conference and filing associated documentation, and numerous other attendances. I accept that the defendant's actual costs were reasonable in the circumstances.

[11] The defendant submits that increased costs ought to be ordered, essentially on three grounds. First because the plaintiff unreasonably failed to accept an offer of settlement. Second because the plaintiff pursued a claim without merit. Third because the conduct of the litigation unnecessarily increased costs.

[12] I decline to uplift costs on the basis of without prejudice communications between the parties. The defendant wrote to counsel for the plaintiff on 12 April

2016 advising that costs would be sought but that this could be avoided if the defendant was prepared to agree to costs on a 1A basis "now". There was no articulation of what 1A costs were said to amount to and the timeframe for accepting the offer could reasonably be interpreted as immediate. Counsel for the plaintiff responded within the hour advising that any issue with costs could be dealt with at the forthcoming mediation. The defendant took this as a rejection of the offer. I do not consider that the plaintiff's approach to the offer was unreasonable in the

particular circumstances and I am not satisfied that an uplift is appropriate.

3 See *R v Meyrick* [2008] NZCA 45 at [2], [10].

[13] The plaintiff decided against proceeding with her claim in the Court, filed a notice of discontinuance and opted to commence proceedings in the Authority. Forum bouncing has put the defendant to unnecessary cost. This has been exacerbated by the way in which the claim was pursued prior to discontinuance. An uplift is justified. In doing so I am mindful of the fact that the additional time involved in dealing with issues such as non filing and service of various documents has already been reflected in an assessment of reasonable costs, and there is a need to avoid double counting.

[14] The defendant submits that GST ought to be included in any costs order. The defendant is GST registered. That means that it will be able to recover the GST component of its legal costs. Including a figure equivalent to GST would effectively result in double recovery.4 Such a result is to be avoided. I decline to order any uplift in the circumstances.

[15] Having regard to the foregoing, I consider that a just contribution to the

defendant's costs is $2,000.

[16] The defendant is also entitled to a contribution to costs in connection with its costs application. I consider that a reasonable amount is no more than $800.

[17] The plaintiff is accordingly ordered to pay the defendant the sum of $2,800 by way of contribution to costs. No disbursements are sought and none are ordered.

Christina Inglis

Judge

Judgment signed at 9 am on 14 September 2016

4 For a discussion of these issues see, for example, *New Zealand Venue and Event Management Ltd v Worldwide NZ LLC* [2016] NZCA 282; *Ritchies Transport Holdings Ltd v Merennage* [2016] NZEmpC 22 at [30]- [42].
