Employment Court of New Zealand

Caffe Coffee (NZ) Ltd v Farrimond [2016] NZEmpC 105 (23 August 2016)

Last Updated: 30 August 2016

IN THE EMPLOYMENT COURT AUCKLAND

[2016] NZEmpC 105

EMPC 198/2015

IN THE MATTER OF a challenge to a determination of the

Employment Relations Authority

BETWEEN CAFFE COFFEE (NZ) LTD Plaintiff

AND SUNE FARRIMOND Defendant

Hearing: (on the papers by submissions filed on 24, 27 June and 4 July

2016)

Appearances: D Clark, counsel for the plaintiff

C Patterson and L Cole, counsel for the defendant

Judgment: 23 August 2016

COSTS JUDGMENT OF JUDGE B A CORKILL

Introduction

[1] Each party seeks costs against the other following the Court's substantive

judgment of 9 June 2016.1

[2] In that judgment, Caffe Coffee (NZ) Limited (Caffe Coffee) was successful in establishing that there were two breaches of Mr Farrimond's Individual Employment Agreement (IEA), along with the associated duties of fidelity and good faith. All its other allegations were dismissed. Caffe Coffee's claim for damages was also dismissed. Penalties totalling $10,000 were imposed; half of this sum was ordered to

be paid to Caffe Coffee with the other half to be paid to the Crown.

1 *Caffe Coffee (NZ) Ltd v Farrimond* [2016] NZEmpC 65.

[3] Now, Caffe Coffee submits that it was the successful party. It urges the Court to fix costs according to the Court's Guideline Scale of costs in the sum of

$87,809.50, and to approve disbursements of $5,905.86. It has also brought a challenge to a costs determination of the Employment Relations Authority (the Authority), in which Mr Farrimond was awarded costs of $14,000 because Caffe Coffee had been unsuccessful in obtaining any remedies following the investigation meeting.2 Caffe Coffee now submits that it should be awarded $7,000, applying the Authority's daily tariff of $3,500 for the two day hearing.

[4] For Mr Farrimond it is submitted that he substantially succeeded in resisting Caffe Coffee's claims so that he should be regarded as the successful party; and that the conduct of the company was such that it increased the length of the trial and thereby the costs which Mr Farrimond incurred. He also asserts that Caffe Coffee unreasonably rejected a Calderbank offer made soon after its challenge was instituted; and that he should be regarded as the successful party on two interlocutory

applications that were resolved by the Court.3

[5] It is argued that Mr Farrimond's actual costs were fair and reasonable and he should be awarded 80 per cent of these, $94,225, together with disbursements of

$27,720.23. As for the challenge of the Authority's costs determination, it is submitted that the Authority reached a correct conclusion in law and took into account all relevant considerations including the relevance and significance of Calderbank offers which had been made. Accordingly, the challenge as to costs should be dismissed.

Principles

[6] Clause 19 of sch 3 to the Employment Relations Act 2000 (the Act) governs the award of costs in this Court. Furthermore, reg 68 of the Employment Court Regulations 2000 provides that in the exercise of its discretion, the Court may have

regard to "any conduct of the parties tending to increase or contain costs".

2 *Caffe Coffee (NZ) Ltd v Farrimond* [2015] NZERA Auckland 328.

3 *Caffe Coffee (NZ) Ltd v Farrimond* [2015] NZEmpC 208; *Caffe Coffee (NZ) Ltd v Farrimond*

[2015] NZEmpC 221.

[7] Both parties referred to the well established costs principles which were set out in the Court of Appeal judgments of *Victoria University of Wellington v Alton-Lee;*4 *Binnie v Pacific Health Ltd*5 and *Health Waikato Ltd v Elmsly*.6

[8] Under these principles, a 66 per cent contribution to the reasonable costs as determined by the Court is normally regarded as fair and reasonable, but that percentage contribution may be adjusted upwards or downwards, depending on the particular circumstances.

[9] For the purposes of the challenge in respect of the Authority's costs determination, it is first necessary to refer to cl 15 of sch 2 of the Act which bestows a broad discretion on the Authority to order one party to pay another such costs and expenses as the Authority thinks reasonable. The applicable principles are outlined

in two full Court judgments: *PBO Ltd (formerly Rush Security Ltd) v Da Cruz,*7 and

*Fagotti v Acme & Co Ltd.*8

[10] In summary, the Court has approved the notional daily rate approach to costs orders in the Authority, but particular circumstances may require the exercise of discretion to either increase or decrease that daily rate, having regard to the particular circumstances.

[11] I shall now consider the cost issues which arise, in light of those principles.

Costs in the Court

[12] The issues which arise with regard to costs in the Court are:

a) Is either party entitled to costs given the outcome?

b. If so, what constitutes a fair and reasonable figure for the assessment of costs?

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

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

6 *Health Waikato Ltd v Elmsly* [2004] NZCA 35; [2004] 1 ERNZ 172 (CA) at [17].

7 *PBO Ltd (formerly Rush Security Ltd) v Da Cruz* [2005] NZEmpC 144; [2005] ERNZ 808 (EmpC).

8 *Fagotti v Acme & Co Ltd* [2015] NZEmpC 135, (2015) NZELR 1 at [6].

c. If so, are there any particular factors which should give rise to an adjustment?

[13] As already indicated, each party submits that they succeeded. In reviewing this issue, it is necessary to summarise the findings which I made.

[14] Caffe Coffee had asserted that Mr Farrimond undertook preparatory steps during the term of his employment which breached multiple terms of his employment agreement; these were purchasing a roaster, entering into an agreement to lease, incorporating The Village Roaster Limited (TVR), and making an inaccurate statement in his resignation email. I found that Mr Farrimond did breach his contractual obligations when he incorporated TVR and when he was concerned in its business without the prior written consent of the Chief Executive of Caffe Coffee, Mr Alford; and furthermore by failing to report to Mr Alford fully on matters

that impacted on the performance of his duties.9 Although there were also breaches

of the duty of fidelity and of the duty of good faith, those findings did not add anything to the conclusions as to the breaches of particular provisions of Mr Farrimond's IEA.10 I was not satisfied that all the remaining allegations as to the

undertaking of preparatory steps were established.11

[15] Allegations were also brought against Mr Farrimond that after the term of his employment ended at Caffe Coffee, he used its confidential information when establishing a new business. I was not satisfied that this allegation was established; accordingly, the causes of action relating to the use of confidential information

post-employment and as to a breach of intellectual property rights were dismissed.12

[16] Turning to remedies, I dismissed Caffe Coffee's damages claim because the established breaches of the employment agreement had not caused loss.13 Penalties were imposed in the sum of $5,000 for each of the established breaches, half of

which was to be paid to Caffe Coffee.14

9 *Caffe Coffee (NZ) Ltd v Farrimond*, above n 1, at [78], [114], [117] and [120].

10 At [121] and [122].

11 At [64], [68] and [93].

12 At [197].

13 At [204] – [206].

14 At [233].

[17] For Caffe Coffee, Mr Clark submitted in essence the company should be regarded as the successful party, because it had to commence proceedings in order to uphold the provisions of the employment agreement. Significantly, those terms had been upheld. A significant part of its success was to achieve the vindication of its employment terms and its reputation; Caffe Coffee had obtained a finding that

Mr Alford had been deliberately misled.15

[18] Mr Clark relied on dicta of the Court of Appeal in *Elmsly* that where a party has had to go to Court to achieve relief "conventional practice ... has been to regard a plaintiff in this situation as having an entitlement to costs".16

[19] For Mr Farrimond, Mr Patterson submitted that the plaintiff was successful in being awarded "one penalty in respect to one breach of the IEA", a breach which he had never disputed. The other penalty was awarded to the Crown.

[20] Despite Caffe Coffee being successful to this extent, it was argued that it was appropriate for the Court to recognise that none of Caffe Coffee's other causes of action succeeded, and that these took more time to hear.

[21] In reply to these submissions, Mr Clark submitted that it was incorrect to assert Mr Farrimond had never disputed the breach regarding the incorporation of a company, because that assertion was expressly denied in Mr Farrimond's amended statement of defence where it had been asserted that this was a permissible preparatory step. It had also been argued that the breach was of no consequence because the incorporated company had not traded; in fact the Court had found that the breach was significantly more serious than the defendant had been prepared to acknowledge. For Mr Farrimond it had also been argued that the penalty claim was out of time, a yet further assertion which was not upheld. As regards the breaches that were not established, they nonetheless stemmed from the same factual matrix, and relied on duties arising from Mr Farrimond's IEA. It would be artificial to isolate particular allegations.

[22] In determining this issue, reference should be made to the following statement in *Elmsly*, where the Court of Appeal said:17

[39] It is not usual in New Zealand for costs to be assessed on an issue by issue basis, albeit that it is common enough, where both parties had a measure of success at trial, for no order as to costs to be made. The reluctance to assess costs on an issue by issue basis probably stems from the reality that in most cases of partial success it is not practical to separate out from the total costs incurred by the parties what was incurred in relation to the individual issues before the Court.

[40] The result of the present case was that Dr Elmsly was awarded relief and it would appear (given that there was no Calderbank letter) that he had to go to Court to receive that relief. Conventional practice (probably influenced by the way in which the old payment in rules used to operate) has been to regard a plaintiff in this situation as having an entitlement to costs. While this is no doubt a simplistic and not entirely logical approach, it is reasonably straightforward to apply. Further, it is not unjust to defendants, providing judges are prepared to react appropriately where there has been a Calderbank offer. In any event, whatever the merits of the current costs practice, there is nothing out of the ordinary in the conclusion of the Judge that Dr Elmsly was entitled to costs.

[23] In that case, Dr Elmsly had claimed $137,000, but had recovered only

$15,000.18 His costs were $72,000 (including a modest disbursement of about

$1,300). The Employment Court had awarded him approximately half of his actual costs, which were rounded to $36,000. The Court of Appeal concluded that whilst it would have been open to conclude that each party be left to pay their own costs, the implicit conclusion of the Employment Court that the plaintiff had sufficient success at trial to warrant an award of costs was also open to it.

[24] However, later in the judgment, the Court of Appeal stated that the trial Judge had concluded that at least a majority of the hearing time had been associated with issues on which the plaintiff had failed. The Court said that whilst New Zealand courts did not usually award costs on an issue-based basis, the failure of a

"successful party" on so large a scale could not properly be ignored.[19]

[17] *Health Waikato Ltd v Elmsly,* above n 6.

[18] At [20].

19 At [44](43).

[25] It was decided that the trial Judge had not assessed the plaintiff's relative lack of success at trial correctly; he had been awarded a contribution to costs on issues in which he had failed, which was plainly wrong.20

[26] Accordingly, the Court of Appeal fixed $30,000 as the proportion of the costs reasonably incurred by the plaintiff in relation to the issues in which he succeeded; allowing for two-thirds recovery of that figure produced a total costs award of

$20,000.21

[27] In the present case, whilst it may have been appropriate to conclude that this was an instance of mixed success where neither party should be awarded costs, I accept the submission made for Caffe Coffee that it was necessary for it to bring the proceeding in order to obtain vindication. In my view it is accordingly appropriate that it be awarded costs based on an assessment of the proportion of costs reasonably incurred in establishing the issues on which it succeeded.

Quantum

[28] Caffe Coffee utilised the Court's Guideline Scale to determine a fair and reasonable figure for cost purposes.

[29] Several of the assumptions which underpin Caffe Coffee's schedule of costs require comment. First, time allocation. Band B has been adopted for many but not all of the assessed steps; in some instances Band C has been adopted. Band B is appropriate if a normal amount of time is considered reasonable; Band C may be appropriate if a comparatively large amount of time for a particular step is considered reasonable. I am not persuaded that any of the steps referred to in Caffe Coffee's schedule should be other than Band B.

[30] Secondly, I deal with the daily recovery rates, or Categories, which have been adopted. In the main, Category 2 has been adopted, which is appropriate for proceedings of average complexity which is an appropriate description of the present

case. For the purposes of two of the steps,22 Category 1 was adopted. That Category relates to steps of a straightforward nature, and is appropriate for the particular steps involved.

[31] The third issue relates to the items included in the assessment, which have been fixed with reference to all but two of the included items. The item for inspection of documents was doubled to $4,460;23 I consider that a reasonable figure for this item is $2,230. Two separate claims were included for the trial issues of admissibility of evidence and exclusion of witnesses, totalling $7,136;24 I consider a reasonable figure for these items is $3,568. The steps relating to interlocutory matters will be

dealt with separately.

[32] Making those adjustments, the scale assessment produces a figure of $53,297. I note that this is deemed to be two-thirds of the daily rate considered reasonable in relation to the proceeding.

[33] I am also required to consider whether there should be any yet further adjustment for particular reasons that were advanced by Mr Patterson. He argued that the majority of evidence at the hearing was dedicated to issues surrounding breaches which were not established, and that there was unnecessary cross- examination on issues where there was little controversy, such as the incorporation of TVR. He also argued that Mr Farrimond had been put to extra expense in briefing an expert accountant to assess what, if any, losses had allegedly been sustained also as a result of the assorted confidentiality breaches. Counsel submitted that the sum of $27,720.23 had been incurred with regard to the expert's fee and "other usual disbursements". No further breakdown of this figure was provided. I take into account, however, the fact that significant work was undertaken with regard to aspects of Caffe Coffee's claims which were not established.

[34] These are factors which relate to aspects of Caffe Coffee's unsuccessful

claims.

22. Item 1, amended statement of claim; and item 31, preparation of bundle on admissibility of evidence and exclusion of witnesses.

23 Item 27.

[35] I take all these factors into account. I consider 20 per cent of the deemed costs as fixed by the scale assessment arose from those claims on which Caffe Coffee succeeded; the other factors raised by Mr Patterson relate to aspects of Caffe Coffee's unsuccessful claim which I have taken into account when undertaking this assessment. I fix a figure of $10,659 as the proportion of costs relating to those issues upon which Caffe Coffee succeeded.

Interlocutory application for disclosure

[36] I turn next to consider the position relating to the interlocutory applications which the Court considered. The first was an application brought by Caffe Coffee for disclosure. This application was resolved in favour of Caffe Coffee by my judgment of 26 November 2015.25 As Mr Patterson points out, initially, one of Mr Farrimond's objections related to the fact that there was no express pleading on behalf of Caffe Coffee for breaches that occurred after the termination of Mr Farrimond's employment. Accordingly, disclosure of documents with regard to that period were initially opposed. This issue was discussed with counsel when

receiving submissions relating to the challenge, which resulted in an amended statement of claim being filed. Orders were then made for disclosure of documents in the post employment period. There were, however, other grounds for objection which did not succeed. Overall, I consider that in this instance, costs should follow the event.

[37] As to quantum, Caffe Coffee in its scale assessment sought allowances under Item 30, (Preparation of Written Submissions), Item 31 (Preparation of Bundle for Disclosure Hearing) and Item 32 (Appearance by Telephone). For the last item I allow 0.25, so that the total sought is 1.65. Having regard to the factors raised by Mr Patterson I allow $2,230 to Caffe Coffee in respect of this interlocutory application.

[38] A second interlocutory application was brought by Caffe Coffee for a stay. It too was opposed. The application for a stay which Caffe Coffee was ordered to pay to Mr Farrimond related to the Authority's costs determination.26 It was opposed by

Mr Farrimond; it was argued that the costs order should be paid to him. An order for a stay was granted, but it was a condition of that order that there be a payment into Court of the sum owed by Caffe Coffee. Mr Farrimond was partially successful in opposing this application, in that Caffe Coffee was required to make a payment into Court of the sum involved; but he was not successful to the point of persuading the

Court that the sum should be paid to him.27 On this application, costs should lie

where they fall.

[39] To this point, the total amount of costs which is potentially in Caffe Coffee's

favour is $12,889.

Costs in the Authority

[40] Before turning to the issue as to whether there should be any adjustment to that figure having regard to a Calderbank offer made on Mr Farrimond's behalf, it is first necessary to resolve the challenge as to the Authority's costs determination,

since the outcome of that will also be relevant to the assessment of that offer.

[41] In its determination, the Authority:28

a) Proceeded on the basis that costs should follow the event, that is, Caffe

Coffee should contribute to Mr Farrimond's costs.

b) Stated that as the investigation meeting had been conducted over two days and utilising the current notional daily tariff of $3,500 per day, the starting point was $7,000.

c) Considered two Calderbank offers which had been made. The first had been made by Mr Farrimond some months prior to the investigation meeting. It would have provided Mr Farrimond's consent to certain injunctions which Caffe Coffee had sought conditional upon his name not being published unless he was in breach; and would have resulted in a payment of $12,500 plus GST in two equal instalments. Caffe Coffee counter-offered proposing an increase of the proposed payment

to $18,000 plus GST, and certain restraints. It was open for 24 hours and was "non-negotiable". The Authority determined that Caffe Coffee's offer gave an unreasonable period of time for acceptance. That left Mr Farrimond's offer which was better than the outcome achieved by Caffe Coffee at the investigation meeting. The Authority accordingly determined that the starting figure of $7,000 should be increased to $14,000. This was the sum which Caffe Coffee was ordered to pay to Mr Farrimond.

[42] In my substantive judgment, I stated that as my conclusion had differed in some respects from that of the Authority's substantive determination, it was set aside.29 The result of that conclusion is that issues as to costs in the Authority are at large and require reconsideration by the Court.30

[43] In my view, the assessment of costs in the Authority must proceed on the basis that Caffe Coffee succeeded in part. I adopt the same approach as to success as I adopted with regard to costs in the Court. I take the sum which reflects the notional daily rate of $7,000, and reduce that to $1,400. That figure represents the extent of Caffe Coffee's success in the Authority.

[44] Next it is necessary to consider the position arising from the Calderbank offers made prior to the investigation meeting.

[45] It remains the position that the Calderbank offer advanced for Mr Farrimond, as described at para [41](c) above, was better than the ultimate outcome which Caffe Coffee achieved; this is evident because Caffe Coffee was offered a sum which was more than the award ultimately obtained, and because Mr Farrimond also indicated agreement to a form of restraint, a remedy which was initially sought in the Court but not pursued. In short, Caffe Coffee would have been in a better position had it accepted the offer. The relevant principles are outlined fully later in this decision. Adopting a steely approach, I find that the offer was unreasonably rejected. A

further allowance for this factor must therefore be made. I reduce the figure of

29 *Caffe Coffee (NZ) Ltd v Farrimond*, above n 1, at [234].

$1,400 to $700. I allow Caffe Coffee's challenge to the Authority's costs

determination and find that Mr Farrimond should pay Caffe Coffee this sum.

Effect of subsequent Calderbank offers to the issue of costs in the Court

[46] In August 2015, there were a series of exchanges between counsel for the parties, on a Calderbank basis. These can be summarised as follows:

a) On 14 August 2015, Mr Farrimond offered $15,000 in full and final settlement of the challenge, and any claims Caffe Coffee might have against him or his company, TVR.

b) On 17 August 2015, Caffe Coffee counter-offered by stating that it would accept $20,000, including costs in the Authority, in full and final settlement.

c) On 19 August 2015, Mr Farrimond responded indicating that there were now two offers advanced in the alternative. The first was a renewal of the offer to settle on the basis of a payment of $15,000. The second alternative was that Mr Farrimond would agree not to solicit any of Caffe Coffee's existing customers who had entered into supply contracts with it for a period of 18 months. This agreement would constitute a full and final settlement of all issues. Later that day it was clarified that the foregoing offers excluded costs in the Authority, so that Caffe Coffee would be obliged to pay any award of costs made by the Authority.

d) On 21 August 2015, Caffe Coffee rejected Mr Farrimond's offers, and reiterated that it would accept $20,000 in full and final settlement of all matters, including costs in the Authority.

[47] In determining whether there is a qualifying Calderbank offer, it is necessary to compare the above proposals with the awards which were ultimately obtained, together with a notional allowance for costs up to the date of the relevant offer.31 As already indicated, the financial remedies which were ultimately awarded amounted to $10,000; and costs in the Authority have been fixed at $1,400. To those sums should be added a notional amount for fair and reasonable costs up to August 2015, by which time the substantive challenge had been brought. I allow $2,000. In all, the total figure for comparative purposes is $13,400.

[48] In *Blue Star Print Group (NZ) Ltd v Mitchell,* the Court of Appeal referred to the applicable principles which apply to a Calderbank offer.32 In particular, it emphasised that the detailed provisions of the High Court Rules would be relevant.

[49] The offer made by Mr Farrimond, of $15,000 exceeded the comparative figure of $13,400. Consequently r 14.11 of the High Court Rules applies. That is, the offeror is entitled to an allowance for costs after the offer is made, if that party offers a sum of money to the other party that exceeds the amount of a judgment obtained by the other party against the offeror, although this is a discretionary matter for the Court. The criteria of that Rule are made out.

[50] The offer made by Caffe Coffee to accept a payment of $20,000 should be considered according to the guidance contained in r 14.6(3)(b)(v) of the High Court Rules. An aspect of that rule is that the Court may order a party to pay increased costs if that party has contributed unnecessarily to the time or expense of the proceeding or a step in it by failing, without reasonable justification, to accept an offer of settlement, whether or not that is in the form of a Calderbank offer – again subject to the direction of the Court. For the purposes of that rule, having determined that Mr Farrimond had made a valid counter Calderbank offer in the sum of $15,000, I conclude there was reasonable justification for him to reject Caffe

Coffee's counter-offer of $20,000.

31 *Rodkiss v Carter Holt Harvey Ltd* [2015] NZEmpC 147, (2015) 10 NZELC 79-058 at [35] –

[37].

32 *Blue Star Print Group (NZ) Ltd v Mitchell* [2010] NZCA 385, [2010] ERNZ 446.

[51] Earlier in this judgment I determined that Caffe Coffee had a potential entitlement to costs in the sum of $12,889. I must now consider whether a discount to that figure should be made, having regard to Mr Farrimond's Calderbank offer. In doing so I recognise the principles referred to by the Court of Appeal in *Blue Star* that:33

a) The public interest in the fair and expeditious resolution of disputes would be undermined if a party were able to ignore a Calderbank offer without any consequence as to costs; and

b) A steely approach is required.

[52] Proceeding on the basis of these principles, I consider the earlier figure I

identified in respect of Caffe Coffee's costs of $12,889, should be reduced to $6,500.

Disbursements

[53] Finally, I deal with Caffe Coffee's claim for disbursements. I do so on the basis that to qualify as a recoverable disbursement, a payment must be both necessary to the conduct of the proceeding and reasonable.34

[54] Caffe Coffee seeks allowance for the issuing of the statement of problem in the Authority, when a filing fee of $71.56 was paid. It also seeks filing fees in the Employment Court totalling $306.66 and hearing fees of $1,502.64 are sought. These fees were necessarily incurred; I adopt the same approach as adopted when assessing costs, and allow 20 per cent of each such figure.

[55] It also seeks an allowance for the costs incurred in retaining its expert, Mr David Burton, in the sum of $4,025. Mr Burton's evidence related to the breach

of confidentiality cause of action, which did not succeed. I disallow this claim.

33 *Blue Star Print Group (NZ) Ltd v Mitchell,* above n 32 at [18] and [20].

34 *Baker v St John Central Regional Trust Board* [2013] NZEmpC 109 at [43].

Conclusion

[56] The challenge of the Authority's costs determination is allowed. Mr Farrimond must pay Caffe Coffee a contribution to its costs of $700, and for a disbursement, the sum of $14.31.

[57] Mr Farrimond is to pay Caffe Coffee a contribution to its costs of $6,500, and for disbursements the sum of $361.86.

[58] The Registrar is directed to pay to Caffe Coffee's lawyer the sum which was paid into Court so as to stay the Authority's costs determination, together with accrued interest.

B A Corkill

Judge

Judgment signed on 23 August 2016 at 10.15 am
