New Zealand Employment Relations Authority Decisions

Clark v Idea Services Limited (Christchurch) [2010] NZERA 940 (17 December 2010)

Last Updated: 11 January 2011

IN THE EMPLOYMENT RELATIONS AUTHORITY CHRISTCHURCH

CA 112A/10 5161774

BETWEEN

A N D

WILLIAM STUART CLARK Applicant

IDEA SERVICES LIMITED Respondent

Member of Authority: Representatives:

Submissions Received:

James Crichton

Damien Pine, Counsel for Applicant Paul McBride, Counsel for Respondent

17 November 2010 from Respondent 1 December 2010 from Applicant

Date of Determination:

17 December 2010

COSTS DETERMINATION OF THE AUTHORITY

The application for costs

[1] By determination dated 7 May 2010, the Authority resolved the employment relationship problem between these parties by determining that the applicant (Mr Clark) had not been unjustifiably dismissed from his employment by the respondent (Idea).

[2] Costs were reserved.

The claim for costs

[3] Counsel for Idea, Mr McBride, seeks an order for costs in the sum of $16,000 together with $3,993.56 in witness expenses and/or disbursements as scheduled.

[4] That submission is resisted by Mr Clark who proposes a costs award of $5,000 together with a contribution of $800 towards the disbursements incurred by the successful respondent.

The legal principles

[5] The law concerning costs fixing in the Authority is well settled. The tariff-based approach in particular has a long history in the Authority and has been specifically referred to with approval by the Employment Court provided the particular circumstances of the individual case are taken into account as well: *PBO Ltd v. Da Cruz* [2005] NZEmpC 144; [2005] 1 ERNZ 808. *Da Cruz* is also authority for the proposition that the usual range of factors traditionally referred to by the Authority in a

costs setting are appropriate in the exercise of the Authority's discretion.

[6] It is fundamental to costs fixing that costs follow the event. In the present case, Idea was completely successful in defending itself against Mr Clark's personal grievance claim. It follows that, on general principles, Idea is entitled to have Mr Clark contribute to its costs.

[7] Also relevant in the Authority is the principle that costs should generally be modest and, in particular, more modest than costs set in the more traditional Court environment. The nature of the Authority's investigative process ought to militate against the quantum of fees often incurred in the more traditional adversarial environment.

[8] Finally, having identified the general principles which might apply in a particular case, the Authority is charged with the obligation of applying what amount to multipliers to, for instance, the basic daily tariff, in order to reflect the particular circumstances of the case. I am satisfied there are three such issues in the present case, namely the behaviour of Mr Clark in the management of his claim and the impact of that (if any) on the successful party, the matter of the extensive disbursements claimed by Idea and finally Mr Clark's ability to pay.

[9] Distilled down, the Authority's task may be summarised by the response to three questions:

(a) What are the legal and other expenses of the successful party;

(b) Are those expenses reasonable; and
(c) What percentage of those expenses ought to be met by the unsuccessful

party?
Graham v. Airways Corporation of New Zealand Ltd AA39/04 applied. **Discussion**

[10] The Authority is told that Idea incurred costs of approximately $23,000 plus GST and disbursements. It follows that Idea's claim for costs to be fixed at $16,000 (exclusive of GST and disbursements) represents around two-thirds of the actual costs incurred by Idea.

[11] The next issue for the Authority to consider is whether the costs incurred by Idea are reasonable. In this connection, it is appropriate to consider the practical effects of geography. This was an investigation run by the Authority, as the law requires, at the location closest to where the work in dispute was performed, at Invercargill. Counsel for Idea, presumably a national entity in itself, is based in Wellington. It follows that a significant portion of the disbursements cost is a function of the distance between counsel's base and the place where the work was performed. As Mr Pine makes clear in his submissions on behalf of Mr Clark, there is a line of authority emphasising the principle that travel and other ancillary costs associated with counsel's remoteness from the district will not necessarily be recoverable in the employment jurisdiction. Balanced against that is the fact that Idea is a national entity and there is much to be said for the principle that parties should be free to choose their own counsel.

[12] However, I am satisfied that reimbursement of all of the disbursements claimed would be unfair and inappropriate. Even if counsel instructed attended at the investigation meeting on behalf of his client, it seems quite inappropriate that the work of briefing witnesses and the costs associated with that prior to the investigation meeting, were not dealt with by a local agent or, as Mr Pine suggests, by way of telephone conference or video link. Nor do I accept that it is appropriate for Idea to expect to recover the cost of bringing its witnesses down to Invercargill. One of those witnesses in particular, while no doubt of assistance to the Authority in its investigation, was hardly critical.

[13] In endeavouring to answer the question of what proportion of the successful party's costs ought to be borne by the unsuccessful party, a relevant pair of factors, one going each way, needs to be reflected upon. The first of these is Idea's allegation that the costs of the hearing were materially affected by the way in which Mr Clark conducted himself, and in particular by the continuing delays in obtaining his evidence and generally having Mr Clark conform to timetables. It is contended that the Authority was frustrated by Mr Clark's behaviour and that at various points during the management of the file, leading up to the investigation meeting, the Authority made it clear that the continuing delays would sound in costs.

[14] While it is clear that there was some engagement between the parties prior to the investigation meeting concerning the witnesses that would give evidence for Mr Clark, I am not persuaded that the failure of Mr Clark to prepare written briefs of evidence for his witnesses and instead to simply summons those witnesses to the investigation meeting, put Idea at a disadvantage or indeed caused it additional cost. In fact, as the Authority makes clear in its determination, many of those witnesses were of no help to Mr Clark at all. It seems that, having been provided with a list of the witnesses who Mr Clark proposed to call, Idea then had its counsel seek to engage with those witnesses first and, in the result, counsel for Idea was able to speak with a number of those witnesses. It is suggested for Idea that that cost is reasonable and ought appropriately be part of the costs recovered from Mr Clark. The implication to be taken from this submission is that, had Mr Clark done a proper job briefing up his witnesses, that additional cost would not have been necessary.

[15] Mr McBride, for Idea, claims that the Authority was contemplating adjourning the matter because Mr Clark had not briefed up his witnesses, but that is simply not borne out by the Authority's file and the careful handwritten notes taken of the telephone conference between the parties at the time. Indeed, those notes record the Member saying quite the reverse: that he was loathe to contemplate an adjournment. When Mr McBride subsequently sought that adjournment directly after the telephone conference, it was promptly refused by the Authority in a Minute dated 31 August 2009. That Minute does refer to costs, but on the basis that if Mr Clark did not strictly adhere to an undertaking that he had made, the effect of which was that the evidence of the summonsed witnesses was simply corroborative of Mr Clark's own evidence (which had been filed and served), the failure of Mr Clark to keep to his undertaking *will likely sound in costs.*

[16] It is true that immediately prior to the investigation meeting, Mr Clark supplied some new briefs of evidence and withdrew the necessity to call other witnesses, having perused Idea's briefs of evidence in response.

[17] While I am not persuaded, from a careful study of the Authority's file, that the Authority Member conducting the investigation was as determinative about the costs issue as Mr McBride claims, I think it is appropriate to factor in some increase in costs incurred as a consequence of Mr Clark's frequent change of position prior to the investigation meeting.

[18] However, on the other hand, Mr Pine's submission about Mr Clark's ability to meet a costs award also must be taken into account. It is well known that the Authority regularly considers applications from indigent parties who are unable to meet the full rigour of a normal costs award. It is the case that such applications are considered and taken into account. In the present case, whatever the award, it will of necessity be significant. The matter took two days to hear and, as I have already just described, there were some steps taken by Mr Clark who seems to have mostly acted for himself, which may well have put the other side to additional expense.

[19] Taking all those factors into account, I think the appropriate starting point is the daily tariff. This matter was dealt with in two days. On the face of it, that would suggest a contribution to costs of perhaps $7,000 at $3,500 a day together with a contribution to disbursements. I have already made clear that I do not accept that all the disbursements can properly be recovered. I agree with Mr Pine's estimate that a contribution of $800 is all that is appropriate. Considering whether the daily tariff needs to be moved up or down because of the various factors that I have described above, I think the matter is reasonably balanced at that sort of figure; on the one hand I think Mr Clark's rather cumbersome approach to his claim did contribute to increasing the successful party's costs, but on the other, I am mindful of Mr Clark's reduced circumstances since the dismissal and I think the proper course is to let matters rest there.

Determination

[20] On that basis then, costs are fixed at $7,000 together with disbursements of $800. Mr Clark is to pay that total of $7,800 to Idea.

[21] Mr Pine refers to the fact that the matter is going on challenge to the Employment Court and seeks a stay in relation to costs. I do not think that appropriate in the circumstances. The proper course is for costs to be fixed now in the Authority; the Court, which will be seised of the matter shortly, may entertain a stay if it sees fit.

James Crichton
Member of the Employment Relations Authority
