Employment Court of New Zealand

Croft v Transfield Services (New Zealand) Limited [2011] NZEmpC 136 (21 October 2011)

Last Updated: 28 October 2011

IN THE EMPLOYMENT COURT AUCKLAND

[2011] NZEmpC 136

ARC 92/09

IN THE MATTER OF a challenge to a determination of the

Employment Relations Authority

AND IN THE MATTER OF an application for costs

BETWEEN PAUL CROFT & OTHERS Plaintiff

AND TRANSFIELD SERVICES (NEW ZEALAND) LIMITED

Defendant

Hearing: Submissions filed on 25 August and 9 September 2011

Judgment: 21 October 2011

JUDGMENT OF JUDGE B S TRAVIS

[1] The defendant has applied for costs against the plaintiffs.

[2] The current position of these proceedings had become unclear. Mr Yukich, the representative of the plaintiffs attempted to file a notice of discontinuance dated

11 February 2011 which stated that the plaintiff, Paul Richard Croft, “discontinues this proceeding against Transfield Services Limited”. It also stated that there was no issue as to costs between the parties.

[3] The defendant had already indicated that there was an issue as to costs and, because the notice did not deal with the other plaintiffs referred to in the entituling, the Registry of the Court declined to accept it for filing.

[4] Mr Yukich has advised the Court that he has had continuing difficulties in trying to locate the other plaintiffs who might have been wishing to continue to

pursue the challenge.

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[5] The determination of the Employment Relations Authority, issued on 20

October 2009,[1] dealt with two applications. The entituling showed the Electrical Union Incorporated as first applicant and Paul Croft and others as the second applicants. In relation to the matter of parties the Authority stated:

[4] While it is accepted that the Electrical Union Incorporated (“the Union”) is the first applicant to the proceedings, the respondent has raised the fact that Paul Croft is the only person whom has been named in regard to the citation of the second applicants. Mr Yukich has provided a union membership list which names 48 people (including Mr Croft) whom, he submits,

are the second applicants to the proceedings. This list is attached as Appendix One to this determination. There was no objection raised by the respondent that these employees should be the applicant parties. In the absence of evidence to the contrary, I have taken it that the Union is authorised to act on behalf of the 48 named employees in regard to their status as the second applicants to the proceedings.

[6] When the matter reached the Court the position of the plaintiffs had not been clarified. A number of callovers were adjourned to enable the plaintiffs to determine the progress of another case before the Court which could affect the outcome of the present challenge. In a minute on 1 September 2010, I directed that the plaintiffs must clarify who intended to proceed with the present challenge and, if as many as six of the plaintiffs were overseas, observed that this might justify the granting of security for costs. I invited the parties to settle the aspect of security informally. I also invited them to seek a further directions conference as soon as the position with the other case before the Court was clarified.

[7] Ms Service, on behalf of the defendant, sought specific directions from the

Court regarding the issues of the plaintiffs' identity. I issued a further minute on 17

December 2010, requiring the advocate for the plaintiffs to advise the defendant and the Court by 4pm on Friday 21 January 2011:

(a) the names of all the plaintiffs to be represented in this hearing, together with some evidence that they have authorised that

representation;

(b) the plaintiffs were to indicate whether they reside in New Zealand or overseas.

[8] I also directed that a further telephone conference call should be arranged early in February at a mutually convenient time to clarify all of these aspects. Counsel for the defendant sought to have a callover prior to receiving notification of the identities and location of the plaintiffs in order that the matter might be progressed. I was sympathetic to that request as this matter had already taken a considerable time and was still not ready for setting down. Mr Yukich responded advising that the list of plaintiffs had not been finalised and they had not been served and he was experiencing difficulties in locating those applicants who were no longer in New Zealand. He advised that the list would be prepared and served prior to 28

February 2011 when the plaintiffs would be available for callover. I therefore directed that a callover be arranged at the first mutually convenient date after 28

February 2011 when the list of plaintiffs was to be filed and served. This was then followed by the attempted filing of the notice of discontinuance.

[9] Mr Yukich filed a memorandum as to costs on 9 September in which he advised that the plaintiff, Mr Croft, who is a key witness in these proceedings, was unable to proceed for personal health reasons, the nature of which were known both to the defendant and to the defendant's counsel. It was for this reason that the discontinuance of proceedings was filed.

[10] Following the attempted filing of the notice of discontinuance the plaintiffs were directed to file and serve an amended statement of claim with the correct particulars of the plaintiffs. Once that had been done, if it was the position that those plaintiffs did not wish to proceed, a further notice of discontinuance should be filed. Mr Yukich advised the Court that he has since been unable to locate at least half of the original plaintiffs to take instructions regarding the refiling of the statement of claim as they are no longer in New Zealand. Accordingly he was in a position of stalemate with no valid statement of claim before the Court and, as a consequence, unable to discontinue a proceedings that was never properly brought.

[11] In these circumstances I consider that Mr Yukich, as the authorised representative of the named plaintiff has effectively withdrawn these proceedings on behalf of all of the plaintiffs. I can therefore now proceed to deal with the defendant's application for costs as though a valid discontinuance was filed.

[12] If either party takes objection to that course they should, within 14 days from the issuing of this judgment, apply to the Court in writing and serve the application upon the other side.

[13] Counsel for the defendant had listed the attendances they had performed for the defendant since the challenge was filed. They included responding to a notice of disclosure by drafting and filing an objection to disclosure, preparation for attendance at a callover on 28 May 2010, various attendances regarding requests to adjourn the callover, drafting memoranda for the Court, drafting a statement of defence and various attendances following receipt of the notice of discontinuance. These are said to total $14,859.

[14] The defendant seeks a contribution of $11,887 towards those costs, citing *Bennett v Bright Wood New Zealand Ltd*[2] where the plaintiff 's decision to "unilaterally discontinue her proceedings" was unexplained. They submitted that the Court in that case inferred that the plaintiff 's challenge was without merit and that the defendant was needlessly put to the cost of defending it. The Court ordered an

80 per cent contribution to the total costs incurred by the defendant. Counsel for the defendant submitted that the same may be inferred in the present proceeding and therefore a percentage of 80 percent as a contribution to the costs incurred was sought.

[15] Mr Yukich referred to the proceedings that are still before the Court as demonstrating that there was merit in the challenge and that it was circumstances beyond the control of the named plaintiff that has led him to instruct Mr Yukich to

discontinue.

[16] Mr Yukich submitted that in a non de novo application a large amount of the preparation work will already have been completed in the Authority and that therefore the costs claimed by the defendant are neither reasonable nor necessary and were excessive and not for the purpose of the conduct of the case. Mr Yukich submitted that the costs were not as a consequence of responding to the plaintiff's case but were at the initiation of the defendant. He observed that there had been no disclosure or discovery. He also submitted that the information provided to the Court for the purpose of assessing the costs was inadequate and lacking in detail as no invoice showing costs actually charged and paid were provided. Moreover, he submitted, no times were allocated for the various activities or information provided as to the level at which counsel were engaged.

[17] Finally he observed that the plaintiffs remained out of work for a lengthy period of time and, as a result of the redundancy, numbers were being forced to leave New Zealand to seek work in the Middle East or Australia.

[18] Mr Yukich submitted that costs should lie where they fall. In the alternative they should be no more than two thirds of those reasonably incurred in attending the callover when the plaintiff sought adjournment. He submitted that any further subsequent costs were incurred at the initiation of the defendant. He also submitted that any costs award should be apportioned among the plaintiffs.

[19] I accept Mr Yukich's submission that, from the parallel proceedings still before the Court arising from the same matter, it cannot be inferred that the present challenge was without merit. This challenge was therefore distinguishable from the *Bennett* case. I am also not satisfied that the costs incurred were reasonable in the absence of the information which might well have been placed before the Court, recording the actual costs that were incurred by the defendant and from the nature of the attendances at this early stage of the proceedings.

[20] As a guide to what might have been reasonable for the attendances that were required in relation to the preparation of the statement of defence and opposing disclosure, I have had regard to the principles for determining costs in the High Court Rules for category 2 proceedings in Band A. I have chosen that band

because I consider that a small amount of time was reasonable in view of the incomplete state of the proceedings to which the defendant had to respond and the work that had already been performed for the Authority's investigation. I allow for the notice of objection to the disclosure and the various attendances relating to the callover and the filing of the defence a total of $4,000 as a reasonable sum. I consider that the plaintiffs should contribute $2,666 being two thirds of that sum as a contribution towards what I have assessed as the defendant's reasonable costs.

[21] The sum of $2,666 also takes into account the costs of preparing the memorandum in support of the defendant's costs application.

[22] I therefore direct the plaintiffs to pay to the defendant the sum of $2,666. I cannot make the apportionment sought by Mr Yukich as I still do not have any list of the plaintiffs who were involved in the challenge, nor their number.

B S Travis

Judge

Judgment signed at 3.45pm on 21 October 2011

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[1] AA 369/09.

[2] [2010] NZEmpC 74.
