Employment Court of New Zealand

Doran v Crest Commercial Cleaning Limited [2012] NZEmpC 200 (29 November 2012)

Last Updated: 10 December 2012

IN THE EMPLOYMENT COURT CHRISTCHURCH

[2012] NZEmpC 200

CRC 49/10

IN THE MATTER OF a proceeding removed into the Court by the

Employment Relations Authority

AND

IN THE MATTER OF an application for costs

BETWEEN ROGER TERRANCE DORAN Plaintiff

AND CREST COMMERCIAL CLEANING LIMITED

Defendant

Hearing: on the papers - memoranda received 2 August and 29 August 2012

Court: Judge A A Couch

Judge A D Ford

Judgment: 29 November 2012

COSTS JUDGMENT OF THE FULL COURT

[1] We concluded our substantive judgment1 by encouraging counsel to agree costs if possible. That did not occur and memoranda have now been filed.

[2] This case raises four issues of note regarding costs:

(a) The matter was removed into the Court by the Employment Relations Authority and no order for costs was made by the Authority. This raises the question how costs incurred prior to the removal ought to be

considered.

1 [2012] NZEmpC 97.

(b) This case was promoted by the defendant as a test case. Was it properly a test case? If so how, if at all, should that affect any award of costs? If it was not a test case, it raises the question whether it was nonetheless reasonable for the plaintiff to incur greater costs than might otherwise have been the case.

(c) The remedies sought and ultimately awarded to the plaintiff were small compared with the costs of the litigation. That raises the question whether a plaintiff in Mr Doran's position should have to contribute a substantial part of his remedies to costs.

(d) As the plaintiff was legally aided, the rates at which his counsel were paid for their work were minimal. This raises the question whether the plaintiff should be reimbursed for a greater proportion of the costs incurred on his behalf than would

otherwise have been the case.

[3] The Court's discretion to award costs and the core principles generally applicable to the exercise of that discretion were conveniently summarised in *Merchant v Chief Executive of the Department of Corrections:2*

[2] Clause 19(1) of Schedule 3 to the Employment Relations Act 2000 confers on the Court a broad discretion to make orders as to costs but, as with all such discretions, it must be exercised judicially and in accordance with principle. The key principles applicable to the Court's discretion to award costs have been set out by the Court of Appeal in three very well known decisions: *Victoria University of Wellington v Alton-Lee* [2001] NZCA 313; [2001] ERNZ 305, *Binnie v Pacific Health Ltd* [2003] NZCA 69; [2002] 1 ERNZ 438 and *Health Waikato Ltd v Elmsly* [2004] NZCA 35; [2004] 1 ERNZ 172.

[3] The fundamental purpose of an award of costs is to recompense a party who has been successful in litigation for the cost of being represented in that litigation by counsel or an advocate. A useful starting point is two- thirds of the costs actually and reasonably incurred by that party but that proportion may be adjusted up or down according to the circumstances of the case and the manner in which it was conducted. Ability to pay is also a factor to be taken into account.

Actual costs

[4] In this case, the costs said to have been actually incurred by the plaintiff in relation to the proceedings as a whole are $20,896.42 for fees and $2,956.40 for

2 [2009] ERNZ 108

disbursements, both figures being inclusive of GST. These amounts are confirmed by copies of invoices attached to Mr Zindel's memorandum.

[5] The only issue regarding the actual costs incurred is the extent to which they relate to the proceedings before the Court. The first two invoices are for work up to

17 December 2011, that being shortly after the date on which the proceedings were removed into the Court. The sum of those two invoices is $2,718.43 for fees and

$142.23 for disbursements.

Costs incurred prior to the removal

[6] This brings us to the first question posed earlier, that is how the plaintiff should be recompensed for costs incurred prior to removal. Neither counsel made submissions on this issue, and there appears to be no previous decision of the Court which has specifically dealt with it, but it is important and we have considered it. On one hand, it is arguable that these are costs incurred while the matter was before the Authority and therefore ought to be dealt with according to the principles used to

determine orders for costs in the Authority3. On the other hand, the Authority

ordered that the whole matter be removed into the Court without the Authority investigating it. It follows that all of the preparatory work done by the parties prior to the removal was applied to the hearing in the Court and cannot be said to have been part of an investigation by the Authority.

[7] We adopt the second point of view. The principles to be applied in ordering costs in the Authority, clarified by the full Court in the *Da Cruz* decision, were based very largely on the distinctive nature of the investigation and determination process of the Authority. Where a matter has been removed to the Court in its entirety without the Authority investigating the matter, that distinctive resolution process is not used. Rather, the matter is resolved solely through the traditional adversarial process of the Court. In such cases, it is appropriate that the principles guiding orders for costs be those which the Court of Appeal has decided should be applied to

cases decided according to the process of the Court.

3 Set out in *PBO Ltd (formerly Rush Security Ltd) v Da Cruz* [2005] NZEmpC 144; [2005] ERNZ 808.

Was this a test case?

[8] For the defendant, Mr Kiely's primary submission was that this was a test case and, for that reason, no order for costs should be made. In support of this submission, Mr Kiely referred us to the full Court decisions in *NZ Labourers etc IUOW and Ors v Fletcher Challenge Ltd and Firth Industries Ltd and Ors4* and *Adams v Alliance Textiles (New Zealand) Ltd5.*

[9] In the earlier *Fletcher Challenge* decision, the Court said:6

In a sense every case which is novel, and this was such a case, can be described as a test case. In another sense of the term, a test case is a case of a kind which frequently comes before this Court and which, although decided as between two parties

and perhaps in respect of a cause of action which is only a sample, is agreed or intended to affect not only those parties in respect of the sample cause of action but also those parties in respect of other similar occurrences and, in comparable circumstances, other parties bound by the same instruments. Another example of a test case is a case concerning the practice or procedure of this Court or some generalised ruling on a subject matter involving or affecting many parties.

[10] We accept Mr Kiely's submission that this is a useful working definition of a test case and we note that it appears to have been used as the basis for the decision in the later *Alliance Textiles* case. On the basis of this understanding of the term, Mr Kiely submitted that this was truly a test case because it involved the interpretation of ss 69G and 69I of the Employment Relations Act 2000 which had not previously been considered by the Court. He noted that the Authority determined that this gave rise to important questions of law which justified removal of the matter into the Court. In particular, Mr Kiely directed our attention to the view of the Authority that the Court's decision may have significance to a large number of employees affected or potentially affected "especially by contract changes in the cleaning services

industry."7

[11] In effect, Mr Kiely invited us to adopt a similar approach to that taken in the

Alliance Textiles case where the Court concluded:8

4 [1990] 1 NZILR 557.

5 [1992] NZEmpC 187; [1992] 3 ERNZ 822.

6 At 570.

7 CA233/10 at [9].

8 At 827.

We have no doubt that this was indeed a test case in the sense that it was novel and it concerned not only the practice and procedure of the Court but new substantive proceedings in radically different legislation, that is a generalised ruling on a subject matter involving or potentially affecting many parties.

[12] We do not think that this was such a case. While it appears to have been the first case in which the 2006 amendments to Part 6A of the Employment Relations Act 2000 were relied on for a remedy, that does not, of itself, make it a test case. To the extent that the meaning of those new provisions was in issue, that was because the defendant chose to put them in issue and did so in an indefensible way. As we found in our substantive judgment, the interpretation of the key provisions adopted by Mr McLaughlin was irrational and unreasonable. While Mr Kiely made a valiant effort to advance the defendant's case on the basis of mainstream legal principles, it became increasingly clear as the case progressed that the defendant's position was based on ideological and political beliefs rather than on legal analysis. On the facts, it was abundantly clear that the defendant's case was untenable on any reasonable interpretation of the statute. Accordingly, we decided the case very largely by a conventional application of the plain meaning of the words used in the statute to the facts as we found them. We did not need to discern and define precise boundaries. Thus, if there is any real doubt about the meaning of the provisions of the Act involved, it did not emerge in this case.

[13] We conclude that there is no reason to depart from the usual starting point that costs should follow the event.

Extent to which actual costs were reasonably incurred

[14] The first aspect of this consideration follows on from our discussion of whether this was a test case. While we have firmly concluded that it was not actually a test case, it was promoted as such by the defendant throughout the entire course of the proceedings. Mr Zindel submits that, as a result, it was reasonable for the plaintiff to present more detailed and extensive argument than would otherwise have been the case. He says that preparing that expanded argument involved significantly more work for counsel and therefore resulted in greater fees being incurred by the plaintiff.

[15] We accept this submission. The extent to which legal fees are reasonably incurred will always depend on the particular circumstances of the case. From the outset, one of the dominating features of this case was that the defendant promoted it as a test case which would involve novel and important legal issues in addition to disputed questions of fact. Counsel for the plaintiff were entirely justified in researching those issues and preparing full argument on them in order to counter the case it was anticipated the defendant would advance. Indeed, counsel may have been considered negligent not to do so. We find that this made it reasonable for the plaintiff to incur the additional cost of such work over and above what was required to properly prepare and present what he saw as a relatively straightforward claim.

[16] Taking the conclusions we have reached so far into account, we must now consider overall the extent to which the costs actually incurred by the plaintiff were reasonable. In his memorandum, Mr Zindel says that the fees charged to the plaintiff were for 146 hours of work, being about 103 hours of his time at $134 plus GST per hour and the balance being Ms

Mckinnon's time at $92 plus GST per hour.

[17] Mr Zindel has set out in his memorandum a list of the tasks that he and Ms Mckinnon performed and which occupied this time. This includes 13 categories of work but the only record of specific time spent on a particular type of work is the time in Court. He does, however, note that 204 letters, faxes or emails and 27 telephone calls were made or received. Mr Zindel also records that there was some duplication of effort with junior counsel being involved in the hearing.

[18] Mr Kiely submits that the time spent on the matter by counsel for the plaintiff was excessive. He relies on the observation in *Binnie* that "The broad approach of two days preparation for every day of hearing is no doubt also a useful rough and ready guide."9 On this basis, Mr Kiely submits that a total of 67.5 hours was the limit of what was a reasonable time for counsel to devote to the matter. We note, however, the next sentence of the judgment in which the Court of Appeal suggested that this needed to be reconsidered if the case was well outside the norm in respect of legal expenses incurred prior to hearing as a result of the defendant's conduct. We

think this is such a case. The defendant's promotion of this as a test case caused the

9 [2003] NZCA 69; [2002] 1 ERNZ 438 at [16].

plaintiff to incur unusually large fees for preparation and, as we have concluded, it was reasonable that he did so.

[19] In previous decisions, this Court has taken the view that any costs approved by the Legal Services Agency should be regarded as reasonable.10 While we think that remains a proper inference in most cases, there may be exceptions. In this case, the plaintiff was represented throughout the Court hearing by two counsel, both of whose fees were apparently approved by the Legal Services Agency. It is not our role to decide whether or not the Legal Services Agency was correct to approve

payment for two counsel. What we must be concerned with, however, is whether it is reasonable to require the defendant to contribute to the costs for two counsel. In this case, we think not. While considerable additional work was required to prepare submissions, it was well within the ability of experienced counsel such as Mr Zindel to present those submissions and to conduct what was otherwise a relatively straightforward case. Accordingly, we exclude the fees charged for Ms Mckinnon's appearance from consideration. That was 16.2 hours at $92 plus GST per hour which equates to $1,713.96. We regard the balance of the time devoted to this matter by counsel for the plaintiff and the fees charged for that work as reasonable. That balance is $19,182.46.

Extent of contribution

[20] Applying the conventional principles, we take as a starting point that the defendant should be ordered to pay two thirds of the costs actually and reasonably incurred by the plaintiff. We then consider whether that proportion ought to be adjusted up or down to reflect the manner in which the case was conducted and other relevant factors.

[21] On the first day of hearing of this matter, the proceeding was delayed while documents which had not been previously disclosed by the plaintiff were copied and Mr Kiely given a proper opportunity to consider them. Mr Kiely submits that this

was avoidable and ought to be reflected in the quantum of costs awarded. We agree

10See, for example *Reynolds v Burgess* CC 5A/07 and *Hayllar and Matene v The Goodtime Food*

Company Ltd [2012] NZEmpC 193.

and take this into account. It unnecessarily increased not only the costs incurred by the plaintiff but also those incurred by the defendant.

[22] Mr Kiely also submits that we should reduce the costs awarded to the plaintiff to reflect the fact that his claims for penalties against the defendant were unsuccessful. We do not accept this submission. The claims for penalties were a minor adjunct to the plaintiff's proceedings. No additional evidence was led in relation to them and very little time devoted to them in submissions.

[23] In support of a contribution greater than two thirds, Mr Zindel highlights the very modest legal aid rates at which the plaintiff was charged for his work and that of Ms Mckinnon. As noted earlier, those rates were $134 plus GST per hour for Mr Zindel and $92 plus GST per hour for Ms Mckinnon. Mr Zindel submits that, where the actual costs were so low, it is reasonable to award a greater proportion of them to a successful party.

[24] In response to this submission, Mr Kiely very properly referred us to the decision in *Goodfellow v Building Connexion Ltd*11 where the Court concluded that the same principles should be applied to cases in which the successful party was legally aided as are applied in other cases. The principal reason given for this conclusion was that, in the leading decisions, the Court of Appeal made no distinction between parties paying their own costs and those who were legally aided.

[25] While that observation was undoubtedly correct, we think that it did not fully take account of the reasoning of the Court of Appeal in the leading cases, particularly that in *Alton-Lee*. In summarising five factors they took into account in deciding what level of contribution was reasonable, the first factor referred to was that Dr Alton-Lee's solicitors had written off significant unbilled time devoted to work on her behalf. The Court said "We accept that an assessment of what costs are reasonable in relation to litigation is not controlled by the level of costs actually

charged."[12] Applying this principle, they took into account in assessing what were

11 [2010] NZEmpC 153

12 [2001] NZCA 313; [2001] ERNZ 305 at [62].

reasonable costs the amount which the solicitors might have charged as fees but had written off.

[26] In this case, had the plaintiff engaged Mr Zindel and Ms Mckinnon without legal aid, we would have had no hesitation in accepting that rates double those actually charged in this case were reasonable. We take this into account in our overall assessment of what it is reasonable to order the defendant to contribute to the plaintiff's actual costs.

[27] Another factor Mr Zindel urges us to take into account is that the remedies sought by the plaintiff and awarded to him were very modest compared to the costs incurred. Mr Zindel submits that it would be unjust if the plaintiff was required to devote most or all of the remedies he was awarded to repayment of legal aid provided to him.

[28] While we see some merit in this proposition in principle, we cannot apply it in practice in this case. We have not been told what proportion of the legal aid advanced to the plaintiff he will be required to repay or even what proportion is commonly required in cases such as this. There is therefore no material before us on which we could exercise our discretion to take this factor into account. It may be that this is a submission more appropriately advanced to the Legal Services Agency when it is considering the extent of contribution required by the plaintiff.

[29] In terms of movement from a starting point of two thirds, we make a small adjustment downward to reflect the costs wasted by the plaintiff's failure to disclose documents in time and a moderate adjustment upwards to reflect the very economical rates at which the legal work for the plaintiff was done. The defendant is to pay the plaintiff 75 per cent of the fees actually and reasonably incurred. Rounding that figure up slightly, we order the defendant to pay the plaintiff $14,400 for fees.

Disbursements

[30] The plaintiff seeks reimbursement of disbursements totalling $2,956.40 inclusive of GST, which have been met by the Legal Services Agency. That sum includes filing fees of $276.00 which are plainly recoverable. It also includes two amounts of $751.32 for hearing fees. This appears to have been in error as hearing

fees were payable for only three half days, being each half day after the first day13.

Attached to Mr Zindel's memorandum is an invoice from the Ministry of Justice dated 29 August 2011 for $751.32 hearing fees for three half days. We allow one such amount.

[31] Other disbursements claimed include airfares of $522.00 for both Mr Zindel and Ms Mckinnon to attend the third day of hearing in Wellington together with "accommodation" costs of $118.50, expenditure on "taxis" of $82.70 and "gown hire" of $10. As we have earlier concluded that it is not reasonable to require the defendant to contribute to the cost of second counsel appearing in Court, we disallow

$261.00 being half of the cost of airfares and, inferring that the gown was hired for Ms Mckinnon to wear, that amount also. The claim for accommodation is unexplained and, given that the airline tickets show that Mr Zindel was able to travel to and from Wellington on the day of hearing, this amount cannot relate to his appearance there. We disallow that amount.

[32] The final sums claimed are $168.56 for preparing the bundles of documents and materials and a total of $207.00 for "office". There is no information establishing that these amounts were true disbursements in the sense of sums paid to third parties for goods or services provided. Indeed, the sums for "office" are clearly to cover incidental supplies and services provided within Mr Zindel's office. In most cases, the Court would regard these amounts as normal business overheads covered by legal fees. Where, as in this case, the successful party is in receipt of legal aid and the level of fees chargeable is severely constrained, that is not appropriate. The Legal Services Agency itself recognises that by paying such amounts in addition to

fees. We allow these amounts.

13 See regulation 75 and Schedule 3 of the Employment Court Regulations 2000.

[33] In total, we conclude that the defendant ought to reimburse the plaintiff for disbursements totalling $1,746.58.

Conclusion

[34] In conclusion, the defendant is ordered to pay the plaintiff $16,146.58 for costs being $14,400.00 for fees and $1,746.58 for disbursements.

A A Couch
For the full Court

Signed at 3.30pm on 29 November 2012.
