New Zealand Employment Relations Authority Decisions

Douglas v Hames Sharley International Limited (Auckland) [2007] NZERA 24 (2 March 2007)

IN THE EMPLOYMENT RELATIONS AUTHORITY AUCKLAND

AA 24A/07 5039421

BETWEEN MARGARET DOUGLAS

Applicant

AND HAMES SHARLEY INTERNATIONAL LIMITED

Respondent

Member of Authority: Leon Robinson

Representatives: Phillipa Muir for Applicant

Blair Edwards for Respondent

Determination: 2 March 2007

DETERMINATION OF THE AUTHORITY AS TO COSTS

[1] By a Determination dated 1 February 2007, the Authority ordered the Respondent Hames Sharley International Limited ("Hames Sharley") to comply with a Record of Settlement and pay a penalty of $3,000.00. The applicant Ms Margaret Douglas ("Ms Douglas") now asks the Authority to order that the Hames Sharley pay her costs.

[2] The Authority dealt with the application for compliance orders and penalty on the papers. Ms Douglas now seeks costs on an indemnity basis in the sum of $12,375.50 together with disbursements of $83.20 being the legal fees incurred since September 2006.

[3] Following unsuccessful mediation on 30 August 2006, Ms Douglas' solicitors wrote to Hames Sharley by letter of the same date advising:-

We confirm that if Ms Douglas does not receive copies of the case studies outlined above (if necessary, Ms Douglas would be prepared to accept documentation relating to the Waitakere Mega Centre project instead of Uxbridge project), a positive reference from Hames Sharley as detailed in the Record of Settlement, and the sum of $5,403.93 net (or $4,903.93 net if a payment of $500 is received today), plus interest of $101.30 net and a contribution of $3,000 plus GST towards her legal costs, by ***5pm on Friday 1 September 2006,*** *Ms Douglas will seek an urgent hearing and will vigorously pursue her proceedings in the Employment Relations Authority. She will also seek reimbursement of her full legal costs (which are likely to amount to over $10,000), as well as a penalty of $10,000 for Hames Sharley's failure to comply with its obligations under the record of settlement."*

[4] It is submitted that this advice is in the form of what lawyers know as a "calderbank" letter. Counsel says it confirms that Hames Sharley was on notice from 30 August 2006 that Ms Douglas would be claiming full client/solicitor costs (likely to amount to over $10,000) if the record of settlement was not complied with by 1 September 2006. It is also submitted that the ongoing delays and refusal to comply with the record of settlement have added considerably to the applicant's costs. Counsel produces to the Authority a time printout detailing the legal work undertaken on Ms Douglas' behalf to procure compliance. I agree, Hames Sharley has delayed and failed to comply with the record of settlement.

[5] Mr Edwards for Hames Sharley, submits the advice of 30 August 2006 is not a calderbank letter because it contains no compromise by Ms Douglas and is therefore a letter of demand rather than a calderbank letter. Mr Edwards refers to the

Authority's usual range of costs awards and submits that the costs sought are excessive. Counsel concludes by submitting that an award of $1,000 plus the lodgement fee of $70 is appropriate.

[6] In exercising its discretion, the Authority determines what is a fair and reasonable contribution as between the parties. It adopts a principled approach taking into account relevant matters and having no regard for irrelevant ones. It has been held that the public interest in fair and expeditious resolution of disputes requires full weight be given to the extent to which costs were properly incurred following non-acceptance of offers of settlement at figures above any amount eventually awarded in litigation.

[7] It is also established that a calderbank offer must be transparent (free from hidden pitfalls), clear (readily understandable) and made in, and kept open for, sufficient time to enable the obtaining of advice and mature, unhurried consideration1. This I regard as definitive of a calderbank offer, and because the offer contained within the advice of 30 August 2006 was not kept open for sufficient time so as to permit unhurried consideration, I cannot regard it as a calderbank offer. Nor do I accept the submission that only cases or defences that are pursued in a reprehensible way can found a claim for full solicitor/client costs. That submission no longer correctly states the law2.

1 *Wellington Racing Club Inv -v- Welch &Anor* [2002] NZEmpC 131; [2002] 1 ERNZ 685
2 *Binnie v Pacific Health Ltd* [2003] NZCA 69; [2002] 1 ERNZ 438 (CA)

[8] Notwithstanding those legalities, I regard it undoubted that Ms Douglas has incurred legal costs she should not have. She should not have had to engage representation to enforce the provisions of the Record of Settlement. The terms of that settlement were abundantly clear and well known to both parties, entered into by both in good faith. There was no uncertainty or dispute which required resolution or clarification by adjudication. It required no more than performance by the parties. The application for compliance was not an action to clarify or determine legal rights but rather, one which required the parties to do what they had already agreed they would.

[9] Although there was no calderbank letter, in the circumstances of this case however, I am satisfied that something approaching indemnity costs is called for. I have particular concern to underscore the policy objectives that settlement agreements are to be honoured, that employment relationship problems are best resolved between the parties themselves at first instance, and that judicial type intervention be minimal.

[10] Ms Douglas successfully obtained an order for enforcement of the Record of Settlement. Although I have concluded the advice of 30 August 2006 cannot operate as a calderbank offer in the strictest sense, in my view Hames Sharley was always on notice from the time of its breach, that it ran a real risk of ultimately being called upon to meet the costs of its default. This is especially so for this particular respondent because the risk was run in the context of what I have earlier found to be deliberate non-compliance. The risk materialises now.

[11] I exercise my discretion by determining what is a fair and reasonable contribution as between the parties. I assess that contribution as the greater bulk of what her Counsel now claims. Ms Douglas should not have had to pay to compel Hames Sharley to do what it voluntarily agreed in good faith that it would. I make an award which does not seek to punish Harmes Sharely, but rather, attempts to compensate Ms Douglas for an expense she should not have incurred. Accordingly, exercising my discretion on a principled basis, I conclude a contribution of $10,000.00 is appropriate. **I order Hames Sharley International Limited to pay to Margaret Douglas the sum of $10,000.00 as a contribution to costs.**

Leon Robinson

Member of Employment Relations Authority
