Employment Court of New Zealand

Evolution E-Business Limited v Smith [2012] NZEmpC 58 (17 April 2012)

Last Updated: 24 April 2012

IN THE EMPLOYMENT COURT AUCKLAND

[2012] NZEmpC 58

ARC 15/10

IN THE MATTER OF proceedings removed from the

Employment Relations Authority

AND IN THE MATTER OF an application for costs

BETWEEN EVOLUTION E-BUSINESS LIMITED Plaintiff

AND BEN SMITH Defendant

Hearing: (on the papers, memoranda filed on 14 September 2011, 12 October

2011, 22 November 2011, 14 December 2011, 19 December 2011 and

20 December 2011)

Counsel: Philip Skelton, counsel for the plaintiff

Defendant in person assisted by his father Mr Brian Smith JP Judgment: 17 April 2012

COSTS JUDGMENT OF JUDGE A D FORD

[1] In the substantive proceeding in this case, the plaintiff (Evolution) sought damages and other relief against the defendant, its former employee, for alleged breaches of his employment agreement, in particular, his duties of good faith and confidentiality. In a judgment[1] dated 26 August 2011, I found against the plaintiff. On the issue of costs, I stated that the defendant was not entitled to costs in respect of the hearing because he had not been represented by legal counsel, but I noted that

he did have lawyers acting for him on a number of interlocutory matters and I accepted that in connection with those attendances he was entitled to claim an award for legal costs and disbursements reasonably incurred. I invited the parties to

endeavour to reach agreement on the costs issue, failing which I set a timetable for

filing memoranda. I also requested the defendant to attach receipted invoices to his memorandum together with an appropriate explanation of the services provided by his lawyers.

[2] Settlement did not prove possible and the memoranda filed by the parties raised new issues for consideration by the Court which could only be dealt with by allowing additional memoranda to be filed addressing those new issues.

[3] In his first memorandum filed on 15 September 2011, Mr Smith attached

13 invoices and a credit note from Kensington Swan covering the period 9 December

2009 to 22 February 2011 for fees and disbursements (including GST) totalling

$91,326.40. None of these costs or disbursements related to the seven-day hearing itself which did not commence until 27 June 2011. In addition to the Kensington Swan charges, Mr Smith also sought to recover airfares of $5,308.02 and taxi fares of $210. Mr Smith attached to his memorandum a copy of various email exchanges between the parties which indicated some frustration on his part in resolving the costs issue because Evolution had changed its legal representation and was obtaining a second opinion as to whether or not it would file an appeal in the matter.

[4] On 13 October 2011, a memorandum was filed on behalf of the plaintiff with respect to the issue of costs. It confirmed that Evolution had changed its legal representation to Russell McVeagh and that Mr Skelton had been instructed as counsel in the matter. Mr Skelton's helpful memorandum referred to the recognised legal principles in relation to awards of costs and then made a number of relevant observations in response to the defendant's claim in the present case. In summary, the submissions counsel made were:

1. There was no evidence before the Court that Mr Smith had incurred the legal costs he was now seeking to recover because each of the Kensington Swan invoices was made out to Transactor Technologies and marked for the attention of Mr John Norrie of that company. (Transactor Technologies and Mr Norrie had figured prominently in the substantive proceedings. That company had been a joint-venture partner with Evolution in developing a particular form of technology and the breakdown of their

joint-venture partnership had resulted in litigation between the two companies in the High Court and, indirectly, in Evolution's Employment Court claim against Mr Smith. Mr Smith went to work for Transactor Technologies in the United Kingdom after leaving Evolution.)

2. Mr Smith had failed to provide details as to the services provided by Kensington Swan. Each invoice simply recorded "Professional services for the period..." No other information was provided and no indication was given as to the nature of the legal services provided, the authors who provided the services or their hourly charge out rates.

3. "$91,326.40 is not and is nowhere near a reasonable fee to charge for the interlocutory steps taken by Kensington Swan in the Authority and before the Employment Court prior to Kensington Swan ceasing to act in February 2011."

4. "This is not one of those exceptional cases where the Court should award indemnity costs (as claimed by the Defendant) and depart from the usual rule of two thirds of reasonable actual costs incurred."

[5] There was significant substance in each of the points made by Mr Skelton and further time was given to Mr Smith to respond. In his Memorandum in Response dated 22 November 2011, Mr Smith attached a breakdown of the various Kensington Swan invoices. In response to the submission that the legal costs had been incurred by Transactor Technologies rather than the defendant personally, Mr Smith said:

5. I also append herewith the ledger from my employer, Transactor Technologies Ltd ("TTL") ("**Appendix BS-2**") in respect of their loan to me to cover the legal costs I incurred with Kensington Swan. As provided in evidence during the course of the hearing, I am still repaying the loan to TTL via a monthly deduction of the bonus incentive I am entitled to for managing TTL's project in the UK under the terms of my Employment Contract.

[6] Mr Skelton then filed a lengthy supplementary memorandum dated

14 December 2011 in which he made submissions on the itemised Kensington Swan

accounts and responded to the allegation by Mr Smith that TTL had advanced him a loan to cover his legal costs which was being repaid out of bonuses which would otherwise have been payable to him by TTL each month. Mr Skelton submitted:

11. No loan documentation has been produced to evidence a legal obligation on the part of the defendant to repay money advanced to him. TTL did not advance money to the defendant which he then used to pay Kensington Swan. If, as alleged by the defendant, this was a bona fide loan, Kensington Swan would have invoiced the defendant for the services provided, TTL would have made a loan advance to the defendant, there would be financial records showing the money being advanced to the defendant, and there would be a loan agreement or some written record, (or at least an e-mail) recording the terms of the loan including when and how the loan is to be repaid. No such documentation has been produced.

[7] In response, Mr Smith filed a further memorandum on 19 December 2011 attaching a copy of a two-page document headed "Cost Arrangements (Ben Smith) (April 2010)" dated 8 April 2010. The document signed by Mr Norrie and Mr Smith on 8 April 2010 records the arrangement whereby TTL would meet the legal costs Mr Smith incurred through Kensington Swan, up to a maximum limit of $100,000, on the basis that the loan would be repaid in full by Mr Smith out of the bonus incentive payments Mr Smith would otherwise have received for what was referred to as "the Subway European Roll-Out" provided for in cl 7.3 of his employment contract. Mr Smith apologised to the Court for "the omission of this agreement".

[8] The next development occurred on 20 December 2011 when Mr Skelton filed a further memorandum referring to passages in the notes of evidence which counsel submitted "cast grave doubt as to the authenticity of the document which the Defendant has sought to produced entitled "Costs Arrangement"." Mr Skelton submitted that the Court "should not place any credence on or have any regard to that document".

[9] Disputes over disclosure became an unfortunate feature of this case from an early stage in the litigation and they continued even throughout the hearing to the point where I received a report of an altercation having occurred between the parties outside the courtroom one evening over disclosure of material recorded on a laptop. Against that background, I ordinarily would be most reluctant to act on a document at this stage that had not been disclosed during the discovery process. In this regard,

reg 52 of the Employment Court Regulations 2000 entitles the Court to refuse to receive in evidence any document tendered by a party who is in default in disclosing the document earlier for the purposes of inspection.

[10] The disclosure that TTL paid the Kensington Swan invoices under a special loan agreement arrangement between TTL and Mr Smith, however, is not new information. In an affidavit sworn on 27 January 2011 filed in the proceeding, Mr Smith deposed in para 17: "TTL has provided me with a loan to assist me in meeting my legal costs in these proceedings but this is simply a loan." To like effect, the notes of evidence record that when Mr Norrie was invited to comment on the allegation that TTL had borne the costs of Kensington Swan's legal fees, the witness said:

No this is not the case. What we agreed with Ben was that we would provide loans to Ben with a maximum limit of $100,000 to cover legal costs. Your Honour we didn't believe for one minute that this – these proceedings would get – exceed that amount at all. So when it became clear that the costs were getting – were actually just under or just over $100,000 we advised Ben in I think December 2010 that we were not willing to make any more advances to Ben. $100,000 is a lot of money. We arranged to offset the advances against the agreed bonus that I understand you will have read in his employment contract and that is still the case Your Honour. Mr Smith has not been paid any of his bonus as set out in that agreement and as it stands at the moment we'll continue the offset until the amount is paid off.

[11] Even though the defendant can be criticised, therefore, for failing to produce the "Costs Arrangement" document as part of his general disclosure, I do not consider that the plaintiff has been prejudiced as a result of the oversight. The thrust of its contents were clearly disclosed in evidence and the advocate then acting for Evolution had full opportunity to cross-examine. On the face of it, the document appears to be a genuine recording of the loan agreement. There is authority in this Court to the effect that a successful employee litigant is entitled to a costs award even if those costs have in fact been paid by a third party such as a union, employer

or insurer.[2] In the present case, the position is even stronger because I am satisfied

that Mr Smith was responsible for reimbursing his employer for the legal costs that they had incurred on his behalf.

[12] Turning now to the costs claim itself, I accept Mr Skelton's submission that this is not a case for an award of indemnity costs. The litigation was not totally lacking in merit and the plaintiff's behaviour or conduct in relation to the litigation could not be categorised as being so reprehensible or exceptional that indemnity costs should be ordered.

[13] The principles relating to the assessment of costs awards in both the Employment Relations Authority (the Authority) and in this Court are well established and need not be repeated at any length. Costs in the Authority are normally awarded on a 'tariff basis' ranging between approximately $2,500 - $3,500 per hearing day. Mr Skelton provided a helpful breakdown on the Kensington Swan invoices. The breakdown for costs incurred in the Authority amounted to $13,384 (inclusive of GST). There was no investigation in the Authority, however, other than a hearing on the papers to deal with an application by Mr Smith to have the employment relationship problem removed in its entirety to the Court. That application was determined on the basis of written submissions. The Authority

declined the application on 12 February 2010[3] and Mr Smith then sought special

leave for removal from the Authority which was granted by Judge Travis on

16 February 2010.[4] Mr Skelton submitted that, in those circumstances, an award for costs in the Authority would be $2,500. I agree and I fix costs in that amount.

[14] Costs awards in this Court are governed by the principles in *Victoria University of Wellington v Alton-Lee*[5] and *Binnie v Pacific Health Ltd*.[6] The Court should first determine whether the costs incurred by the successful party were reasonably incurred and once that step has been taken the Court must decide, after an appraisal of all relevant factors, at what level it is reasonable for the unsuccessful party to contribute towards those costs. A starting point at 66 per cent of the reasonably incurred costs is generally regarded as an appropriate starting point to be

increased or decreased depending upon the circumstances of the particular case.

[15] In this exercise, I again acknowledge the assistance the Court has received from Mr Skelton's detailed analysis of the Kensington Swan invoices. Counsel has particularised Kensington Swan's attendances in these terms:

(a) application to the Employment Court for special leave to remove the proceedings into the Employment Court;

(b) drafting a statement of defence and counterclaim to the plaintiff's

statement of claim;

(c) an application for security for costs;

(d) attendances with respect to disclosure and inspection of relevant documents;

(e) attendances with respect to drafting application for withdrawal as solicitor of the record;

(f) other matters.

[16] Mr Skelton submitted that $750 would be an appropriate reimbursement for costs incurred in connection with the special leave proceedings. It is clear from Judge Travis' interlocutory judgment on this issue that the matter was not straightforward and it needed to be dealt with on an urgent basis because the Authority had already convened its investigation meeting for 23 February 2010. I consider that an appropriate allowance for costs under this head would be $1,500.

[17] In relation to the costs claim for drafting the statement of defence and counterclaim, Mr Skelton correctly observed that the defendant did not succeed in its counterclaim and it was, therefore, entitled to a "cost credit" for its successful defence to the counterclaim pleaded. The breakdown of invoices showed that a total of $11,689 had been charged for drafting the statement of defence and counterclaim pleading. Mr Skelton made the observation, "It is difficult to comprehend how Kensington Swan could have reasonably charged $11,689 for drafting the statement of defence and an (unsuccessful) counterclaim pleading". Originally three counterclaims were pleaded but an amended statement of defence was subsequently filed which reduced the number to a single counterclaim which, as Mr Skelton observed, failed. Mr Skelton has submitted that $1,000 should be allowed under this head. I am prepared to allow $2,000 as a reasonable contribution to the costs claimed on account of the drafting exercise.

[18] The total charged by Kensington Swan for attendances in relation to a security for costs application made by the defendant appears to have been approximately $14,676 (inclusive of GST). Mr Skelton submitted that no allowance should be made under this head because the application for security for costs was unsuccessful. I agree with that submission. Whilst Kensington Swan may have assisted in research and drafting in connection with the application, they were no longer acting when I determined the matter on 17 May 2011.

[19] For attendances in connection with disclosure issues and inspection of documents, Kensington Swan appears to have charged approximately $7,725 (inclusive of GST). Mr Skelton accepted that considerable time was taken in dealing with disclosure, challenges to disclosure and inspection issues. It involved an interlocutory hearing and numerous other attendances. Mr Skelton submitted that an appropriate figure to allow on this count would be $2,000. I would accept, however, that a higher allowance is appropriate and I am prepared to allow $5,000 as a reasonable contribution towards this part of the claim.

[20] In his breakdown of the various invoices, Mr Skelton has identified a charge of $2,728 (inclusive of GST) for attendances by Kensington Swan in connection with its application to withdraw as solicitor on the record. Counsel submitted that there was no justification for Evolution having to contribute to the costs of the withdrawal application. I agree.

[21] It appears from counsel's breakdown of the various invoices that an additional sum of $29,906 (inclusive of GST) was charged for other miscellaneous attendances in relation to the Employment Court proceedings. Mr Skelton submitted that a reasonable fee for this miscellaneous category would be $10,000. I accept that submission.

[22] In summary, my assessment of the costs reasonably incurred by Mr Smith can be summarised as follows:

<u>The Authority</u>:

Contribution towards costs in the Authority $2,500

<u>The Court</u>:

Application for special leave to remove $1,500

Pleadings $2,000

Security for costs nil

Disclosure/inspection $5,000

Application for leave to withdraw nil

Miscellaneous attendances $10,000

[23] I do not see any reason to depart from the two thirds rule and, rounding off the figures, I consider an appropriate allowance for interlocutory attendances in this Court to be $12,300.

[24] Mr Smith has also claimed by way of disbursements $5,308.02 on account of two return Auckland/London airfares and $210 in taxi fares for attending the Court hearing. Receipts have been produced for the airfares. I am prepared to allow one return airfare in respect of the Court hearing itself. Different airlines were used on each occasion with different airfares. I am prepared to allow for reimbursement at the lesser airfare of $2,581.30. No receipts were produced for the taxi fares and, in any event, I am not convinced that they were a necessary expenditure. That claim is disallowed.

[25] The overall position, therefore, is that Mr Smith is awarded costs in the sum of $17,381.30 made up as follows:

1. Costs in the Authority $2,500.00

2. Costs in this Court $12,300.00

3. Disbursements $2,581.30

A D Ford

Judge

Judgment signed at 4.00 pm on 17 April 2012

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[1] [2011] NZEmpC 109.

[2] *IHC New Zealand Inc v Scott* AC 45A/06 at [20]; *O'Malley v Vision Aluminium Ltd* (No 3) [1992] 2 ERNZ 1043at 1045 and *Unkovich v Air New Zealand Ltd* [1995] 1 ERNZ 336 at 340.

[3] AA 62/10.

[4] [2010] NZEmpC 9.

[5] [2001] NZCA 313; [2001] ERNZ 305 (CA).

[6] [2003] NZCA 69; [2002] 1 ERNZ 438 (CA).
