Employment Court of New Zealand

Gini v Sturgess [2013] NZEmpC 9 (4 February 2013)

Last Updated: 18 February 2013

IN THE EMPLOYMENT COURT WELLINGTON

[2013] NZEmpC 9

WRC 13/12

IN THE MATTER OF a challenge to a determination of the

Employment Relations Authority

BETWEEN JENNIFER GINI Plaintiff

AND LINDA STURGESS Defendant

Hearing: 12 July 2012

(Heard at Wellington)

Appearances: Patrick O'Sullivan, advocate for the plaintiff

Tim Cleary, counsel for the defendant

Judgment: 4 February 2013

JUDGMENT OF JUDGE A D FORD

Introduction

[1] The plaintiff has challenged a costs determination[1] of the Employment Relations Authority (the Authority) dated 2 May 2012 which ordered her to pay the defendant $4,500 in costs. There was no cross-challenge but the defendant seeks to uphold the Authority's award.

[2] By consent, it was agreed between the parties that no evidence would be

heard but the hearing would take the form of the parties' representatives presenting

oral submissions on the papers before the Court.

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[3] The background facts are complex but there is no need for me to canvass them in any detail. They are fully set out in the judgment of this Court in *Gini v Literacy Training Limited*.[2]

Background

[4] In brief, the plaintiff Ms Jennifer Gini was employed by the company, Literacy Training Ltd, under a one-year fixed term employment agreement to carry out literacy tutoring work at prisons in the Wellington area. The defendant, Ms Linda Sturgess was the owner and managing director of Literacy Training. On

1 October 2009, some three months into her contract, Ms Gini was summarily dismissed. She then brought a claim in the Authority against both Literacy Training and Ms Sturgess. The claim against Literacy Training was based on unjustified dismissal and a disadvantage grievance. The claim against Ms Sturgess was said to be based on inciting, instigating, aiding or abetting a breach of an employment agreement (for which penalties were sought under s 134(2) of the Employment Relations

Act 2000 (the Act)); secondly that she was "inextricably and integrally involved as an employer regardless of any notion of labelling and limitation of liability" and thirdly, that there was "a compelling argument for lifting the corporate veil."

The strike out determination

[5] Counsel for the defendant, Mr Cleary, made application to the Authority to have the claims against Ms Sturgess dismissed on the grounds that there was no employment relationship between her and Ms Gini. In a determination[3] dated

23 February 2011, the Authority dismissed Mr Cleary's application holding that the claims could only be determined in a substantive investigation meeting. The Authority, however, went to quite extraordinary lengths in its determination to point out to Ms Gini that she had "substantial hurdles to overcome" if she was to be successful. The Authority recorded that it did not allow for the doubling up of remedies by the use of penalties. It also referred to the principles relating to limited

liability companies and the liability of directors and highlighted the difficulties

Ms Gini faced in attempting to lift the corporate veil.

[6] In the final paragraph of its determination, the Authority stated:

7. Given the formidable obstacles facing Ms Gini in being able to prove that there is liability on Ms Clareburt-Sturgess (other than potentially as a party to a breach), then it is appropriate to inform Ms Gini that should her claims over fundamental liability prove to be unsuccessful I will seriously consider a claim for indemnity costs. Thus she should face paying for indemnity costs for any costs and expenses incurred by Ms Clareburt-Sturgess in pursuing any part of the claims against her, other than those under s.134(2).

[7] In the face of that clear direction from the Authority, Ms Gini withdrew all her claims against Ms Sturgess personally apart from the claim for a penalty under s 134 of the Act. To overcome the "doubling up of remedies" objection raised by the Authority, Ms Gini amended her claim to have any penalty paid to the Crown thereby averting a potential double-up.

[8] The Authority then proceeded in the usual way to investigate Ms Gini's claims. In a determination[4] dated 3 November 2011 it upheld her claims against Literacy Training and awarded Ms Gini $10,140 gross in lost remuneration and

$5,000 in compensation. However, it dismissed the claim for a penalty against Ms Sturgess on the basis that it was out of time. It pointed out that under s 135 (5) of the Act a claim for recovery of a penalty must be commenced within 12 months but the claim in this case was made on 17 November 2010 which was said to be "well beyond a year".

The costs determination

[9] Ms Sturgess then made a claim for costs against Ms Gini. The claim was dealt with in a costs determination of the Authority dated 2 May 2012.[5] The Authority recorded that Mr Cleary, on behalf of Ms Sturgess, accepted that the standard tariff approach to costs would lead to an award of around $3,000 but counsel sought indemnity costs of $9,603 against Ms Gini on the grounds, first, that "Ms Gini was on notice from the Authority that indemnity costs might be awarded if

the full breadth of the original claims other than the penalty were not withdrawn. Second, there is no evidence that Ms Sturgess ever acted in the knowledge that Literacy Training was acting in breach of contract. Third, the penalty action was out of time."

[10] The Authority recorded Mr O'Sullivan's response on behalf of Ms Gini. First, Mr O'Sullivan noted that Ms Gini had withdrawn two of the three actions against Ms Sturgess soon after the delivery of the determination on the strike out application. Secondly, Mr O'Sullivan contended that there was no need for Ms Sturgess to have had separate legal representation at the investigation meeting (Literacy Training was represented by Ms Susan-Jane Davies) because she would have had to attend the investigation in any event as the principal of Literacy Training.

[11] After its consideration of the respective contentions for each party, the

Authority concluded:

[8] Given that Ms Gini was successful in defending the "strike out" claim and that she did withdraw all claims other than the penalty claim soon thereafter, I conclude that no costs will be awarded for that part of the proceedings. I also conclude that the preliminary matters dealt with, such as the disclosure issues, were principally matters for costs between Literacy Training and Ms Gini. Therefore they will not be dealt with in this determination.

[9] As a consequence, that only leaves an assessment of whether there should be any uplift on the normal tariff that might be applied in respect of the costs awarded to Ms Sturgess, who was entirely successful. I accept that Ms Sturgess was entitled to be separately represented throughout. In my determination I concluded that Ms Gini knew or ought to have known of the time limits within which to claim a penalty, and that she was aware of all relevant factors that she now relies on. Because her claim was out of time it could never succeed. She has to bear responsibility for that delay. For these reasons a greater than

usual contribution to costs is appropriate.

[10] In all the circumstances of this case I consider that an award of $4,500 is appropriate. ...

The respective contentions

[12] The argument in this Court really centred upon whether it was appropriate for

the Authority to allow a $1,500 "uplift" to the normal daily tariff for costs in the

Authority at the time, which was accepted as being in the order of $3,000. The contentions made before the Authority were expanded upon and repeated before me. Mr Cleary submitted that this Court should not lightly interfere with an award of costs made before the Authority Member who had sat through the whole investigation. I think that is a fair submission provided, of course, that the Authority has acted consistently with the costs principles recognised by the full Court in *PBO*

Ltd (formerly Rush Security Ltd) v Da Cruz.[6]

[13] Mr O'Sullivan repeated his submission before the Authority that it was unnecessary for Ms Sturgess to have separate legal representation from Literacy Training. Mr Cleary submitted that in the circumstances it was prudent for Ms Sturgess to be separately represented because there was otherwise a possibility of conflict. The Authority accepted that it was appropriate for Ms Sturgess to be separately represented throughout and I accept that finding.

[14] The more persuasive submission made by Mr O'Sullivan related to the Authority's reasoning in allowing the $1,500 uplift. The Authority, as is evident from [11] above, seemed to have approached the matter on the basis that the uplift was appropriate because Ms Gini, "knew or ought to have known of the time limits within which to claim a penalty ... Because her claim was out of time it could never succeed. She has to bear responsibility for the delay."

[15] The point Mr O'Sullivan stressed in his submissions was that Ms Gini did heed the Authority's warning and withdrew the claims against Ms Sturgess apart from the claim for a penalty but the Authority's warning did not extend to the penalty claim under s 134(2) of the Act. On the contrary, as appears in [6] above the Authority did not appear to have any problems in relation to Ms Gini's claim for a penalty pursuant to s 134(2) of the Act. In all probability, however, the Authority simply did not turn its mind to the limitation point in relation to the claim for a penalty. Mr O'Sullivan said that if the Authority had raised the limitation point at the time it gave its other warnings then Ms Gini would "most certainly" have dropped altogether the proceedings against Ms Sturgess. As Mr O'Sullivan colourfully expressed it, "She's not a Kamikaze Pilot."

Conclusions

[16] It was the obligation of the plaintiff and her representative (not the Authority) to familiarise themselves with the relevant provision in the Act which prescribes the limitation period for commencing a claim for a penalty. It would appear, however, from the documentation before the Court, which was also before the Authority, that had it turned its mind to the issue, the Authority would have realised at the outset that the claim for a penalty was out of time and it would have mentioned that fact in its determination on the strike out at the same time as it gave its warning to Ms Gini about indemnity costs. The fact that the Authority raised strong concerns about Ms Gini's other claims, apart from the claim for a penalty, may well have lulled Ms Gini and her representative into a false sense of security.

[17] In all the circumstances, it is difficult to avoid the conclusion that the Authority imposed the $1,500 uplift as a punishment on Ms Gini because she knew or ought to have known of the time limits within which to claim a penalty.

[18] One of the costs principles recognised in *Da Cruz*[7] as a "basic tenet" is that costs are not to be used as a punishment or as an expression of disapproval of the unsuccessful party's conduct although conduct which increased costs unnecessarily can be taken into account in inflating or reducing an award.

[19] Whether it can be said in any given case that the conduct of an unsuccessful party increased costs unnecessarily is a judgment call to be made on the facts of the particular case under consideration. "Conduct" in this context is normally associated with behaviour that unnecessarily prolongs the duration of the hearing. The conduct the Authority appeared to be referring to in the present case was Ms Gini's failure to appreciate the time limit for claiming a penalty. With respect, that approach seems to be more in the nature of a punishment for not knowing the law. I do not see it as the type of "conduct" contemplated in *Da Cruz*.

[20] For this reason, I allow the plaintiff's challenge and fix costs in the Authority

in the sum of $3,000.

[21] The plaintiff is entitled to costs on the present application. To avoid the additional expense that would inevitably be involved if I called for submissions on the issue, I fix those costs in the sum of $750.

A D Ford

Judge

Judgment signed at 3.00 pm on 4 February 2013

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[1] [2012] NZERA Wellington 52.

[2] [2013] NZEmpC 1.
[3] [2011] NZERA Wellington 28.

[4] [2011] NZERA Wellington 169.·
[5] [2012] NZERA Wellington 52
[6] [2005] NZEmpC 144; [2005] ERNZ 808.

[7] At [44].
