



Employment Court of New Zealand

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Hally Labels Limited v Powell [2015] NZEmpC 146 (24 August 2015)

Last Updated: 31 August 2015

IN THE EMPLOYMENT COURT AUCKLAND

[\[2015\] NZEmpC 146](#)

ARC 35/11

IN THE MATTER OF proceedings removed from
the
Employment Relations
Authority

AND IN THE MATTER of an application for costs

BETWEEN HALLY LABELS LIMITED
Plaintiff

AND KEVIN POWELL Defendant

Hearing: By memoranda filed on 14 July, 11 August and 19 August
2015

Appearances: C Patterson and A Halloran, counsel for plaintiff
C Stewart and G Tanner, counsel for defendant

Judgment: 24 August 2015

COSTS JUDGMENT OF JUDGE M E PERKINS

[1] In a judgment dated 16 June 2015 the claims by the plaintiff (Hally) for further injunction, declarations and damages and the counter-claim by the defendant (Mr Powell) for damages and penalty were dismissed. ¹ That judgment had been preceded by judgments of the Court dealing with Hally's claim to enforce a restraint of trade against Mr Powell. Those judgments were dated 13 and 16 June 2011 respectively,² the latter providing the reasoning of the Court for the granting of a permanent injunction against Mr Powell.

[2] There had been an earlier unsuccessful application by Hally to the

Employment Relations Authority (the Authority) for an interim injunction.³ Hally's

¹ *Hally Labels Ltd v Powell* [\[2015\] NZEmpC 92](#).

² *Hally Labels Ltd v Powell* [\[2011\] NZEmpC 60](#) (injunction); *Hally Labels Ltd v Powell* [\[2011\] NZEmpC 63](#), [\[2011\] ERNZ 233](#) (reasons).

³ *Hally Labels Ltd v Powell* [2011] NZERA Auckland 181.

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2015]

challenge to the Court against that determination of the Authority was successful in procuring recognition of implied undertakings that Mr Powell had given in his evidence to the Authority. The Court held, having considered the balance of convenience, such circumstances meant an interim injunction was not necessary. Nevertheless the Court spelled out the terms of any injunction, which would be imposed if Mr Powell elected not to comply with his implied undertakings.

[3] During the course of dealing with these proceedings the parties have presented several opposed interlocutory applications. These have required, in some cases, quite lengthy hearing time.

[4] Judge Travis, who dealt with the interim injunction challenge and the restraint of trade pleadings which had been removed to the Court, reserved all issues as to costs. This position has remained pending the hearing and resolution of Hally's remaining causes of action against Mr Powell and, as the pleadings developed, Mr Powell's counter-claim against Hally.

[5] Once the judgment of 16 June 2015 was issued, all issues as to costs were reserved for a further period to enable the parties to endeavour to resolve matters between themselves. That has not been possible and accordingly, in default of agreement, timetabling orders requiring submissions on costs have come into effect. Submissions on costs have now been received from both parties.

[6] Substantial costs and disbursements are sought by each party against the other. Hally was successful in the proceedings to the extent that it procured an injunction enforcing the restraint of trade against Mr Powell. Nevertheless, Mr Powell seeks costs against Hally on the basis that the portion of the causes of action in which Hally was unsuccessful was greater and took substantially longer to hear. Counsel for Mr Powell also submits that Hally was unsuccessful in the interim injunction proceedings and should meet an order for costs in respect of those proceedings. That submission is not entirely correct because, while the determination of the Authority was against Hally, as a result of the challenge not only did it procure from the Court an indication of the rigorous terms of an interim injunction if it was required, but also Mr Powell's implied undertakings were recognised by the judgment.

[7] Counsel for Hally has submitted that costs should be awarded in its favour. This is on the basis that it was successful in the first part of the proceedings and, while unsuccessful in its claim for damages, so was Mr Powell on his counter-claim. The plaintiff further submits that Mr Powell and his counsel substantially prolonged the second hearing by their tactics during trial; and aggravated the position by taking an unreasonable position in opposing the plaintiff's interlocutory application for leave to amend pleadings prior to trial. The lengthy hearing of that application degenerated into what was effectively a strike-out application by Mr Powell without any formal application having been filed. Leave was granted to the plaintiff extending the time to file the amended pleadings.⁴

[8] Counsel for Hally submits in the alternative that, should it not receive an award of costs, then costs should lie where they fall in view of the overall outcome of the proceedings. Counsel for Mr Powell did not take a similar stand.

[9] The Court is bound by three main decisions of the Court of Appeal dealing with Employment Court costs.⁵ In addition to costs normally following the event, the successful party will generally receive an award of two-thirds of actual and reasonable costs although there may be circumstances where the proportion awarded will be increased, or in exceptional circumstances an award of full indemnity costs will be made. Despite Mr Powell submitting that the present case is a situation

where he should receive either an increased award or full indemnity costs, there are no circumstances justifying such awards.

[10] In exercising its discretion in making an assessment of what are fair and reasonable costs, the Court will sometimes have regard to the scale of costs contained in the High Court Rules for comparative purposes. In this case, counsel

have referred to that scale.

⁴ *Hally Labels Ltd v Powell* [2013] NZEmpC 182.

⁵ *Victoria University of Wellington v Alton-Lee* [2001] NZCA 313; [2001] ERNZ 305 (CA); *Binnie v Pacific Health*

Ltd [2003] NZCA 69; [2002] 1 ERNZ 438 (CA); and *Health Waikato Ltd v Elmsly* [2004] NZCA 35; [2004] 1 ERNZ 172 (CA).

[11] Hally is the only party in these proceedings to have successfully procured remedies. However, the subsequent causes of action, which needed to be considered by the Court following amended pleadings, took a substantially greater time to hear than the restraint of trade injunction and the interim injunction challenge which preceded it. Mr Powell successfully defended those subsequently heard claims.

[12] When fixture dates were being set, counsel for both parties gave an estimate of time for the hearing of the latter causes of action as five days. In fact this extended to a total trial time lasting 15 days with a 10-month delay between the conclusion of the five days then adjourned part-heard, and the time when the hearing could resume. The inadequate initial estimate was through the fault of counsel in failing to make a proper estimate when they were the only ones having knowledge of all of the circumstances. Similarly, the substantial delay of nearly 10 months between the two hearings was brought about by the parties. Mr Powell sought and was granted an adjournment of the first date set for the resumed hearing. Subsequent dates for a resumed hearing were then offered by the Court within a reasonable period.

[13] While Mr Powell was successful in defending the further causes of action, he was unsuccessful in his own substantial counter-claim. The second part of the hearing of this matter, which consisted of all causes of action beyond that sought to enforce the restraint of trade and lasting as long as it did, was probably contributed to equally by the parties in pursuing their respective claims. Mr Powell unsuccessfully sought a substantial penalty against Hally in addition to his claims for damages. Evidence was led by both parties which was not strictly necessary. Nevertheless, while counsel have been critical of each other in their submissions, this was a case where it was important for the parties to feel satisfied that they had the opportunity to properly present their respective cases.

[14] There are costs claims still outstanding in respect of a dispute between the same parties in the High Court. These costs were discussed at length in the judgment of this Court on 16 June 2015.⁶ They are already the subject of judgments of the

⁶ *Hally Labels*, above n 1.

High Court and the Court of Appeal.⁷ If costs are to be pursued further in respect of the High Court proceedings, then no doubt a further hearing will be required in that jurisdiction. Standing back and considering the proceedings in this Court in their entirety, it is clear that a sense of proportionality was lost by both parties and particularly the plaintiff. The costs incurred by both parties well exceed the potential benefit either could have gained against the other in the form of damages. Having regard to the nature of the proceedings, the sums incurred as costs by both parties would appear to be totally excessive. Each of them incurred total legal fees and disbursements in excess of \$500,000. Each party made decisions which lacked judgment; Mr Powell, in seeking to evade the restraint of trade in the first place; and Hally, in seeking to pursue the ancillary causes of action when it had already successfully restrained Mr Powell from working for its competitor.

[15] I commented at one point in my judgment of 16 June 2015 that I wondered about the motives of Hally in pursuing these claims for damages in addition to the injunction to enforce the restraint. Hally inflicted substantial financial cost on Mr Powell in having to defend what were found to be baseless allegations. Leaving each party to bear their own costs would not be a fair recognition of the respective positions of the parties at the conclusion of the case. Hally has to have recognition in costs for the remedies it successfully obtained against Mr Powell. That must, however, be balanced against Mr Powell's successful defence of claims for substantial damages, the hearing of which involved considerably more hearing time and legal resources than the early hearings. Finally, I have to take into account the fact that Mr Powell raised a substantial counter-claim for damages and a penalty in which he also was totally unsuccessful.

[16] Analysing the accounts and invoices attached to counsel submissions as best I can, I consider that an appropriate contribution for Hally to make to Mr Powell's costs is \$100,000 plus the disbursements incurred by him of \$68,515.87. In reaching that conclusion I have balanced each of the factors discussed. While I consider the costs incurred by each of the parties disproportionate to their potential for a

successful outcome in the proceedings, I am sure that counsel have done their best to

7 Hally Labels Ltd v Powell HC Christchurch CIV-2011-409-867, 1 February 2013; *Hally Labels*

Ltd v Powell [2013] NZHC 1760; *Powell v Hally Labels Ltd* [2015] NZCA 11.

represent their respective clients and I make no criticism of the actual charges as being other than fair and reasonable.

M E Perkins

Judge

Judgment signed at 10.30 am on 24 August 2015

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