



Employment Court of New Zealand

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Kirby v New Zealand China Friendship Society [2015] NZEmpC 213 (1 December 2015)

Last Updated: 4 December 2015

IN THE EMPLOYMENT COURT CHRISTCHURCH

[\[2015\] NZEmpC 213](#)

EMPC 150/2015

IN THE MATTER OF a challenge to a determination of the

Employment Relations Authority

BETWEEN JOHN KIRBY Plaintiff

AND NEW ZEALAND CHINA FRIENDSHIP SOCIETY

Defendant

Hearing: (on the papers by memoranda dated 5, 8 and 9 November 2015) Appearances: J Kirby, plaintiff in person

J Pullar, counsel for the defendant

Judgment: 1 December 2015

COSTS JUDGMENT OF JUDGE B A CORKILL

Introduction

[1] This judgment resolves an issue as to costs arising from my judgment of

22 October 2015 when I concluded that Mr Kirby was not a volunteer who expected to be rewarded by the New Zealand China Friendship Society (the Society) for work he performed in China in that capacity; I also found that he did not receive any reward for work performed as a volunteer for the Society.¹ Mr Kirby's challenge to a determination of the Employment Relations Authority was accordingly dismissed.² I

directed that the Society was entitled to bring an application for costs, and a

timetable in that regard was established.³

¹ *Kirby v New Zealand China Friendship Society* [2015] NZEmpC 189.

² *Kirby v New Zealand China Friendship Society Inc* [2015] NZERA Christchurch 66.

³ *Kirby v New Zealand China Friends Society*, above n 1 at [91].

[2] Counsel for the defendant, Mr Pullar, has filed a memorandum as to costs stating that the Society had incurred legal costs of \$5,000 plus GST. An application is made for an order that Mr Kirby pay a contribution to the Society's legal costs of \$3,300, and \$734 for disbursements.

[3] Mr Pullar explained that the hourly rate charged to the Society was \$280 plus GST per hour, and that although 41 hours of

his time was recorded, the Society was charged for only 18 hours. Mr Pullar stated that this was because excessive correspondence had been sent by Mr Kirby the cost of which had not been passed on to the Society; and because the Court had requested supplementary legal submissions on one matter the cost of which was again not passed on to the Society.

[4] Initially assistance was provided to the Society on the basis that it would represent its own interests in the course of the challenge, but ultimately counsel was briefed to appear at the substantive hearing which was of assistance to the Court.

[5] In essence, it is submitted for the Society that it was wholly successful in defending the de novo challenge, and there was no reason to depart from the ordinary position that costs should follow the event, or the principle that two-thirds of the legal costs incurred should be paid.

[6] Disbursements of \$734 were sought, comprising a reimbursement of an airfare for the Society's primary witness, and costs of photocopying and couriering of documents in the course of proceedings.

[7] Mr Kirby has filed a response asserting that there have been "serious criminal activities, forged documents, theft, damaged property [and] fabricated certificates". He says in effect that any order for costs is therefore inappropriate.

Discussion

[8] It is well established from Court of Appeal decisions that the Employment Court is required first to determine whether costs incurred by a successful party were reasonably incurred, and then after an appraisal of all relevant factors, decide at which level it is reasonable for the unsuccessful party to contribute to the successful

party's costs. Sixty-six per cent is generally regarded as a starting point, although the Court has a discretion to consider whether there are factors justifying an increase or a decrease, given the discretionary nature of the assessment.⁴

[9] Rule 14.12 of the High Court Rules defines a disbursement as:

14.12 Disbursements

...

(1) (a) ... an expense paid or incurred for the purposes of the proceeding that would ordinarily be charged for separately from legal professional services in a solicitor's bill of costs ...

[10] To qualify as a recoverable disbursement, the payment must be both necessary to the conduct of the proceeding and reasonable.⁵

[11] I deal first with the issue raised by Mr Kirby, essentially alleging criminal conduct on behalf of members of the Society. In my substantive judgment, I found that many of Mr Kirby's assertions were misconceived and unsupported by any reliable evidence. For example, with regard to his allegation that certain receipts which the Court was required to consider had been forged, I held that no expert evidence had been filed to support such a serious allegation which would require proper proof.

[12] Once again the Court has received no evidence whatsoever which would support the serious allegations which Mr Kirby has made as to conduct of the Society's officers; accordingly I have no hesitation in rejecting those assertions as baseless.

[13] That leaves the Court in the position where it must first assess the reasonableness of the legal costs incurred by the Society. I find that the costs

incurred are entirely reasonable, particularly having regard to the fact that a

⁴ *Victoria University of Wellington v Alton-Lee* [2001] NZCA 313; [2001] ERNZ 305 (CA) at [61]- [63], *Binnie v*

Pacific Health Ltd [2003] NZCA 69; [2002] 1 ERNZ 438 (CA) at [13]- [16]; *Health Waikato Ltd v Elmsly* [2004] 1

ERNZ 172; [2004] NZCA 35; (2004) 17 PRNZ 16 (CA) at [42] and *Belsham v Ports of Auckland Ltd* [2014] NZCA 206 (CA) at [18] and [22].

⁵ *Baker v St John Central Regional Trust Board* [2013] NZEmpC 109 at [43], per Judge Inglis.

significant component of Mr Pullar's constructive attendances were not passed on to the Society.

[14] I conclude that \$3,300, which is 66 per cent of the actual legal costs incurred, is fair and reasonable in the difficult circumstances which the Society faced.

[15] Similarly, with regard to the disbursements incurred, I am satisfied that each of the disbursements was necessary to the conduct of the proceeding; and the amounts actually sought are reasonable. Accordingly, I allow those disbursements.

Conclusion

[16] I order Mr Kirby to pay a contribution to the Society's costs of \$3,300, along with disbursements of \$734.

B A Corkill

Judge

Judgment signed at 2.15 pm on 1 December 2015

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