



Employment Court of New Zealand

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Kostic v Dodd and Milligan CC14A/07 [2007] NZEmpC 105 (28 August 2007)

Last Updated: 6 September 2007

IN THE EMPLOYMENT COURT

CHRISTCHURCHCC 14A/07CRC 4/06

IN THE MATTER OF a de novo challenge to a determination of the Employment Relations Authority

AND

IN THE MATTER OF an application for costs

BETWEEN GERRY KOSTIC

Plaintiff

AND GRAHAM DODD AND GRANT MILLIGAN T/A ALLAN MILLIGAN CARS AND/OR MOTOWORLD SYSTEMS LIMITED T/A ALLAN MILLIGAN CARS

Defendants

Hearing: By memoranda filed on 2 and 14 August 2007

(Heard at Christchurch)

Judgment: 28 August 2007

COSTS JUDGMENT OF JUDGE A A COUCH

[1] In my substantive judgment dated 11 July 2007 (CC 14/07), I reserved costs and invited the parties to provide me with memoranda. Those memoranda have now been received.

[2] The nature of this proceeding was relatively conventional. It was a challenge to a determination of the Authority regarding a personal grievance conducted by way of a de novo hearing. The manner in which the plaintiff was represented, however, was somewhat unusual. The proceedings were initiated on his behalf by counsel who continued to represent Mr Kostic until shortly before the hearing. Because Mr Kostic could not afford the continuing cost of representation, counsel then withdrew and Mr Kostic appeared in person at the hearing.

[3] As the successful party, Mr Kostic is entitled to a reasonable contribution to the costs of representation he has incurred. He is also entitled to reimbursement of the disbursements he has appropriately incurred. He is not, however, entitled to any contribution to the costs he may have incurred in representing himself.

[4] Mr Kostic provided me with a brief memorandum to which were attached copies of six invoices from the solicitors who represented him prior to the hearing. The total amount of those invoices is \$5,221.03 inclusive of GST. Mr Kostic submits that he should be awarded a reasonable contribution to that sum.

[5] In his memorandum, Mr Kostic recorded that he paid a filing fee of \$200 when the proceedings were initiated. In a subsequent letter dated 13 August 2007, Mr Kostic's solicitor, Mr Twomey, also sought on his behalf reimbursement of Court hearing fees of \$1,225.00 payable by Mr Kostic.

[6] Finally, Mr Kostic sought reimbursement of disbursements incurred as a result of the hearing and while he was representing himself. He described these as including parking costs, petrol and photocopying. Mr Kostic did not particularise what had actually been spent on such things. Rather, he sought a blanket amount of \$100.00 per day of the hearing.

[7] In a memorandum on behalf of the defendants, Mr Davidson accepted that Mr Kostic is entitled to a reasonable contribution to the costs of representation actually and reasonably incurred by him. Mr Davidson submits, however, that the sum sought by Mr Kostic is excessive because the invoices from his solicitors related to work done not only in relation to the Court proceedings but also in relation to the proceedings before the Authority. Mr Davidson correctly points out that costs in the Authority have been fixed and were confirmed in my substantive judgment.

[8] Relying on the decision in the Court of Appeal in *Binnie v Pacific Health Limited* [2003] NZCA 69; [2002] 1 ERNZ 438, Mr Davidson submitted that the Court has a wide discretion in fixing costs and that it is open to the Court to fix costs anywhere between 0 and 100 percent of the costs actually and reasonably incurred. Mr Davidson then went on to submit that, in this case, a just award of costs would be in the vicinity of \$1,000.00.

[9] In his memorandum, Mr Davidson recorded that the defendants opposed full reimbursement of the \$200.00 filing fee paid by Mr Kostic and the claim by Mr Kostic for reimbursement of expenses incurred during the hearing but gave no reason for this opposition. In a letter dated 22 August 2007, Mr Davidson recorded that the defendants also object to Mr Kostic being reimbursed for the daily hearing fees. That objection was based solely on the fact that reimbursement of those fees was not sought until after the 21-day period fixed for the provision of Mr Kostic's memorandum as to costs.

[10] While Mr Davidson is correct that the Court has a broad discretion to fix costs as it thinks fit, that discretion must be exercised according to principle. The relevant principles are well established. In most cases, the successful party will be entitled to a reasonable contribution to the costs of representation actually and reasonably incurred. As to what constitutes a "*reasonable contribution*", a useful starting point is two-thirds but that may be increased or decreased according to the circumstances of the case and, in particular, the extent to which the manner in which the case was conducted by one party may have increased or decreased the costs incurred by the other party.

[11] The first issue to be determined is the extent to which the costs actually incurred by Mr Kostic and detailed in the invoices attached to his memorandum were reasonably incurred in relation to the proceedings before the Court.

[12] With respect to this issue, I accept Mr Davidson's submission that, on their face, the invoices relate to work done by Mr Twomey not only in respect of the Court proceedings but also in respect of the proceedings before the Authority. I have considered requesting a further memorandum from Mr Twomey clarifying the extent to which the costs incurred related to the proceedings in each venue but have formed the view that this is not necessary and to do so would inevitably result in all parties incurring yet further costs. I am satisfied that the division of the costs into six invoices relating to successive time periods and the detailed narration included in each invoice provides me with sufficient information to fairly estimate the extent to which the costs incurred related to the proceedings before the Court.

[13] Of the six invoices comprising the costs incurred by Mr Kostic, only the first one dated 6 March 2006 related to any significant extent to work done in connection with the proceedings before the Authority rather than those before the Court. The total amount of that invoice was \$1,715.63 inclusive of GST. The only aspect of the work charged for in that invoice which related to the Court proceedings was the drafting and filing of a statement of claim. Having regard to the statement of claim actually filed and an appropriate charge out rate for counsel of Mr Twomey's experience, \$500.00 plus GST would be a reasonable amount to charge for that work. Accordingly, I find that \$562.50 was the extent of the costs reasonably incurred by Mr Kostic in respect to the work described in the first invoice.

[14] In respect of the work charged for in the other five invoices, the only aspects of it which related to proceedings before the Authority rather than the Court were considering the defendant's costs submissions to the Authority and receiving the costs determination. That would have involved such a small amount of Mr Twomey's time that I need not make a deduction in respect of it. Accordingly, I find that the balance of the costs actually incurred by Mr Kostic amounting to \$3,505.40 were reasonably incurred in relation to the proceedings before the Court.

[15] It follows that Mr Kostic should receive a reasonable contribution to a total of costs incurred by him of \$4,067.90.

[16] In reaching this conclusion, I am conscious that each of the invoices includes a small amount for disbursements. A successful party is normally entitled to full reimbursement of disbursements but, in my view, that can only apply where they are disbursements in the true sense of the term, that is they are sums of money which have been paid to third parties for services rendered or goods provided. In this case, the disbursements charged are for goods and services provided by Mr Twomey's firm and therefore do not involve the payment to a third party of the sums involved. In my view, such disbursements should be treated in the same manner as fees.

[17] I turn then to the extent of contribution which the defendants ought to make to the costs actually and

reasonably incurred by Mr Kostic. The manner in which this matter was conducted while Mr Kostic was represented by counsel was unexceptional. I therefore see no reason to depart from the accepted starting point that a reasonable contribution to his costs is two-thirds of the costs actually and reasonably incurred. On that basis, the defendants are ordered to pay Mr Kostic \$2,712.00 by way of costs.

[18] As to disbursements, I reject Mr Davidson's submission that Mr Kostic should not be reimbursed for the hearing fees incurred simply because they were not referred to in his memorandum. Hearing fees are payable pursuant to the [Employment Court Regulations 2000](#). As such, Mr Davidson would have been aware that, once the hearing went beyond the end of the first day, Mr Kostic would be obliged to pay hearing fees. Mr Davidson does not suggest that the defendants are prejudiced in any way and, in the circumstances, it is difficult to imagine how they could be.

[19] The defendant's opposition to full reimbursement of the \$200.00 filing fee is unsupported by reasons and lacks any merit. Mr Kostic should be reimbursed in full for that sum.

[20] I have sympathy with Mr Kostic's claim for reimbursement of the costs he incurred associated with the hearing. The difficulty with that claim is that it is not particularised or supported by evidence. Given the relatively small sums involved, it is not realistic to invite further memoranda and I reject that claim.

[21] The defendants are therefore ordered to pay Mr Kostic \$1,425.00 by way of disbursements.

[22] In summary, the defendants are ordered to pay Mr Kostic a total of \$4,137.00 being \$2,712.00 by way of costs and \$1,425.00 by way of disbursements.

[23] It will be noted that I have dealt with all costs and disbursements incurred by Mr Kostic on a GST inclusive basis. I have done so on the understanding that Mr Kostic is not personally registered for GST and therefore has no ability to claim a refund of the GST component of these expenses. It follows that the real cost to Mr Kostic of them is the GST inclusive amount. If I am mistaken about Mr Kostic's GST status, he is to inform the Registrar immediately so that the orders made can be amended appropriately.

A A Couch
Judge

Costs judgment signed at 12.30 pm on 28 August 2007