New Zealand Employment Relations Authority Decisions

Kumar v Selwyn Fresh Limited (Christchurch) [2018] NZERA 1077; [2018] NZERA Christchurch 77 (28 May 2018)

Last Updated: 4 July 2018

IN THE EMPLOYMENT RELATIONS AUTHORITY AUCKLAND

[2018] NZERA Auckland 177
3026572

BETWEEN TURUKI HEALTH CARE SERVICES

Applicant

A N D REPETA MAKEA-RUAWHARE First Respondent

A N D CULTURESAFE NZ LIMITED Second Respondent

A N D TRACEY SIMPSON Third Respondent

A N D ALLAN HALSE Fourth Respondent

Member of Authority: James Crichton

Representatives: Anthony Drake, Counsel for Applicant

Allan Halse, Advocate for Respondents

Investigation Meeting: On the papers

Submissions Received: 14 and 15 May 2018 from Applicant

14 May 2018 from Respondents

Date of Determination: 1 June 2018

COSTS DETERMINATION OF THE EMPLOYMENT RELATIONS AUTHORITY

The substantive determination

[1] In my second determination on this matter issued as [2018] NZERA Auckland

136, on 1 May 2018, I reserved costs notwithstanding that the applicant Turuki had, as

I acknowledged, made extensive submissions as to costs.

[2] I indicated in that second determination that I felt obliged to seek submissions from the respondents, notwithstanding the fact that they had chosen not to engage in the Authority's process in respect to the issue of that second determination.

[3] In the result, the respondents furnished very full submissions which include material that is frankly pertinent to the substantive issue and which would have been useful if that material had been before me when the substantive issues were under consideration.

The claim for costs

[4] Turuki seeks full indemnity costs and have now provided me with evidence of the total amount charged to them by their solicitors. That amount is in the sum of

$28,559.68 inclusive of GST, expenses and disbursements.

[5] The application for full indemnity costs proceeds on the basis that the breaches of the settlement agreement which resulted in the need to initiate legal proceedings were egregious and continuing and evidenced a complete unwillingness to engage in the Authority's process.

[6] As well, there were continuing examples of improper pressure exerted on the applicant by way of attempts to interfere with the applicant's funding lines, and by very personal attacks on counsel for Turuki and myself as the Member presiding over this particular matter.

[7] In that regard, there was a continuing campaign of threats against counsel for Turuki seeking to publically embarrass him or question his professional integrity and there were similarly, continuing attempts to seek my resignation from my role or my dismissal.

The response

[8] The respondents have at least been motivated to engage in the Authority's process in respect to the imposition of costs. The effect of their submissions is that no costs should be awarded.

[9] The respondents persevere with their continuing personal attacks both on counsel for Turuki and on me and amongst other things seek an inquiry into my

conduct alleging a "personal affiliation with the respondent (sic)". Presumably, that

last reference should be to the applicant.

[10] For the record, I have no personal involvement with the applicant party nor indeed with counsel for the applicant. Counsel for the applicant is known to me as a senior practitioner in this jurisdiction and he has appeared in my hearings previously but our association goes no further than that.

Discussion

[11] The rules determining the fixing of costs in the Authority are well settled and have been recently affirmed by the decision of the full bench of the Employment Court in *Fagotti v Acme & Company Limited* [2015] NZEmpC 135.

[12] Amongst the principles that that decision sets out is the fundamental precept that costs follow the event. In the present case, Turuki have been completely successful and accordingly, on normal judicial principles, are entitled to consideration of an award of costs.

[13] However, an application for full indemnity costs is unusual and is only rarely considered in the Authority. A leading case on indemnity costs is still *Bradbury v Westpac Banking Corporation* [2009] NZCA 234.

[14] The essence of the Court's decision in *Bradbury* is that indemnity costs *"are*

exceptional and require exceptionally bad behaviour" in litigation.

[15] In *Prins v Tirohanga Group Limited* EmpC Auckland AC 27/07, 16 May

2007, the Court held that even where the offending parties behaviour was egregious it was not appropriate for the successful party to aspire to a greater cost award than would normally be available where the offending party's *"...wrongs have been marked already by both a monetary penalty and compensatory awards."*

[16] Arguably that is precisely the position here. I have already determined that the behaviour of the defendants is such as to justify a significant award in respect to penalties and in respect to general damages.

[17] Moreover, the Authority's jurisprudence is marked by a *"low level, cost*

effective, readily accessible and non-technical... (approach)..... It is a first instance

hearing that is not intended to have the trappings of the more formal, procedurally constrained processes of the Court" : *Stevens v Hapag-Lloyd (NZ) Limited* [2015] NZEmpC 28, per Judge Inglis.

[18] I venture to agree with Chief Judge Inglis as she now is.

[19] Applying the normal rules to the assessment of a costs application, the first question to answer is whether the costs incurred are reasonable and having regard to the evidence before me in the present matter, I am satisfied that the costs

incurred by the applicant are indeed reasonable having regard to the importance of the matter for them, the urgency with which the matter needed to be addressed with a view to trying to prevent further damage to their reputation and the need to effectively stop the defendants from continuing to damage the applicant's position.

[20] The next question is to identify is what percentage of the costs actually incurred and reasonably so, ought to be met by the defendants. In the present case, as in all cases in this Authority, the starting point is the daily tariff. The effect of that calculation would be to impose a rather arbitrary calculation, given there were no actual hearing days but perhaps, looking at it in the round, the starting point might be equivalent to two days of an ordinary investigation meeting given the extent of the attendances that counsel for the applicant was required to undertake because of the sheer volume of material being generated by the respondents which was adverse to counsel's clients.

[21] On that footing, the starting point would be a figure of $8,000. The question is whether that figure ought to be increased to encompass the totality of the costs met by the applicant or reduced to some lower amount.

[22] I am not persuaded this is case where full indemnity costs ought to be provided; it is a very rare case where indemnity costs are awarded in the Authority essentially for the reasons set out by the Court in *Stevens*. However, I do think that a lift in the notional daily tariff is appropriate.

Determination

[23] Taking all these matters into account, I have been persuaded that it is appropriate to direct that the second, third and fourth respondents jointly and severally pay to Turuki the sum of $10,000 as a contribution to the costs reasonably incurred by

Turuki in seeking to protect itself from the unreasonable and unlawful behaviour of the respondents.

James Crichton

Chief of the Employment Relations Authority
