Employment Court of New Zealand

Lewis v JPMorgan Chase Bank, N.A. [2015] NZEmpC 185 (19 October 2015)

Last Updated: 21 October 2015

IN THE EMPLOYMENT COURT AUCKLAND

[2015] NZEmpC 185

ARC 75/12

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
AND IN THE MATTER	of a challenge to a costs' determination of the Employment Relations Authority
BETWEEN	ROBERT WADE LEWIS Plaintiff
AND	JPMORGAN CHASE BANK, N.A. Defendant

Hearing:	By memoranda of submissions filed on 18 September and 1 and 8 October 2015
Appearances:	MW O'Brien and B Nicholson, counsel for plaintiff R Towner and S Maxfield, counsel for defendant
Judgment:	19 October 2015

JUDGMENT OF CHIEF JUDGE G L COLGAN

[1] Despite other aspects of the plaintiff's proceeding now having been dismissed by the Court of Appeal as extra-jurisdictional,1 there remains for decision the plaintiff's challenge to the costs determination of the Employment Relations Authority.2 The parties have agreed to deal with that challenge on memoranda filed (as they have been now) without a further hearing.

[2] The Authority's costs award made against the plaintiff amounted to $15,000,

equivalent in effective terms to a standard costs award in the Authority for an investigation meeting lasting more than four days at the Authority's standard rate of

1 *JP Morgan Chase Bank, N.A. v Lewis* (also cited as *JP Morgan Chase Bank NA v Lewis*) [2015] NZCA 255.

2 *Lewis v JP Morgan Chase Bank, N.A.* [2013] NZERA Auckland 18.

$3,500 per day. That award was, however, determined by reference to the defendant's actual costs incurred, taking account of the defendant's early and repeated offers of settlement which the Authority found were, inappropriately, not accepted by the plaintiff.

[3] Amongst the Authority's conclusions about costs, including whether Mr Lewis should pay these and, if so, the amount, were the following statements which are taken from its determination issued on 21 January 2013.

[14] This was a case where Mr Lewis persevered with an application to the Authority over an extended period of time despite the clearest intimations both from the Bank and indeed from the Authority itself that his claim was misconceived.

[15] ... what is unusual in Mr Lewis' claim is his contention that if there were a breach of the settlement agreement, he is entitled to damages. As the Authority noted in the substantive determination, the usual remedy for breach of a settlement agreement is compliance, but because of the particular nature of the settlement agreement entered into by the parties, the Authority would not have been able to order compliance either, in the present case. Furthermore, Mr Lewis' claim for damages for breach cannot be sustained because the Authority has no power to grant that relief.

[16] Those considerations as to the extent of the Authority's remit aside, it is appropriate for the Authority to again observe that there is simply no evidence to suggest that there had been a breach of the settlement agreement of the sort complained of by Mr Lewis. Indeed, the reverse is the case. The evidence available to the Authority in an investigation on the papers, which the parties accepted and agreed to, was that there had been no breach of the settlement agreement.

[17] But even if the Authority's conclusions, both in respect to jurisdiction and the evidence around a breach are put to one side, there is also the fact that, as the Authority has already observed in this determination and made more extensive observations about in the substantive determination, just as soon as the Bank became aware of Mr Lewis' concerns, it promptly engaged with him and endeavoured to find a basis for resolving matters by agreement. Despite those efforts, which on the face of it appeared to deal appropriately with the complaints which Mr Lewis has pleaded, he decided to press on with his claim in the Authority.

[18] In the Authority's judgment, there is nothing in the present matter which obviates the desirability of dealing with costs in the usual way. As costs follow the event, Mr Lewis is obligated to make a contribution to the Bank's costs and, given the Authority's usual principle of dealing with costs in its jurisdiction even where the matter goes on challenge, it is appropriate that those costs be fixed now.

[4] The Authority adopted the reasoning in two previous and unrelated

determinations justifying, as it said, "a higher than normal award of costs". It said:

[19] ... The fixing of costs is an exercise to be informed by principle and there is nothing in the present factual matrix which would discourage the Authority from a significant costs award. Mr Lewis has chosen to persevere with a claim in the Authority which has put the Bank to significant expense. The Bank seeks a contribution to its significant costs in the order of around

40 per cent of the total costs incurred. There was no hearing in person3 and so the notional daily rate approach does not avail.

...

[21] There were numerous points in this saga where Mr Lewis could have withdrawn his proceedings, either without cost or with the ability to

negotiate a cost-free outcome with the Bank. Indeed, the Bank made

precisely that offer during the two year period that this matter has continued.

[22] The Authority is satisfied that Mr Lewis would have had the resources and the opportunity to seek professional legal advice about the merits of his application and that that advice, if taken, would likely have confirmed the outcome Mr Lewis now faces.

[5] Although not referring to the exact amount of the costs incurred by JPMorgan Chase Bank, N.A. (the Bank) or apparently making any assessment of the reasonableness of those in all the circumstances, the Authority set the contribution payable by Mr Lewis in the sum of $15,000. I must assume that, the defendant having sought a contribution of 40 per cent to its actual costs, the sum of $15,000 could not have been more than 40 per cent, so that its actual costs could not have been more than $37,500. The Authority could, or at least should, not have awarded a greater sum than was sought by the Bank in these circumstances.

[6] The plaintiff's case on appeal is that the costs awarded by the Authority's

determination were manifestly excessive and were punitive in nature.

[7] The plaintiff emphasises the principles as stated by the full Court in *PBO Ltd v Da Cruz*4 and reiterated recently by another full Court in *Fagotti v Acme & Co Ltd.*5 These principles are that although costs will usually follow the event, those awarded in the Authority should generally be modest and recognise the Authority's role as a low-level specialist decision-making body. Those principles were also the

subject of recent examination and endorsement by Judge Inglis in *Booth v Big*

3 I assume this to mean that there was no investigation meeting conducted by the Authority.

4 *PBO Ltd (formerly Rush Security Ltd) v Da Cruz* [2005] NZEmpC 144; [2005] 1 ERNZ 808.

5 *Fagotti v Acme & Co Ltd* [2015] NZEmpC 135.

*Kahuna Holdings Ltd*6 in which the Authority had made a costs award of $29,400 following a 1.5-day investigation and in reliance particularly on a rejected Calderbank offer.

[8] The plaintiff submits that although there was no investigation meeting in the Authority, its daily tariff, using a multiplier of the number of days of investigation meetings, also takes into account attendances for the commencement or the defence of proceedings, attendances at any telephone directions conferences, the preparation and filing of witness statements, and the preparation of legal

submissions. In that sense, it might be said that, in this case, a lower notional tariff should be applied because whilst all those preliminary steps were taken, there was no investigation meeting at all, let alone one lasting a day which, together, may have justified at least a starting point of $3,500 for costs.

[9] The plaintiff does not dispute that the Authority has a broad discretion and may provide for an increase to, or decrease from, that notional daily tariff and, in exceptional cases, may provide a 'reasonable contribution to reasonable costs incurred' approach akin to that in this Court. The plaintiff emphasises, however, that the Authority more commonly deals with such situations by multiplying its daily notional tariff to account for additional time and expense incurred by one party.

[10] The plaintiff points out that the sum awarded ($15,000) was 4.3 times the daily tariff then used by the Authority. The plaintiff reminds the Court that the Authority dealt with a preliminary issue on the papers and without recourse to evidence at an investigation meeting.

[11] Further, the plaintiff notes that the Authority appears to have criticised him for the amount of time he took in pursuit of his claim, specified at [4] of the determination, as being more than two years. The plaintiff says that this contradicts the Authority's finding in its substantive determination that this delay was almost

one year and, significantly, was not of Mr Lewis's making.

6 *Booth v Big Kahuna Holdings Ltd* [2015] NZEmpC 4 at [7], [15].

[12] Despite the Authority's criticism of Mr Lewis that he launched and pursued a claim that had no prospect of success, counsel for the plaintiff points out that Mr Lewis's claim to the Authority initially did not seek damages; rather, he says it asked the Authority to investigate what he said was a breach of his settlement agreement by the defendant. That may be so, although the defendant is correct that this was eventually an issue to be, and was, decided by the Authority.

[13] Next, counsel for the plaintiff points out that even although the defendant was ultimately unsuccessful in the Court of Appeal, this Court refused to strike out his proceedings on the very high standard required to make such orders. It was, therefore, inaccurate for the Authority to have said, in effect, that Mr Lewis's claim was so hopeless that it warranted being both struck out on its merits and to be the subject of an award of increased costs. Counsel for the plaintiff submits that Mr Lewis's claim raised important and novel questions of law that were subject to conflicting authorities, so was not an appropriate case in which costs should have been increased at first instance. Counsel for the plaintiff says that the settlement agreement on which Mr Lewis's claim was based was drafted by the defendant and recorded that any disputes were to be heard by the Authority in the first instance. Mr Lewis was not professionally represented before the Authority. I infer he says that he took the defendant at its word in the settlement agreement.

[14] Turning to the defendant's offers of settlement of the proceeding before it was determined by the Authority, the plaintiff says that the Authority Member gave undue weight to the defendant's statement to the plaintiff that it would seek full indemnity costs on a solicitor/client basis against Mr Lewis in the Authority if he did not settle his claim. The plaintiff's submission amounts in effect to one that such a tactic is not a Calderbank offer but, in effect, simply a blunt weapon to dissuade a litigant from proceeding.

[15] The plaintiff says, as to the Authority's comment that he did not respond to its invitation for submissions on costs, that he was unrepresented and ignorant of procedure. Mr Lewis says he now appreciates, with the benefit of advice, that he was wrong to have assumed that, a challenge having been made to the Authority's substantive determination, it would be the Employment Court that dealt with costs.

[16] In these circumstances, the plaintiff submits, the Authority's substantial

award was not justified.

[17] In all these circumstances, the plaintiff submits that any award against him should not exceed $1,500.

[18] In supporting the Authority's determination, the defendant submits that it was right to have ordered the plaintiff to pay substantial costs to the Bank. It, too, relies on statements from the full Court judgment in *Da Cruz*7 recently approved in *Fagotti.*8 Those statements allowed for the Authority's daily rate to be departed from if that did not reflect adequately the conduct of the parties or the preparation required

in a particularly complex matter.

[19] The defendant also relies on a number of determinations of the Authority in unrelated cases in which it has departed from the "tariff approach" and has awarded increased costs. In *Oxygen Business Solutions Ltd v Garcia* the Authority awarded costs of $7,500, being half of the applicant's full costs (including GST and disbursements), saying that the litigation could have been avoided if the respondent "had responded in a constructive and meaningful way to OBSL's attempt to secure from him either payment of the amount owed, or a satisfactory proposal for

payment".9

[20] The Authority's view in that case was that the litigation should not have become as expensive as it had, although that was contributed to significantly by the respondent's failures to engage constructively in a resolution of the problem.10

[21] In *Tobin v Stayinfront Inc* the Authority awarded costs of $30,000 for a preliminary matter determined on papers.11 The preliminary issue was whether a grievance could proceed in the face of the terms of a final and binding settlement. The award appeared to be a full indemnity of the respondent's costs because the

applicant chose to ignore established legal principles in seeking to have his day in

7 *Da Cruz*, above n 3 at [46].

8 *Fagotti*, above n 4 at [26].

9 *Oxygen Business Solutions Ltd v Garcia* [2012] NZERA Auckland 227 at [11].

10 At [13].

11 *Tobin v Stayinfront Inc* AA314A/05, 25 October 2005.

court. The award of $30,000 was approximately 20 per cent of the respondent's

actual costs incurred.

[22] The defendant submits that, in this challenge by hearing de novo, the Court should focus not so much on the Authority's determination and its reasoning but on the application of cl 15 of sch 2 to the Employment Relations Act 2000 (the Act) in determining what would be a proper award of costs in the company's favour in the Authority.

[23] The defendant submits that it attempted, more than two years before the Authority's determination, to resolve the employment relationship problem with Mr Lewis in a constructive, speedy and low-level manner. It says that he acted unreasonably in response to those efforts. It says that the Court may conclude that Mr Lewis was motivated by a desire to reopen and/or to make public the issues which had related to his grievance which had been settled. The defendant says that this was demonstrated again in this Court by Mr Lewis's unnecessary inclusion of matters relating to his personal grievance in paras 14-20 of the second amended statement of claim dated 18 April 2013, which paragraphs were struck out in the Court's judgment, made on the application of the defendant, dated 5 September

2013.12 The defendant says that those were issues that had been fully and finally

settled as long ago as March 2010 but their improper inclusion in the pleadings caused the needless incurring of cost.

[24] Even as early as in his first letter to the Bank written on 30 August 2010 complaining about a breach by the defendant of their settlement agreement, Mr Lewis wished to revisit the merits of the circumstances which brought about that settlement agreement, by seeking to have the Reserve Bank of New Zealand (RBNZ) investigate the litigation that he told the defendant he proposed to bring against it. That is contained within the paragraph of his letter of 30 August 2010 as follows:

As previously explained, any time a bank has court action taken against them in New Zealand; it is required by regulation that the RBNZ is informed of this action. The breach of agreement meets the criteria. I believe that it will result in an investigation by the RBNZ which will include the consultation process that the bank conducted in trying to make me, as the CEO redundant

12 *Lewis v JPMorgan Chase Bank NA* [2013] NZEmpC 148.

for reporting wrongdoing within the bank. All of the documentation which clearly demonstrates this fact has been preserved.

[25] Mr Lewis then elaborated in some detail on the merits of his dispute with the Bank that led to his resignation on the terms outlined in the settlement agreement with it.

[26] The defendant responded promptly (by counsel) to Mr Lewis's letter. While denying that it had breached the settlement agreement, it made some proposals which it said could resolve quickly the issues between the parties without resort to the proceedings that Mr Lewis had by then filed with the Authority.

[27] In particular, it explained why the Bank had declined or refused to confirm to a prospective employer that Mr Lewis had been Chief Executive Officer (CEO) of its New Zealand branch, as he had been. It proposed providing him with a written certificate of service confirming that he had held this office. It proposed also that if confirmation of that was required from the Bank, inquiries should be made of a particular senior office-holder for Australia and New Zealand.

[28] Mr Lewis responded to the defendant's solicitors on the following day, 15

September 2010. Mr Lewis rejected the defendant's settlement proposals and counter-proposed that his proceeding in the Authority continue and that the Authority be invited to involve the RBNZ in its investigation about the role of the Bank's CEO in New Zealand and the representations that the Bank made to the RBNZ. He said that should be about the role which, he said, the Bank subsequently attempted to counteract during a consultation process. Further, Mr Lewis "require[d]" that the confidentiality clause of the settlement agreement be set aside by the Authority. He said that this was necessary because of the damage that had been done to his reputation and credibility by the defendant's refusal to confirm his role as CEO, which would have been compounded by his inability to explain the situation to prospective employers.

[29] On 22 October 2010 the Bank provided a written statement of service over the hand of its Chief Operating Officer which confirmed that Mr Lewis had been the

CEO of the New Zealand branch of the Bank between 15 September 2008 and 5

March 2010.

[30] On 24 January 2011 the Bank's solicitors sent Mr Lewis a draft settlement agreement with the intention of settling directly between the parties those matters which Mr Lewis had taken to the Authority. The Bank's offer was not made "without prejudice". The solicitors' email advised Mr Lewis:

We would emphasise that this offer is, and is intended to be, an open offer. If you decide to reject the settlement offer and proceed with your existing claim in the Authority, the Bank expressly reserves the right to refer this email and the draft settlement agreement to the Authority on any issue as to costs which may arise.

[31] By emailed letter to the defendant's solicitors dated 27 January 2011, Mr Lewis responded to the Bank's proposal of settlement by saying that its earlier refusal to confirm his role as CEO was only one of the issues which he had with it. Mr Lewis indicated his intention to pursue a claim for damages for what he said were the earlier breach or breaches of the first settlement agreement by the Bank and that he wished to continue with his proceeding in the Authority. Mr Lewis described the Bank's threat to seek costs as "unethical".

[32] The Bank's solicitors responded by email to Mr Lewis on 18 March 2011, having then been served with an amended statement of problem which contained a claim for damages for alleged "disparagement" of him by the Bank in breach of the settlement agreement. The defendant regarded Mr Lewis's amended statement of problem as defective and, in particular, that it failed to provide sufficient information about his claim to fully, fairly and clearly inform the Authority and the Bank as is

required by the Employment Relations Authority Regulations 2000.13 The solicitors'

email then set out a number of particulars which were required before filing a statement in reply.

[33] On 30 March 2011 an Authority Member issued a memorandum inviting Mr

Lewis to consider two specified judgments of the Employment Court[14] and

13 Employment Relations Authority Regulations 2000, Form 1 (Application to Authority).

14 *South Tranz Ltd v Strait Freight Ltd* [2007] ERNZ 704; *Musa v Whanganui District Health Board*

WRC 24/08, 18 November 2008.

suggesting that if he intended to proceed with his claim, he should make certain modifications to it.

[34] By a further email to Mr Lewis dated 2 May 2011, the Bank's solicitors elaborated on the conclusions of the Employment Court judgments to which the Authority Member had referred in her memorandum of 30 March 2011. These were said to preclude the Authority from ordering damages for breach of a settlement agreement. The solicitors described Mr Lewis's amended statement of problem as "misconceived" and invited him to withdraw his claim, in which case the Bank would not seek costs against him, "notwithstanding the considerable time and expense it has incurred to date in relation to your claim." The solicitors then reiterated:

On the other hand, if you continue with your claim, I will apply for it to be dismissed on a preliminary basis on the grounds firstly that the Authority lacks jurisdiction to award damages and secondly that the claim is vexatious, and for increased costs to be awarded against you.

[35] Similar advice was subsequently given by the defendant to the plaintiff and the Authority was made aware of the defendant's position in an open fashion.

[36] The defendant says that it incurred substantial legal costs after 15 September

2010 when Mr Lewis rejected its proposal to resolve the problem in what the

defendant describes as a "sensible manner". It submits:

26. ... Rather than being constructive in an effort to resolve the dispute, the plaintiff adopted an obstinate, unreasonable attitude which he maintained for the following two years, which included substantially amending his claim in his amended statement of problem and finally necessitating a determination by the Authority.

[37] The defendant says that after 15 September 2010 it incurred costs (exclusive of GST and service fees) of $36,159 in respect of the Authority proceedings, and sets out details of the attendances for which these charges were levied. It says that about two-thirds of its costs were incurred before Mr Lewis filed an amended statement of problem which sought damages for the first time. It says that even if the Court takes the view that there was a good faith basis for initiating a damages claim, there should still be substantial costs awarded to the defendant for the period before the amended

statement of problem was filed, the defendant having expended $25,080.50 in legal costs in that period.

[38] The defendant's claim includes its costs of participation in mediation. In that regard, it relies on the obiter comments of the full Court recently in *Fagotti* that there is a respectable argument for awarding mediation costs, at least where that is directed as part of the litigation.15 The defendant emphasises that in Mr Lewis's statement of problem to the Authority he said he was unwilling to attend mediation although the defendant sought a direction to mediation in its statement in reply if Mr Lewis was

unwilling to attend voluntarily. The parties were directed by the Authority to attend mediation on 24 September 2010 and in these circumstances, the defendant submits that an award of costs should take into account its mediation costs.

[39] The defendant submits that the proceedings did not raise any novel point of law. It says that the law in relation to the applicable jurisdiction to pursue a breach of a settlement agreement, and the remedies available in each of those jurisdictions, was not novel and so the plaintiff's claim was misconceived.

[40] The defendant disputes the plaintiff's assertion that the settlement agreement drawn up by the defendant required any dispute to be heard by the Authority in the first instance. It says there is no such reference in the settlement agreement: rather, it states: " ... the parties submit to the exclusive jurisdictions of the courts in New Zealand in relation to any dispute which may arise ...". It says that the plaintiff's decision to pursue his claim in the Authority was his own but that the agreement did not require him to do so. That is correct.

[41] Finally, the defendant points out that the plaintiff is a banker "earning a substantial salary with an ability to pay costs". The defendant asks that costs on the challenge be reserved.

[42] In reply, the plaintiff contests, in equally bald terms, the defendant's

assertion that he is earning a good income as a banker and in a position to pay costs.

Mr Lewis says that he is currently unemployed "which impacts his ability to pay an

15 *Fagotti*, above n 4, at [113].

award of costs". In the circumstances of unsatisfactory evidence either way on this question, I will rely upon Mr Lewis's counsel's advice to the Court that the plaintiff is unemployed.

[43] I conclude that the Authority was correct, in all the circumstances of this case, not to limit itself to its notional daily tariff for awarding costs, even though there was no investigation meeting as such. If the Authority had taken, as its starting point, its daily tariff of $3,500 for dealing with the matter on the papers as opposed to in an investigation meeting, an uplift from this sum would have been warranted. That is because, in my assessment, Mr Lewis rejected unreasonably some of the Bank's proposals and proposed an unrealistic justification for doing so. On the other hand, however, Mr Lewis (then without the benefit of representation) did have some apparently valid complaints which the Bank's proposals did not address. For example, there was, in addition to the dispute about the reference and whether he had been CEO, a dispute about the provision to him of outplacement services upon his resignation. The Bank's agents had acted unreasonably and appear to have brought pressure on Mr Lewis to settle his dispute with the Bank by withdrawing his proceedings. That was none of the outplacement services' business. Mr Lewis was not unjustified in objecting to the defendant's settlement proposal which offered money but did nothing to address what appeared to be a conflict of interest on the part of the outplacement service provider.

[44] In all the circumstances, the uplift from the starting point of $3,500 should reasonably have been a 100 per cent increase on that, so that the Authority's costs award should properly have been $7,000. Because its award ($15,000) was more than twice that sum, this was not a borderline case in which the Authority's discretion should be allowed to prevail and not be adjusted by the Court.

[45] That is not to say that the defendant's legal costs were unreasonable. This was a case which warranted the involvement of a senior and experienced employment law practitioner whose emphasis, at least initially, was on settling the litigation in a reasonable way, at least cost to the parties and without involving the Authority.

[46] The question for the Court is to determine how much of that justified legal expense should be visited on the plaintiff in an award of costs. These were proceedings in the Authority which is intended to be a low-level, speedy and user- friendly jurisdiction in which unrepresented litigants such as Mr Lewis may participate on an equal footing with clients represented by leading counsel. There was no investigation meeting, all matters having been dealt with by telephone conference calls and on papers filed. In these circumstances, the Authority's award of costs is set aside and an award of $7,000 is made in substitution in the defendant's favour.

[47] Any questions of costs on this costs application are reserved. That would normally not be the course followed, but the Court still has to determine questions of costs on the challenge to this Court, following the Court of Appeal's dismissal of the proceedings on jurisdictional grounds. It will be convenient, in these circumstances, for any question of costs on the costs challenge, to be determined at the same time.

GL Colgan
Chief Judge

Judgment signed at 4.45 pm on Monday 19 October 2015

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