New Zealand Employment Relations Authority Decisions

Maddigan v Director-General of Conservation (Christchurch) [2018] NZERA 1193; [2018] NZERA Christchurch 193 (18 December 2018)

Last Updated: 7 January 2019

IN THE EMPLOYMENT RELATIONS AUTHORITY CHRISTCHURCH

[2018] NZERA Christchurch 193

3010692

BETWEEN FRASER MADDIGAN Applicant

A N D DIRECTOR-GENERAL OF CONSERVATION Respondent

Member of Authority: Helen Doyle

Representatives: Anna Oberndorfer, Advocate for Applicant

Karen Radich, Counsel for Respondent

Submissions Received: 9 November 2018 from Applicant

30 November 2018 from Respondent

Date of Determination: 18 December 2018

COSTS DETERMINATION OF THE EMPLOYMENT RELATIONS AUTHORITY

A I order that the Director-General of Conservation pay to Fraser

Maddigan costs in the sum of $7,500 and disbursements in the sum of

$224.89. Substantive determination

[1] The Authority in its determination dated 4 October 2018 found that the applicant

was unjustifiably dismissed from his employment. The issue of costs was reserved and a timetable set for an exchange of submissions. The Authority has received submissions on

behalf of the applicant and respondent.

The applicant's submissions

[2] Ms Oberndorfer refers to the judgment of the full Court of the Employment Court in *PBO Ltd (formerly Rush Security) v Da Cruz*1and the basic tenets that the Authority has held to since its inception when considering costs. These were held in *Da Cruz* to be appropriate to the Authority and consistent with its functions and powers.

[3] Ms Oberndorfer submits that there is no good reason in this case to depart from the general rule that costs follow the event because the applicant was successful in his claim of unjustified dismissal.

[4] She submits the starting point for awarding costs should be based on the notional daily tariff and that the investigation meeting was held over two days on 28 and 29 June

2018. Ms Oberndorfer submits that although the meeting on the second day concluded at

12:55 p.m. there was time spent preparing written submissions and the starting point should be the tariff for two days being $8,000.

[5] Ms Oberndorfer submits that although the applicant was not entirely successful because he was not reinstated and the Authority declined to impose a penalty he was largely successful.

[6] Ms Oberndorfer submits that the applicant did all he could to mitigate costs including preparing bundles of documents and that any contribution awarded is irrelevant in fixing costs.

[7] Reference is made to a *Calderbank offer* but Ms Oberndorfer submits that the Authority should not give effect to that because the applicant's primary remedy was always reinstatement.

[8] Ms Oberndorfer seeks an uplift to the daily tariff for two reasons. The first is that the applicant attempted to seek the view of the respondent on the possibility of reinstatement prior to attending mediation but the respondent insisted on proceeding to

mediation and this put the applicant to extra costs. Further that the applicant is not GST

registered and there should be an uplift to take that into account.

[9] The applicant therefore seeks an uplift from the daily tariff in the amount of $1,350 and reimbursement of the filing fee of $71.56.

The respondent's submissions

[10] Ms Radich on behalf of the respondent submits there is no basis for granting costs to the applicant at a level above the daily tariff and submits that the circumstances of the case indicate an award below the tariff.

[11] In particular Ms Radich refers to the applicant not being successful with most of his claims and that an offer of settlement was made well ahead of the investigation meeting for exactly the same amount as the compensation award then ordered by the Authority. Further that the applicant's calculation of costs against the daily tariff is incorrect.

[12] Ms Radich submits that the sum of $10,350 claimed by the applicant for costs is more than $1,350 above the tariff and there is an incorrect calculation.

[13] Further she submits that the investigation meeting was one and a half days in duration and that even with submissions filed afterwards this should not add a further half day to the hearing time from which costs calculations are made.

[14] Ms Radich submits that the respondent was ready to present submissions on the second day but Ms Oberndorfer sought time to prepare and later file submissions. With this in mind she submits that at most the second day should be calculated on a two-thirds basis.

[15] She submits that the applicant was not successful with most of his various claims, his disadvantage grievances or the good faith breach with the latter two brought as separate claims. Further, reinstatement was not granted.

[16] Ms Radich refers to an Authority determination in *Heine v The Chief Executive of the*

Department of Corrections2 where the daily tariff was reduced to reflect some limited

success. Ms Radich submits that this should be a case in which costs should also be reduced below the daily tariff. Ms Radich submits that the *belts and braces* approach to bringing a case to the Authority is not a choice that should be levied on the losing party and she submits the meeting could have been concluded in a shorter time than one and a half days if the claims had been more focused.

[17] Ms Radich refers to an offer to settle by letter dated 15 December 2017 in the nature of a Calderbank offer in the sum of $7,500 without deduction and submits it should be taken into account. Further that mediation occurred at the direction of the Authority and the respondent did not insist on mediation.

[18] Ms Radich submits with respect to GST that the applicant does operate a pest control business which she refers to as *presumably GST registered* in any event she submits that the cases referred to are in the Employment Court and the daily tariff is a contribution toward costs not reimbursement and ought therefore to be GST neutral.

Determination

[19] The exercise by the Authority of its discretion when assessing costs is not to be undertaken in an arbitrary manner but rather in a principled way.

[20] There is no good reason in this matter to depart from the usual principle that costs follow the event. Mr Maddigan was

successful and therefore is entitled to consideration of a contribution towards his costs.

Starting point for an assessment of costs

[21] Costs in the Authority are often assessed against a notional daily rate which currently is $4,500 for the first day and $3,500 for each subsequent day.

[22] The investigation meeting took place over two days. Ms Oberndorfer said that the starting point for an assessment of costs should be $8000. Ms Radich submits that at most the second day should be calculated on a two thirds basis and not a full day taking into account the provision of written submissions after the conclusion of the meeting.

[23] The first day of investigation commenced at 9.30am and concluded at 5.15pm.

There was a half hour lunch break. With morning and afternoon breaks that is almost a 7 hour sitting day. The second day concluded by about 1pm so was about 3.5 hours with a short morning break. The total time for investigation was about 2 hours short of 12 hours.

[24] Ms Radich was prepared to make her submissions on the second day. Had that occurred then there would have been a need for a luncheon adjournment and then at least one further hour and possibly more for submissions. The submissions from both Ms Oberndorfer and Ms Radich were helpful to the Authority.

[25] There were some factual complexities with this matter and three volumes of documents.

[26] The starting point therefore, for all the reasons set out above, is the daily tariff for two days being $8000.

Reduce or increase tariff

[27] Ms Radich submits that there should be a reduction to the tariff because of the limited success that Mr Maddigan had. Ms Oberndorfer accepts that costs can be reduced to account for the additional time and resources to defend where the claims are unsuccessful but she submits significantly increased costs did not result.

[28] The focus for the Authority is on whether or not there was additional resources and time required for the unsuccessful arguments. Although there were a variety of claims including a penalty for a breach of good faith and separate disadvantage grievances much of the evidence was the same as for the dismissal. On that basis I distinguish *Heine.3* In that case there seemed to be two claims in particular that occupied significant time. One was then abandoned at the end of the investigation meeting and the other was described as *never viable*. They both seemed quite distinct from the claim in which there was some success.

[29] I find that the additional costs were incurred more in the need for Ms Radich to respond in submissions. I find that the daily tariff should be reduced by $500 to account for unsuccessful claims and a level of additional costs for the respondent.

[30] It is somewhat speculative whether the investigation meeting could have been

3 Above n 2 at [4]

conducted in a shorter time with a more focussed approach. Initially the matter was set down for three days but then it was considered two would be adequate. I make no adjustment on that basis.

Offer to settle

[31] By letter dated 15 December 2017 Ms Radich on behalf of the respondent offered to make a one off offer of settlement on a *without prejudice save as to costs* basis of $7,500 compensation.

[32] I have considered that offer which was the same as the compensatory amount awarded in the Authority determination. There was additionally an award for lost wages.

[33] I cannot conclude that it was unreasonable of the applicant not to accept that offer in circumstances where the most important claim for him was reinstatement. I make no adjustment because of the offer.

Costs for mediation

[34] The Authority directed the parties to mediation. The respondent did have a firm view about reinstatement. That is not unusual and does not mean that mediation could not still be constructive. It would be unusual for the parties to a personal grievance not to have attended mediation before an investigation meeting.

[35] I make no adjustment for attendance at mediation.

GST

[36] I find that the exercise of the discretion to award costs in the Authority is on the basis that the daily tariff is an inclusive and GST neutral figure. There is no adjustment for GST.

Disbursements

[37] The applicant is entitled to reimbursement of his filing fee of $71.56. Although it was not claimed there was a hearing fee for the second day invoiced to the applicant through Ms Oberndorfer in the sum of $153.33. That is also I find recoverable.

Application for a stay of execution

[38] Ms Radich in her submissions seeks a stay of execution in respect of any cost award as there is a de novo challenge. Ms Oberndorfer questioned this in an email response and stated that it is *desirable for all matters to be decided by the Court.*

[39] I am going to reserve the right for either party to return to the Authority about that matter if required. I am unclear if there is an application already before the Employment Court for a stay.

Order

[40] I order that the Director- General of Conservation pay to Fraser Maddigan the sum of $7,500 being costs and disbursements in the sum of $224.89.

Helen Doyle

Member of the Employment Relations Authority
