Employment Court of New Zealand

McIvor (Ali) v Saad [2015] NZEmpC 174 (2 October 2015)

Last Updated: 12 October 2015

IN THE EMPLOYMENT COURT AUCKLAND

[2015] NZEmpC 174

ARC 54/14

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
AND IN THE MATTER	of an application for costs
BETWEEN	GARY MCIVOR (ALI) Plaintiff
AND	SAMIR SAAD Defendant

Hearing:	By memoranda of submissions filed on 31 August and 10 September 2015
Appearances:	M Moncur, advocate for plaintiff T Mukusha, counsel for defendant
Judgment:	2 October 2015

COSTS JUDGMENT OF CHIEF JUDGE G L COLGAN

[1] The successful plaintiff in a judgment issued on 19 August 2015 seeks costs against the defendant.1 The plaintiff's actual costs of representation are said to have been $13,752 (including GST). The plaintiff accepts that the starting point for determining a costs order should be two-thirds of that amount which, he says, was a reasonable amount in all the circumstances; but he claims that in this case there should be an uplift.

[2] Those circumstances in support of uplift include the following contentions. First, the plaintiff says that the defendant did not challenge the Employment Relations Authority's decision awarding him wages and holiday pay, but did not pay these unchallenged amounts to the plaintiff. He says that in these circumstances his

claims for further relief have also served to enable him to have an enforcement

1 *McIvor (Ali) v Saad* [2015] NZEmpC 145.

mechanism by way of increasing the award of costs in this Court so as to "incentivize other employers to take compliance matters more seriously". This does not impress me as a good argument for increasing costs in this case.

[3] Next, the plaintiff says that the parties were "directed to attend a judicial settlement conference" requiring preparation of relevant documents. That is not correct. Parties cannot be required to attend a judicial settlement conference: it is a voluntary process in which the parties may have been encouraged but the plaintiff must have agreed to do so. Any award will not take that attendance into account.

[4] Next, the plaintiff says that an offer of settlement without prejudice as to costs was made on 28 April 2015 but was not accepted.

Unfortunately, the plaintiff's advocate's written submissions do not clarify by and to whom this offer was made but I will assume it was the plaintiff who was prepared to settle the litigation for the sum of $13,000. The plaintiff says that when the defendant first engaged counsel in June 2015, further attempts were made to settle the matter including an offer by the plaintiff to settle for the reduced sum of $12,000 which was likewise rejected.

[5] The plaintiff points out that the amount to which he is now entitled by the Court's judgment is significantly in excess of those amounts that he proffered in settlement of the proceeding at a time when the parties' costs of litigation were lower than subsequently. This is the plaintiff's strongest argument for uplift.

[6] Further, the parties have not been able to agree on the amount of lost remuneration due to Mr McIvor and, in these circumstances, the plaintiff seeks an order specifying this sum. He claims 13 weeks' lost income at the rate of 50 hours' work per week at the (then) minimum wage of $13.75 per hour, a total (before tax) figure of $8,937.50.

[7] The only real argument between the parties on the amount of this wage-loss remuneration under [53] of the principal judgment, is the number of hours per week which is to be the multiplier. That is because the Court has directed compensation for three months (or 13 weeks) under the relevant minimum wage. It is necessary, in these circumstances, to go back to the evidence to calculate whether, had he not been

dismissed unjustifiably, Mr McIvor had been, and would have been, working a 50- hour week. I consider on balance that these would have been the weekly hours worked by Mr McIvor had there not been a dismissal.

[8] The defendant submits that the plaintiff 's claim for a contribution to costs based on actual costs is excessive. He says that, calculated by reference to the number of hours' work undertaken by the advocate, six hours' instead of 54 hours' preparatory work would be reasonable. Further, the defendant says that he should have any amount required to be paid reduced by the plaintiff's late arrival for the hearing. Unfortunately for the defendant, that is not a submission that will achieve any traction. The defendant says that it would be reasonable for the plaintiff's advocate to have spent only 30 minutes preparing evidence for the hearing. Similarly, Mr Mukusha submits that preparation of submissions can only reasonably have taken two hours, given the advocate's constant involvement for the plaintiff from the outset of the proceedings in the Authority. The defendant says that in these circumstances, no more than $3,000 as an award of costs would be reasonable. I consider those submissions about the appropriate periods of preparatory time to be unrealistic and completely untenable.

[9] The defendant has not responded to the plaintiff's submissions on the quantification of his loss and in these circumstances I accept the plaintiff's formula calculating that loss and his claim for $8,937.50 (before tax).

[10] The case was an unexceptional one, appropriate for prosecution by a lay advocate as the plaintiff 's is. Balancing the various considerations already alluded to in submissions and the amount of the judgment obtained, I consider that the starting point for reasonable costs in this proceeding (including in the Authority) should be

$10,000. Two-thirds of that is $6,667. The plaintiff is entitled to an uplift from that two-thirds figure to take account of Mr Saad's unreasonable rejections of the plaintiff's settlement proposals including that made when he had the benefit of professional representation. A 40 per cent uplift to take account of the additional and unnecessary hearing costs will add $2,667 to that starting point, bringing the plaintiff's award of costs to $9,333. The other remedies provided in the judgment of

19 August 2015 (s 123(1)(c)(i) compensation, reiteration of the costs and disbursements awarded in the Authority, a penalty and interest) continue to apply.

[11] In summary, the plaintiff is entitled to the following remedies:

• The sum of $9,333 as a contribution by the defendant to the plaintiff's

costs in the Employment Court; and

• the sum of $8,937.50 (before tax) for wage loss remuneration.

GL Colgan
Chief Judge

Judgment signed at 4.15 pm on Friday 2 October 2015