Employment Court of New Zealand

Nathan v C3 Limited [2016] NZEmpC 160 (1 December 2016)

Last Updated: 6 December 2016

IN THE EMPLOYMENT COURT AUCKLAND

[2016] NZEmpC 160

ARC 94/12

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
AND IN THE MATTER	of an application for costs
BETWEEN	ANDY NATHAN Plaintiff
AND	C3 LIMITED Defendant

Hearing: On papers filed on 30 September, 31 October and 11 November 2016

Representatives: S R Mitchell, counsel for plaintiff
P Muir and R M Rendle, counsel for defendant

Judgment: 1 December 2016

COSTS JUDGMENT OF JUDGE M E PERKINS

[1] The plaintiff, Andy Nathan, and a fellow employee Henry Nee Nee were dismissed from employment following a disciplinary procedure conducted by the defendant, C3 Limited. They claimed personal grievances in the Employment Relations Authority (the Authority). In a determination dated 14 December 2012 the Authority held that they had been justifiably dismissed. 1

[2] Both Mr Nathan and Mr Nee Nee filed a challenge to that determination. During the course of the hearing Mr Nee Nee withdrew his challenge. In a judgment

1 *Nee Nee v C3 Ltd* [2012] NZERA Auckland 457.

dated 20 November 2013, Mr Nathan's challenge to the Authority's determination

was dismissed.2

[3] In a subsequent costs judgment dated 4 January 2014, costs in respect of Mr Nee Nee's withdrawn challenge were dealt with.3 It was recorded in that judgment that issues of costs between C3 Ltd and Mr Nathan had been resolved between them.

[4] Mr Nathan sought leave to appeal against the judgment of 20 November 2013 dismissing his challenge. Leave was granted by the Court of Appeal to Mr Nathan to appeal on a point of law.4 In a judgment dated 4 August 2015 the Court of Appeal

answered the point of law thereby allowing Mr Nathan's appeal.5 C3 Ltd was

ordered to pay Mr Nathan's costs on the appeal. The Court of Appeal remitted the matter back to the Employment Court for a

determination in light of its judgment.

[5] Following the matter being remitted back to this Court by the Court of Appeal, discussions were held with counsel as to the process which would need to be adopted. Unfortunately, the Court of Appeal in its judgment did not give any directions to this Court as to how the rehearing or reconsideration should be

conducted.6 Counsel for C3 Ltd indicated that the defendant wished to adduce

further evidence at the rehearing and an application for leave to do so was filed, heard and granted.7 The hearing of the matter was then allocated a fixture. The date of that fixture was 22 July 2016.

[6] On 20 July 2016 Mr Nathan filed a notice of discontinuance of the proceeding. The notice of discontinuance indicated that the matter of costs remained outstanding.

[7] Even though the proceedings were not to continue, a brief hearing was conducted with counsel on 22 July 2016. Costs on the discontinuance were reserved. Following that hearing, indications were given to the Court that counsel for the

parties were discussing the issue of costs. Eventually, the issue of costs could not be

2 *Nee Nee v C3 Ltd* [2013] NZEmpC 207, (2013) 11 NZELR 174.

3 *Nee Nee v C3 Ltd* [2014] NZEmpC 5 at [2].

4 *Nathan v C3 Ltd* [2014] NZCA 198.

5 *Nathan v C3 Ltd* [2015] NZCA 350, [2015] ERNZ 61.

6 As is required by the Employment Relations Act 2000, s 215(2)(b).

7 *Nathan v C3 Ltd* [2016] NZEmpC 55.

settled. Counsel have now respectively filed memoranda of submissions as to costs. In addition, Mr Nathan has sworn and filed an affidavit setting out his current financial position.

[8] Costs are sought by the defendant against both Mr Nathan and his union, the Maritime Union of New Zealand (MUNZ). The claim is made on the basis that as the action was discontinued at the last minute, the costs of preparation for the hearing had already been incurred. The sum claimed is $27,507.60. This sum does not include GST. In addition an application is made for costs incurred in respect of preparing the costs application and the sum of $750 (plus GST) is sought as a contribution towards those costs. It is also submitted by Ms Muir and Ms Rendle, counsel for the defendant, that the failure of Mr Nathan to give adequate and timely notice of the full extent of the case he would present at the hearing has contributed unnecessarily to the time and expense of the proceedings.

[9] The attendances for which costs were incurred on behalf of the defendant involved preparing for the hearing on the matter remitted back by the Court of Appeal. They included the application for leave to call further evidence; preparing further briefs of evidence for two witnesses; and preparing legal submissions. An application for indemnity costs is made by the defendant in view of the fact that Mr Nathan discontinued the action at the last minute.

[10] Mr Nathan opposes the making of an order for costs. Mr Mitchell, counsel for Mr Nathan, submitted that the costs claimed are unreasonable; that the application in relation to adducing further evidence would not have been required had the defendant addressed the discrimination issue matters directly in the first instance at the original hearing of this matter; and that this is not a proper case for the Court to award costs against the third party union. In addition, the submission is made that in any event, Mr Nathan's precarious financial position should be taken into account in deciding whether to make any costs award against him and/or the quantum of such costs.

[11] The power of the Court to award costs is contained in cl 19 of sch 3 to the

Employment Relations Act 2000 which reads as follows:

19 Power to award costs

(1) The court in any proceedings may order any party to pay to any

other party such costs and expenses (including expenses of witnesses) as the court thinks reasonable.

(2) The court may apportion any such costs and expenses between the parties or any of them as it thinks fit, and may at any time vary or alter any such order in such manner as it thinks reasonable.

[12] The Court's discretion as to costs is elaborated upon in reg 68 of the

Employment Court Regulations 2000 which reads as follows:

68 Discretion as to costs

(1) In exercising the court's discretion under the Act to make orders as

to costs, the court may have regard to any conduct of the parties tending to increase or contain costs, including any offer made by either party to the other, a reasonable time before the hearing, to settle all or some of the matters at issue between the parties.

(2) Under subclause (1), the court—

(a) may have regard to an offer despite that offer being expressed to be without prejudice except as to costs; but

(b) may not have regard to anything that was done in the course

of the provision of mediation services.

[13] The power to award costs and the exercise of the Court's discretion in doing so have been the subject of several Court of Appeal decisions and the principles are now well-established.8 The primary principle is that costs usually follow the event. Normally where a party has discontinued an action, the party discontinuing is required to make a contribution towards the costs of the other party. This rule may be displaced if there are just and equitable circumstances for doing so.9 Usually an award of costs to a successful party in this Court would be two-thirds of actual reasonable costs.10 The Court has a wide discretion in making an award of costs and can order increased costs and full indemnity costs where the circumstances would justify that. In this particular case, Mr Nathan has set out in his affidavit his precarious financial position and in deciding whether or not to make an award of costs against him and the quantum of any such order, his financial position needs to

be taken into account.

8 *Victoria University of Wellington v Alton-Lee* [2001] NZCA 313; [2001] ERNZ 305 (CA); *Binnie v Pacific Health*

Ltd [2003] NZCA 69; [2002] 1 ERNZ 438 (CA); *Health Waikato Ltd v Elmsly* [2004] NZCA 35; [2004] 1 ERNZ 172 (CA).

9. See, for example, *Gini v Literacy Training Ltd* [2013] NZEmpC 25 at [13]. The principles to be applied are set out recently in *Yarrall v The Earthquake Commission* [2016] NZCA 517 at [12].

10 As these proceedings were commenced before 1 January 2016, the Court's guideline scale of

costs does not apply.

[14] In elaboration of his submission that the quantum of the defendant's claim is excessive, Mr Mitchell has submitted that all that the Employment Court would have needed to address, if the hearing had proceeded, was simply whether there was discrimination and whether that was a material factor in the defendant's decision to terminate Mr Nathan's employment. He submitted further that it was not a complicated issue and had in fact been addressed in submissions in the Employment Court at the earlier hearing and in the Court of Appeal. Even though the Employment Court's guideline scale does not apply to the matter, Mr Mitchell submitted that if the scale had applied, then it would have been on the basis of 2B where a daily rate of $2,230 would apply. He added that the hearing itself would have taken only one half-day and that the scale would therefore allow for one day to be allocated for preparation of briefs of evidence and one day for preparation for the half-day hearing. He does not go on to quantify the calculation under the scale but I assess the total allowance under the scale would amount to approximately $10,000. In making this calculation I have added a further allowance of one half-day because even though the hearing did not proceed there would have been preparation for and attendances at a directions conference and the short hearing on 22 July 2016.

[15] Attached to the submissions of Ms Muir and Ms Rendle are the invoices created by their legal firm for the attendances carried out on behalf of the defendant. Annexed to the invoices are narrations of attendances although no specific time allocations are recorded.

[16] This Court's guideline scale is closely connected to the scales applying under the High Court Rules. Already built in is a discount of one-third. The scales are regularly updated and are regarded as representing what would amount to two-thirds of reasonable costs. If the one-third were added back into the scale calculation, the total costs would then be in the vicinity of $15,000. This is substantially less than the claim of $27,507.60 now made by the defendant.

[17] As to the claim against the third party MUNZ, Mr Mitchell has submitted that no order should be made against MUNZ. It appears to be accepted that the involvement of the Union in the matter ceased once Mr Nathan was successful with his appeal in the Court of Appeal and that it has had no involvement in the

attendances since then. At that point the defendant was ordered to pay costs to Mr Nathan. It does not appear that there was any reversal or reimbursement to Mr Nathan of the costs which he agreed to pay in respect of the earlier Employment Court proceedings. Those costs amounted to $17,932.48 and were paid by MUNZ.

[18] So far as Mr Nathan's financial position is concerned, his affidavit discloses that he is currently on a disability benefit. He lives with his sister and pays board to her. His sole asset is an aged motor vehicle. He has a reasonably substantial debt which he is repaying. He is in poor health. He claims that he would be unlikely to be able to meet any award of costs against him.

[19] One further matter which needs to be mentioned is that the defendant is claiming GST on the costs incurred in preparing the costs application. In view of the Court of Appeal's recent decision in *New Zealand Venue and Event Management Ltd v Worldwide NZ LLC*,11 this would appear in any event not to be a case where an award of GST is appropriate. Certainly no submissions have been made that C3 Ltd could bring itself within that category of the Court of Appeal's judgment where GST could be included in an award of costs.

[20] Having regard to all of these matters in considering the exercise of the discretion as to costs, I have reached the conclusion that this is not an appropriate case in which to award costs against Mr Nathan, even though the notice of discontinuance was filed

excessively late in the piece. The Court of Appeal, in allowing Mr Nathan's appeal, made it plain that there was a substantial issue that had to be further determined by the Court. As the hearing of that matter did not proceed, a determination on the ultimate merits of that issue as between Mr Nathan and the defendant was not made. I am also of the view that an inference can be made that Mr Nathan's failure to proceed with the hearing related more to the effect his poor health had on his energy and enthusiasm to proceed than any acknowledgement that on the discrimination point he was not likely to succeed. Those are matters which also need to be taken into account on the issue of costs.

[21] Looking back over the entire proceedings, each of the parties has been successful at certain stages and despite the submission of Ms Muir and Ms Rendle that the defendant should be treated as the successful party, one could say that the ultimate position between them was more in the nature of a draw. Apart from that, I agree with Mr Mitchell's submission that the quantum of the defendant's claim for costs is not reasonable having regard to the attendances which would have been required in this matter. GST (even though in this case for a relatively small sum) is not claimable and certainly this would not be a case where an order of indemnity costs would be appropriate. Finally, when dealing with the claim against Mr Nathan, his state of penury is a consideration. Mr Nathan has produced sufficient evidence to

satisfy the Court that payment of costs would result in undue hardship.12

[22] So far as the claim against MUNZ is concerned, it was not involved in assisting or funding Mr Nathan in the continuation of the proceedings following the Court of Appeal's decision. There is no real basis for the submission put forward that it should contribute further towards the defendant's costs. The submission that, without MUNZ's involvement, the plaintiff would not have pursued his appeal to the Court of Appeal and the defendant would then not have been put to the substantial additional costs associated with the referral back to the Employment Court, is simply not tenable. It is noted that in the submissions of counsel for the defendant, it is stated that MUNZ paid the defendant, on Mr Nathan's behalf, the agreed contribution towards the defendant's costs in respect of the Employment Court hearing. This was a substantial sum. If it had been the subject of a court order, there may have been scope for having it reversed as a result of Mr Nathan's successful appeal to the Court of Appeal.

[23] In conclusion, this is not an appropriate case to exercise the discretion to make an award of costs and the application by the defendant for costs is therefore

declined.

Judgment signed at 2 pm on 1 December 2016

M E Perkins
Judge