Employment Court of New Zealand

Pathways Health Limited v Moxon [2013] NZEmpC 18 (21 February 2013)

Last Updated: 26 February 2013

IN THE EMPLOYMENT COURT CHRISTCHURCH

[2013] NZEmpC 18

CRC 5/12

IN THE MATTER OF a challenge to a determination of the

Employment Relations Authority

BETWEEN PATHWAYS HEALTH LIMITED Plaintiff

AND ALICIA MOXON Defendant

Hearing: on the papers - submissions received 15 June, 12 July and 19 July

2012

Appearances: Simon Menzies, counsel for the plaintiff

Barbara Buckett, counsel for the defendant

Judgment: 21 February 2013

JUDGMENT OF JUDGE A A COUCH

[1] This judgment decides a challenge and cross challenge to a costs determination of the Employment Relations Authority (the Authority).

[2] The plaintiff is a charitable provider of mental health services. The defendant has qualifications in psychology and social work and was employed by the plaintiff in 2005 as a registered health professional.

[3] In August 2009, the plaintiff raised concerns with the defendant about her conduct. These ultimately led to the defendant receiving a formal warning in April

2010. The defendant raised a personal grievance which was lodged with the Authority. In addition to remedies for the personal grievance, the defendant also sought reimbursement of her costs of representation in the investigation process as

special damages.

[4] Following a lengthy investigation, the Authority determined1 that the warning was unjustifiable and that the defendant's employment had been affected to her disadvantage as a result. The Authority ordered that the warning be regarded as never having been given and ordered the plaintiff to pay the defendant $9,000 as compensation for distress. This included a ten percent deduction on account of the defendant's contribution to the situation giving rise to her personal grievance. The Authority dismissed the defendant's claim for special damages. That substantive determination was delivered on 6 October 2011 and was not challenged by either party.

[5] Both parties then sought an award of costs. Those claims were determined by the Authority in a second determination2 delivered on 14 December 2011. The Authority adopted the tariff approach found to be appropriate by the full Court in *PBO Limited (formerly Rush Security Limited) v Da Cruz.*3 Taking account of an investigation meeting lasting three days and

allowing an additional two days for unusually extensive preparation, the Authority adopted a daily rate of $3,500 to conclude that an appropriate award was $17,500. Deducting $2,500 to take account of the defendant's failure to succeed in her claim for special damages, the plaintiff was ordered to pay the defendant $15,000 as costs together with certain disbursements.

[6] The plaintiff challenged the whole of that costs determination and sought a hearing de novo. The plaintiff's claim is based on what it says was the defendant's unreasonable rejection of a *Calderbank* offer made prior to the Authority's investigation meeting. The plaintiff seeks an award of costs in its favour of $9,000.

Scope of the cross challenge

[7] Included in the statement of defence was a cross challenge. As originally framed, this included an attempt to reopen the defendant's claim for reimbursement of pre-litigation costs. In a directions conference, I drew to Ms Buckett's attention

that this amounted to a challenge to part of the Authority's substantive determination

1 [2011] NZERA Christchurch 151.

2 [2011] NZERA Christchurch 201.

3 [2005] NZEmpC 144; [2005] ERNZ 808.

and invited her to consider whether the Court had jurisdiction to entertain it as a cross challenge to the costs determination.

[8] In a memorandum dated 23 April 2012, Ms Buckett said "The cross challenge should be treated as if it had not been filed." On 23 May 2012, Ms Buckett filed a further memorandum saying that the withdrawal of the entire cross challenge was a mistake and that what had been intended was to withdraw only the claim for pre- litigation costs. Mr Menzies took issue with this approach. He submitted that the effect of Ms Buckett's first memorandum was to withdraw the whole of the cross challenge so that there was nothing before the Court which could be revived.

[9] While there is obvious logic in Mr Menzies' submission, the Court must ultimately take a practical approach to such matters. The 2005 practice direction4 provides:

A cross-challenge need not be made within the time prescribed for a challenge but may be included in the defendant's statement of defence to the statement of claim initiating the challenge.

[10] Had I taken the view urged on me by Mr Menzies, it would have remained open for the defendant to have filed an amended statement of defence restating those parts of the original cross challenge which related to the Authority's costs determination. Rather than require the defendant to jump through that procedural hoop for no practical purpose, I allowed the cross challenge to proceed in its reduced form.

[11] In the cross challenge which proceeded, the defendant sought full reimbursement of her litigation costs and costs associated with a second mediation directed by the Authority. They amounted to more than $30,000.

Principles

[12] Conducting a de novo hearing of a claim for costs in the Authority is inevitably problematic. In *Metallic Sweeping (1998) Limited v Ford,5* I noted that a

plaintiff is, in most cases, entitled to a hearing de novo on request and then said:

4 [2005] ERNZ 60.

[12] That raises the question of how the Court can and should conduct a de novo hearing of an application for costs. As in this case, most claims for costs are determined by the Authority on the basis of written submissions by the parties or their representatives. All concerned have been directly involved in the investigation and, as the Authority did in this case, may make only brief and general references to the events which are relevant to the outcome. Evidence is rarely if ever given in relation to costs. Rather, the Authority relies on its own knowledge of events, particularly in relation to interlocutory matters and the manner in which the parties have conducted their cases.

[13] When conducting a de novo hearing of substantive issues, the Court effectively puts the Authority's determination to one side and decides the matter on the basis of the evidence adduced before it. Given the nature of the process by which costs determinations are made, however, that is simply impractical when the Court is asked to decide what costs ought to have been awarded by the Authority. The Court receives nothing from the Authority. There is no record of the investigation meeting. While it would be possible for oral evidence to be given by the parties about every aspect of the Authority's investigation and each other's conduct on which they seek to rely, that could easily lead to a hearing out of all proportion to what is at stake.

[14] It seems to me that the only practical way of deciding a challenge to a costs determination is for the Court to be primarily

informed through the submissions of the parties, with the possibility that this may be supported by affidavit evidence about contentious issues. In most cases, there will not be a hearing at which the parties or their agents appear in person. Thus, resolving differences between the parties or their representatives will be problematic. Inevitably, a Judge of the Court deciding a challenge can never be as well informed about events as the member of the Authority who conducted the investigation but I can see no realistic means to bridge that gap. In areas of uncertainty, the Court will need to have regard to the Authority's assessment of matters in a manner it would not do when deciding a substantive challenge by way of a hearing de novo. It may also be helpful and appropriate for the Court to have regard to the Authority's substantive determination.

[13] I approach the decision in this case in that manner although I have the benefit of more information than was available in the *Metallic Sweeping* case. The Authority's determination was a good deal more detailed and an affidavit was filed on behalf of each party. Attached to the defendant's affidavit were copies of invoices and her solicitor's time records together with selected parts of the pre-hearing correspondence between counsel about settlement. A full set of that correspondence

was attached to the affidavit which was then filed on behalf of the plaintiff.

5 [2010] NZEmpC 129; [2010] ERNZ 433.

[14] In deciding a challenge such as this, the Court must put itself in the place of the Authority. It follows that the Court must apply the principles applicable to awarding costs in relation to proceedings before the Authority. Those principles were confirmed by the full Court in *PBO Ltd (Formerly Rush Security Ltd) v Da Cruz*.6 The essence of the decision is in the following three paragraphs:

[44] The costs principles which the Authority now applies are not necessarily as comprehensive or as prescriptive as those set out in *Okeby7* and similar earlier judgments. The Authority is able to set its own procedure and has, since its inception, held to some basic tenets when considering costs. These include:

- There is a discretion as to whether costs would be awarded and what amount.
- The discretion is to be exercised in accordance with principle and not arbitrarily.
- The statutory jurisdiction to award costs is consistent with the equity and good conscience jurisdiction of the Authority.
- Equity and good conscience is to be considered on a case by case basis.
- Costs are not to be used as a punishment or as an expression of disapproval of the unsuccessful party's conduct although conduct which increased costs unnecessarily can be taken into account in inflating or reducing an award.
- It is open to the Authority consider whether all or any of the parties costs were unnecessary or unreasonable.
- That costs generally follow the event.
- That without prejudice offers can be taken into account.
- That awards will be modest.
- That frequently costs are judged against a notional daily rate.
- The nature of the case can also influence costs and this has resulted in the Authority ordering that costs lie where they fall in certain circumstances.

[45] We hold that these principles are appropriate to the Authority and consistent with its functions and powers. They do not limit its discretion and proper application of them should ensure that each case is considered in the light of its own circumstances. While these general principles are applicable also to the Court, the Authority is not bound by the *Binnie8* principles which extend the range of costs which the Court may award beyond what could reasonably be labelled 'modest.'

6 [2005] NZEmpC 144; [2005] ERNZ 808.

7 *Okeby v Computer Associates (NZ) Ltd* [1994] NZEmpC 82; [1994] 1 ERNZ 613.

8 *Binnie v Pacific Health Ltd* [2003] NZCA 69; [2002] 1 ERNZ 438 (CA).

[46] We find there is nothing wrong in principle with the Authority's tariff based approach so long as it is not applied in a rigid manner without regard to the particular characteristics of the case. For example, even an award of costs based on a low daily rate may not be feasible where the liable party does not have the means to pay or, on the other hand, the daily rate may not adequately reflect the conduct of the parties or the preparation required in a particularly complex matter. The danger that tariffs may be unduly rigid can be avoided by adjustments either up or down in a principled way without compromising the Authority's modest approach to costs.

[15] Of the principles set out in paragraph [44] of this extract, four are particularly relevant to this case:

- That costs generally follow the event.
- That without prejudice offers can be taken into account.
- That awards will be modest.
- That frequently costs are judged against a notional daily rate.

Costs generally follow the event

[16] Applying this principle requires me to determine which party was successful in the proceedings before the Authority. The employment relationship problem investigated by the Authority was in two distinct parts; the defendant's personal grievance and her claim for special damages. The defendant succeeded in her personal grievance but failed in her claim for special damages.

[17] Overall, there is no doubt that the defendant was successful. She was awarded significant and substantial remedies. The starting point should be that the defendant is awarded costs. Having regard to equity and good conscience, however, the award made must be reduced to take account of the plaintiff's successful defence of the claim for special damages.

Without prejudice offers

[18] Where an offer of settlement has been made by a party to litigation and the other party unreasonably rejects that offer, the Authority or the Court should take this into account in deciding costs. Originally, this principle was limited to offers by a defendant made without prejudice as to costs. If the plaintiff rejected the offer and did not succeed in achieving remedies exceeding the value of the offer, it could be

said that the plaintiff had unreasonably rejected the offer and the costs of both parties had been wasted by going to trial. On this basis, costs might be awarded against such plaintiffs even though they had succeeded to an extent at trial. This principle has been endorsed by the Court of Appeal as particularly appropriate in employment litigation.9

[19] In more recent times, this principle has been expanded so that offers to settle made by plaintiffs may be taken into account to increase an award of costs where the amount recovered at trial exceeds the amount for which the plaintiff offered to settle.10

[20] The allegations of misconduct by the defendant which led to the employment relationship problem between the parties were first made in August 2009. In the course of the following 15 months, there were offers of settlement made in three exchanges of correspondence. The first was in December 2009 when the investigation process was far from complete. The second exchange was in March and April 2010 ending shortly before the plaintiff gave the defendant the warning which subsequently became the subject of her personal grievance.

[21] The third exchange began 12 October 2010 when Mr Menzies wrote to Ms

Buckett in the following terms:

1. I am instructed to advance the following settlement proposal on a without prejudice save as to costs basis.

2. Upon expiry of the current warning (28 October 2010) the warning will then be removed from your client's file and your client will thereafter be treated on the basis that there is no formal record on her file.

3. My client agrees to pay the sum of $5,000 either towards your client's costs (GST inclusive) or under section 123(1)(c)(i).

4. The statement of problem currently before the Employment Relations Authority would then be withdrawn. Both parties will thereafter be responsible for their own costs.

5. These arrangements are proposed as full and final satisfaction of all outstanding issues.

9 See *Health Waikato Ltd v Elmsly* [2004] NZCA 35; [2004] 1 ERNZ 172 and *Bluestar Print Group (NZ) Ltd v Mitchell*

[2010] NZCA 385; [2010] ERNZ 446 where a "steely approach" was advocated.

10 See: *Marshment v Sheppard Industries Ltd* [2012] NZEmpC 93 at [25].

6. This offer remains open for acceptance by 5pm on Monday, 18

October 2010.

[22] That offer was rejected by the defendant. On her behalf, Ms Buckett made a detailed counter offer which included the following terms:

- That Pathways will destroy the file and expunge the warning.

- That Pathways will represent that her warning was (upon further investigation) unjustified *ab initio*

- That Pathways will publicly acknowledge that Alicia has been vindicated of all allegations against her.

- To put Alicia back in the position she was in, Pathways will contribute to Alicia's legal fees (unnecessarily increased by Pathways) to the sum of $40,000 + GST.

[23] There followed several further exchanges between counsel. On 2 November

2010, the plaintiff's previous offer was repeated but with an increase in the monetary offer from $5,000 to $10,000. On 5 November 2010, the defendant rejected that offer and simply repeated her previous counter offer. On 11 November 2010, the plaintiff's offer was further repeated but with the monetary amount increased to

$15,000.

[24] It is that offer, comprising the terms set out in Mr Menzies' letter of 12

October 2010 but with the amount of money increased to $15,000 which the plaintiff relies on as having been unreasonably rejected by the defendant.

[25] It can only be said that the offer was unreasonably rejected if the defendant subsequently obtained remedies of no greater value than what was offered. Value is not to be measured simply in money. The obvious example is the remedy of reinstatement which often provides the employee not only with a continuing source of income but also with the dignity and security of employment. An even less tangible benefit of success in litigation is vindication. Employment disputes are frequently very emotive issues in which pride and reputation are important. Many employees who feel they have been unjustly treated by their employer want a public statement that they were not at fault and seek a determination of the Authority or a judgment of the Court for that reason.

[26] In this case, the defendant sought reinstatement by way of retraction of the warning. This was granted by the Authority in the following terms:

[81] Ms Moxon seeks retraction of the warning. I agree that for all purposes she should be regarded as having never received this warning. That is in effect reinstatement her to the position she was in prior to being issued with the warning.

[27] What the plaintiff offered regarding the warning was:

2. Upon expiry of the current warning (28 October 2010) the warning will then be removed from your client's file and your client will thereafter be treated on the basis that there is no formal record on her file.

[28] This offer fell significantly short of what the defendant sought in the proceedings before the Authority and achieved through the Authority's determination. Had the defendant accepted the offer, she would not have been put back in the position she was in prior to the warning being issued. All the plaintiff offered was to remove reference to the warning in it records. It did not offer to retract the warning or, as Ms Buckett put it, to "expunge the warning". The fact that the warning had been given, and the implication that it was given for good reason, would have remained in the memories of those aware of it.

[29] That could well have had practical implications. Although the Authority declined to find as a fact that the warning would have a deleterious effect on the defendant's career, it seems to me almost inevitable that it would have surfaced again if she had simply accepted the plaintiff 's offer. The obvious example is that, if she was asked by another prospective employer whether she had ever been disciplined for misconduct, the only honest answer would be "yes".

[30] On this ground alone, I find that it was not unreasonable for the defendant to reject the plaintiff 's offer of 11 November 2010. I also find that this was a significant part of the actual reason why the defendant rejected that offer. This is abundantly clear from the response given to the offer in its initial form – see the parts of her response bullet pointed above in paragraph [22].

[31] Although not necessary to do so, I find that it was also not unreasonable for

the defendant to reject the monetary component of the plaintiff 's offer. My reasons

for doing so are effectively the same as those expressed by the Authority in paragraph [11] of its determination. I add that I have had the advantage of seeing the invoices rendered to the defendant and the time records kept by Ms Buckett. These confirm that the estimates made by the Authority in reaching its conclusion were conservative. As to the costs which might have been awarded to the defendant had proceedings been halted by 15 November 2010, I defer to the Authority's assessment. This is an aspect of the matter where the Authority had far more information than was available to me.

[32] Ms Buckett submitted that the defendant ought to receive an increased award of costs because the plaintiff unreasonably

rejected offers of settlement made by the defendant. That submission is entirely unsustainable on the facts and I reject it. In every offer of settlement made on behalf of the defendant, Ms Buckett sought reimbursement of the costs incurred by the defendant. As early as 8 April 2010, the sum sought for costs was $30,000 plus GST. By 15 October 2010, that sum had increased to $40,000 plus GST. I have no doubt that these demands for such large payments of costs were a major factor in the plaintiff's rejection of the proposals made by Ms Buckett. I find it was not at all unreasonable for the plaintiff to reject the offers on that ground alone as there was no realistic possibility that the Authority would award costs at anything like that level if the matter went to a hearing.

[33] On the facts of this case, it is timely to repeat the observation made by the full Court in the *Da Cruz* decision:

[47] Finally, in accord with the Court of Appeal in *Binnie* and this Court in *Harwood11* we urge representatives of parties to be conscious of the costs that are accumulating as a matter proceeds. Cases should be approached economically and in a way that is likely to leave a successful party with a satisfactory outcome. There is an overall need to ensure that costs being incurred are reasonable in the light of the amount that is likely to be recovered as remedies and costs from the Authority.

[34] In conclusion on this issue, the without prejudice offers made by the parties prior to the investigation meeting provide no reason to depart from the starting point

that costs should simply follow the event.

11 *Harwood v Next Homes Ltd* [2003] 2 ERNZ 433.

Notional daily rate

[35] The full Court in *Da Cruz* found that awarding costs for proceedings by reference to a notional daily rate was appropriate and consistent with the Authority's jurisdiction. I am also aware from having seen many determinations of the Authority regarding costs that it is also the Authority's usual practice. On the facts of this case, I see no reason to depart from that practice in this decision.

[36] That leads to the question of what is an appropriate notional daily rate. The rate currently being used widely by the Authority is $3,500 per day of hearing. As this challenge relates to a determination made in December 2011, however, it is appropriate that I have regard to the notional daily rate in use then. Looking at costs determinations given by the Authority around that time, it appears that the daily rate being used was either $3,000 or $3,500. The Authority member who determined costs in this case was very experienced and likely to have been better aware of such matters than I am able to be by simply looking at a sample of determinations. I therefore adopt the notional daily rate of $3,500 he found to be appropriate.

Other factors

[37] Applying the conclusions I have reached so far, and noting that the investigation meeting occupied three days, an appropriate award of costs would be

$10,500 less an amount to recognise the plaintiff's successful defence of the claim for special damages. I must now consider whether there are other relevant factors which ought to influence that figure.

[38] In *Da Cruz*, the full Court referred to several such factors including that "the daily rate may not adequately reflect the conduct of the parties or the preparation required in a particularly complex matter." 12 The starting point for considering any variation on this basis is that the notional daily rate itself is at a level which appropriately compensates a successful party not only for the time spent at the investigation meeting but also for the time and effort usually involved in

participating in all other aspects of the investigation. That includes drafting

12 At [46].

statements and submissions and otherwise preparing for hearing. Any variation to the daily rate calculation will only be appropriate where the particular circumstances of the case take it outside what is usual.

[39] In this case, I was not provided with useful information about the time and effort required by counsel to prepare the defendant's case for the investigation meeting and to otherwise represent her in the investigation process. Attached to the defendant's affidavit were copies of time records from Ms Buckett's office but they were jumbled and in no sensible order. No explanation or analysis of them was provided and I found them of no practical use. The best information I have is the conclusion by the Authority that the time to which the notional daily rate should be applied should be extended "by one day to accommodate the comprehensive written submissions and a further day as an additional allowance for preparation in light of

the considerable volume of documentation."13 That seems to me to be a very

generous allowance but, again, I adopt the Authority's assessment on the basis that

the member was very much better informed of what was involved than I have been.

[40] The other factor mentioned by Ms Buckett in her submissions was that the defendant incurred costs, said to amount to $3,000, in being represented at a second mediation directed by the Authority. Other than providing this information, Ms Buckett said little else. She made no submission in relation to it. Clearly, the Authority was also made aware of these costs as they are referred to in the determination.14 I expect they were taken into account by the member when he made his assessment of whether any variation from the notional daily rate was required.

Special damages claim

[41] The analysis above leads to an award of $3,500 for five days which equals

$17,500. The next factor which must be considered is the extent to which that figure ought to be reduced to take account of the defendant's success in resisting the special

damages claim. No useful information was provided by the parties on this issue and,

13 At [15].

14 At [3].

once again, I am guided by the assessment of the Authority member concerned. I

adopt the reduction of $2,500 he determined was appropriate.

[42] This leads me to the same conclusion as that reached by the Authority. An appropriate award of costs is $15,000 in favour of the defendant.

Disbursements

[43] In addition to a contribution to her costs, the defendant should be reimbursed for proper disbursements. They were a filing fee of $70 and hearing fees of $613.32.

Comments

[44] I noted earlier the observation of the full Court in *Da Cruz* that employment relationship problems should be approached economically and in a way that is likely to leave a successful party with a satisfactory outcome. This is one of those unfortunate cases where costs of representation have got out of all proportion to what was at stake and to the parties' means. The defendant has only modest income and the plaintiff is a charitable company. Ultimately, decisions about representation are made by the parties but there is also a strong obligation on counsel and advocates to ensure that disputes are resolved much more economically than this case was.

[45] In the cross challenge filed on her behalf, the defendant sought reimbursement of all the costs she incurred in relation to the litigation before the Authority. That claim was not effectively pursued by Ms Buckett in her submissions and I have therefore not discussed it in detail in this judgment. Suffice it to say that there was no evidence or other information before the Court which brought this case even close to any of the circumstances in which indemnity costs might properly be awarded.

Conclusion

[46] In summary, my decision is:

(a) The challenge and cross challenge are both unsuccessful.

(b) The plaintiff is ordered to pay the defendant $15,000 for costs and

$683.32 for disbursements.

(c) Pursuant to s 183(2) of the Employment Relations Act 2000, the determination of the Authority is set aside and this decision stands in

its place.

Costs

[47] As both parties have been equally unsuccessful in their challenges, my inclination is that there should be no order for costs. If either party wishes to make an application for costs, however, I will consider it. In that event, a memorandum should

be filed and served within 20 working days after the date of this decision and

any memorandum in response provided within a further 15 working days.

Signed at 4.15 pm on 21 February 2013.

A A Couch
Judge
