Employment Court of New Zealand

Penney v Fonterra Co-Operative Group Limited [2012] NZEmpC 67 (27 April 2012)

Last Updated: 5 May 2012

IN THE EMPLOYMENT COURT CHRISTCHURCH

[2012] NZEmpC 67

CRC 32/10

IN THE MATTER OF a challenge to a determination of the

Employment Relations Authority

AND

IN THE MATTER OF an application for costs

BETWEEN NICOLA PENNEY Plaintiff

AND FONTERRA CO-OPERATIVE GROUP LIMITED

Defendant

Hearing: on the papers - memorandum received 16 December 2011

Judgment: 27 April 2012

COSTS JUDGMENT OF JUDGE A A COUCH

[1] In my substantive judgment in this proceeding,[1] I concluded by saying:

[51] Fonterra has been put to significant cost in resisting Ms Penney's challenge. It has been entirely successful in doing so. Unless there are circumstances of which I am unaware, Fonterra is entitled to a contribution by Ms Penney to those costs. I urge the parties to agree what that contribution should be but, if agreement is not possible, counsel for Fonterra should file and serve a memorandum within 20 working days after the date of this judgment. Ms Penney will then have a further 20 working days in which to file and serve a memorandum in response.

[2] For the defendant, Mr Rooney filed a memorandum on 19 December 2011. It was filed by email which showed that a copy had been sent at the same time to Ms Penney at an email address which, in the course of evidence, she acknowledged was

hers and from which she had engaged in a good deal of correspondence over a period

of years. As this judgment will be a public document, I refrain from recording what that email address is.

[3] Ms Penney took no steps in response to the defendant's memorandum. On 12

April 2012, a member of the registry staff sent her an email referring to Mr Rooney's memorandum, noting that the time I had allowed for her to file a memorandum had long passed and asking what her intentions were. Ms Penney replied saying only "Hi, as far as i know the matter is settled." Those emails were sent to and received from the same email address to which Mr Rooney's memorandum had been sent. Attached to Mr Rooney's memorandum was a copy of an email from Ms Penney to

Ms Burson dated 8 December 2011 which was also sent from the same email address.

[4] In these circumstances, I am satisfied that Ms Penney has received a copy of Mr Rooney's memorandum. The information before me shows that Ms Penney has consistently used the same email address over a period of several years and that she was actively using it immediately before and after the memorandum was sent to her at that address.

[5] I proceed on the basis that Ms Penney does not wish to be heard on the question of costs.

[6] The principles applicable to the fixing of costs in this jurisdiction are settled and well known. An appropriate and convenient starting point is two thirds of the costs actually and reasonably incurred by the successful party. That amount may be adjusted up or down to reflect the effect on the parties' costs of the manner in which the case was conducted and the unsuccessful party's ability to pay.

[7] For the defendant, Mr Rooney sought costs of $20,125.38 and disbursements of $476.62. The claim for costs was based on the defendant having incurred actual costs of $30,493 exclusive of GST. This was supported by three invoices totalling that amount and, while it seems very large, there is no reason to challenge that figure. I accept it was the amount the defendant actually paid.

[8] The next step is to assess the extent to which that sum was reasonable. In support of it, Mr Rooney provided a table showing the approximate time spent by counsel on each of 14 categories of work said to have been required to prepare and present the defendant's case. These totalled 87.9 hours. Mr Rooney also said that the time spent on the matter was charged to the defendant at the rate of $590 per hour for a partner, $410 per hour for a senior associate and $180 per hour for a "law graduate". These rates were said to be exclusive of GST.

[9] The difficulty with this information is that it does not allow a proper assessment of the reasonableness of the costs actually incurred. Although various hourly rates have been provided, Mr Rooney has not said how much time was charged at each rate. It must also be said that, in the context of this litigation, an hourly rate of $590 plus GST per hour was unreasonable per se. The maximum rate provided for in the High Court Rules[2] equates to an hourly rate of about $450 plus GST. Under those rules, this proceeding could not be regarded as any more than category 2, that is proceedings of average complexity requiring counsel of skill and

experience considered average in the Court. The rate provided for such proceedings equates to about $350 plus GST per hour.

[10] What can be calculated in this case is that the average rate the defendant was charged for all of the work apparently done on its behalf was just under $350 plus GST per hour.

[11] There must always be a trade off between the hourly rate charged for legal work and the time taken to do the work. Thus, a practitioner who professes to have skill and experience justifying an hourly rate at the top of the range of what is reasonable can be expected to complete the work in less time than a practitioner with less skill and experience who charges less.. In this case, a charge out rate of $350 plus GST per hour would be the maximum which might be considered reasonable for any of the work involved. This was not a complex case. The relevant facts consisted laregly of a linear sequence of events. There were no difficult or contentious issues

of law. A practitioner of average skill and experience ought to have been able to

prepare and present it quite economically. Equally, much of the work ought to have been within the scope of a junior practitioner whose work was charged out at a significantly lower rate.

[12] That being so, and in the absence of any further explanation, I find that significantly less than 87.9 hours of work was reasonably required. That is especially so given that the defendant's solicitors had acted throughout the proceedings before the Authority and were therefore fully conversant with the facts and the issues. For example, the statement of defence was a simple document less than three pages long when double spaced but is said to have taken 5.6 hours to prepare. It is said that 12 hours were required to prepare the defendant's evidence which comprised a 31 paragraph brief for Mr Fleming and a brief for Ms Burson whose sole purpose was to exhibit documents. In addition to preparing those briefs, it is said to have taken a further 10 hours to prepare bundles of documents and authorities. Other than three pages copied from the internet, all of the documents were on the solicitors' file. Copying and binding them may have required several hours of clerical work but that is all. Legal research and preparation of closing submissions is said to have required 21 hours of work. That was undoubtedly a thorough document but ought not to have taken a skilled practitioner anything like that length of time to prepare.

[13] On the other hand, I take account of the fact that considerably more time than usual was involved in pre-hearing procedures. There were three judicial telephone conferences and several other interlocutory issues dealt with on the papers. The brief involvement of Ms Coulston as counsel for the plaintiff also added to the work required by counsel for the defendant.

[14] Overall, I conclude that the costs actually incurred by the defendant were only reasonable in part and, on the limited

information provided, it is not possible to make an arithmetic calculation of the extent to which they were reasonable. Rather, I make a global assessment that costs of $14,000 plus GST were justified. Discounting the GST, which the defendant will already have recovered, and rounding up the calculation, two thirds of that sum is $9,350.

[15] Mr Rooney submitted that the defendant's costs were unnecessarily increased by the conduct of the plaintiff in the following three respects:

(a) The defendant incurred costs in resisting the plaintiff's application for

an adjournment after belatedly instructing counsel.

(b) The content of the plaintiff's brief of evidence necessitated a change of counsel so that Ms Burson could give evidence rebutting it. This required Ms Wilson to spend time becoming familiar with the matter so that she could appear as counsel.

(c) Counsel for the defendant spent considerable time preparing Ms Burson's evidence and cross examination of the plaintiff based on what was in the plaintiff 's brief of evidence. That work was largely wasted when the plaintiff abandoned her brief at the hearing and largely accepted the defendant's account of events.

[16] Each of these propositions is correct in fact but they must be taken into account in different ways. I have allowed for the first issue in my assessment of the extent to which the costs incurred by the defendant were reasonable.

[17] The second and third propositions are closely related and may be considered together. In her brief, the plaintiff suggested she would give evidence that was distinctly inconsistent with official records and other contemporary documents. In order to respond to that evidence, it was necessary for the whole sequence of relevant correspondence to be exhibited and put into context. While that could possibly have been done by someone other than Ms Burson, she was clearly the person best qualified as a witness to do so. I accept, therefore, that it was appropriate for her to withdraw as counsel and become a witness. I also accept that it was then necessary for alternative counsel to spend some time becoming familiar with the file. It was equally necessary to prepare for cross examination of the plaintiff based on the documents. I have therefore included the time properly required to complete those tasks in my assessment of the extent to which the defendant's costs were reasonably incurred.

[18] The fact that the plaintiff resiled from her brief and largely accepted the defendant's case when she gave her evidence in court meant that much of this additional work done by counsel for the defendant was rendered pointless. That must be brought to account by requiring the plaintiff to make a greater than two thirds contribution to those costs. Again, in the absence of sufficient information to calculate what is appropriate, I make an estimate and allow an extra $800 on this account.

[19] The disbursements claimed by the defendant are a courier charge of $12.02 and $464.40 for "document production, delivery and telephone calls". These claims are unsupported by receipts or any explanation of what the second amount specifically included. It is simply too vague to consider.

[20] That leaves only the issue of the plaintiff 's ability to pay. The principle to be applied is that an award of costs should only be reduced if payment would cause undue hardship. To persuade the Court that this would occur requires evidence of the unsuccessful party's means. There was no such evidence in this case.

[21] In summary, the plaintiff is ordered to pay the defendant $10,150 for costs and $12.02 for disbursements.

Signed at 3.15pm on 27 April 2012.

A A Couch
Judge

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[1] [2011] NZEmpC 151.

[2] Category 3 proceedings being "proceedings that because of their complexity or significance require

counsel to have special skill and experience in the High Court".