New Zealand Employment Relations Authority Decisions

Shaw v New Plymouth Club Inc (Wellington) [2017] NZERA 2020; [2017] NZERA Wellington 20 (31 March 2017)

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Last Updated: 14 April 2017

IN THE EMPLOYMENT RELATIONS AUTHORITY WELLINGTON

[2017] NZERA Wellington 20
5607111

BETWEEN OWEN SHAW Applicant

AND NEW PLYMOUTH CLUB INC Respondent

Member of Authority: Trish MacKinnon

Representatives: Sandy Dodunski, Counsel for Applicant

Paul Robertson, Counsel for Respondent

Investigation Meeting: On the papers

Submissions Received: 24 January and 8 February 2017 from the Respondent

7 February 2017 from the Applicant

Determination: 31 March 2017

COSTS DETERMINATION OF THE AUTHORITY

[1] In my determination of 18 November 20161 I dismissed Mr Shaw's claim to have been constructively dismissed. I reserved the issue of costs.

[2] The New Plymouth Club Inc. (the Club) now seeks an award of costs against

Mr Shaw. Mr Shaw opposes such an award.

[3] Mr Shaw was legally aided and in such circumstances a recovery of a contribution to costs is normally unavailable to the successful party. The Legal Services Act 2011 (the LSA) provides that costs orders are not to be made against a legally aided person except in “exceptional circumstances.”2

[4] The Club submits the exceptional circumstances provision applies in this instance. In particular it refers to sections 45(3)(a) and 45(3)(e) which provide,

1 [2016] NZERA Wellington 137

2 Section 45 (2) of the LSA

respectively, that any conduct by the legally aided person that causes the other party to incur unnecessary cost, and any unreasonable refusal to negotiate a settlement or participate in alternative dispute resolution, may be taken into account when considering whether exceptional circumstances apply.

[5] The Club seeks an award of $8,000, citing the Authority's daily tariff (at the time) of $3,500; the length of the hearing, which took place over two days, and the applicant's "unreasonable failure" to resolve the matter despite the respondent's efforts including a Calderbank offer. For this latter factor the Club seeks an uplift to the daily tariff of $1,000.

[6] Counsel for the Club submits three attempts were made to settle Mr Shaw's claims. These occurred at mediation on 14 December 2015, by way of a Calderbank offer on 17 December 2015 and in the course of the Authority's hearing on 17 and 18

August 2016. In counsel's submission, Mr Shaw's refusal to settle caused the Club to incur considerable costs in defending his claims through to a hearing, including the briefing of eight witnesses and the preparation of detailed submissions.

[7] The Club submits Mr Shaw's refusal to settle was unreasonable in the light of its advice to him of what the Club's evidence would be with regard to his claim to have been bullied, and in response to his claim that he had brought his concerns about that bullying to his employer. It also noted it had informed Mr Shaw it considered he had raised his personal grievance out of time and it did not consent to his doing so. This was an aspect of its defence counsel for the Club acknowledges was ultimately abandoned.

[8] Counsel also submits that, although the Club understands Mr Shaw to be legally aided, it had not received formal notification of his legal aid status. Mr Shaw rejects this and has provided documentary evidence of his counsel's notification. I am satisfied the Club was informed by letter dated 29 October 2015 to its counsel that Mr Shaw's application for legal aid had been approved. It was also sent a copy of a letter Mr Shaw's counsel emailed to the Mediation Service on 26 November 2015 advising Mr Shaw's legally aided status.

[9] Counsel for Mr Shaw cites the analysis of the issue of "exceptional circumstances" undertaken by the Court of Appeal in

Laverty and Para Franchising

Limited.3 In particular she refers to McGrath J's citing with approval *Awa v*

*Independent News Limited (No 2)*4:

For circumstances to qualify as exceptional...they have to be

"quite out of the ordinary".5

[10] In counsel's submission there is nothing "quite out of the ordinary" in this matter to warrant an award of costs against Mr Shaw. She notes Mr Shaw's full participation in mediation and submits it was open to both parties to resolve matters from that point forward. In her submission Mr Shaw had a reasonably held belief that his claim had merit based on the facts of the case as he perceived them.

[11] Counsel also submits Mr Shaw had no influence on the factors that increased the Club's costs, such as the number of witnesses it chose to call and its choice of an Auckland-based legal representative when there were experienced local counsel available. She notes the Club abandoned its claim that Mr Shaw had not raised his personal grievance within time when it was established in the course of the hearing that claim could not succeed. Counsel also queries the Club's reference to a two day hearing, submitting that in her recollection it was one and a half.

[12] I agree with counsel for Mr Shaw's recollection. The investigation concluded at 12.30 pm on its second day and therefore was of one and a half days' duration. I also agree with her submission regarding the Club's challenge to the timeliness of Mr Shaw's raising of his personal grievance. The Club conceded that issue in the course of questioning of one of its witnesses. Pursuing that issue undoubtedly made up some of the Club's preparation time.

[13] I am unconvinced by the Club's assertion that Mr Shaw's conduct caused it to incur unnecessary cost, in terms of s 45(3)(a). Its submission relies on Mr Shaw's refusal to settle following the attempts it made to resolve the matter. This then led the Club to the cost of briefing witnesses and incurring the costs of attendance at the hearing and preparation of submissions. Those are the ordinary costs involved in defending a claim. While they could be considered unnecessary because the applicant

did not succeed in his claim, that does not constitute an extraordinary circumstance

3 [2005] NZCA 436; [2006] 1 NZLR 650

4 [1996] 2NZLR at p 186

5 n3 at [31]

under the LSA. The Club's submission that Mr Shaw's refusal to settle constituted extraordinary circumstances is more properly considered under s 45(3)(e) of that Act.

[14] The Club, quite properly, did not provide details of any offer it may have made to Mr Shaw during the confidential mediation process. Mr Shaw's participation in the mediation rules out any "unreasonable refusal to.....participate in alternative dispute resolution" under s 45(3)(e). I cannot infer from the failure of the mediation to resolve his grievance that this was due to an "unreasonable refusal to negotiate a settlement" on Mr Shaw's part. That is only one scenario of many possible explanations for the lack of a resolution.

[15] The Club provided evidence of the Calderbank offer it made to Mr Shaw by letter of 17 December 2015, three days after the unsuccessful mediation of his claims. That is the only offer to settle I can assess in terms of the reasonableness or

otherwise of Mr Shaw's rejection of it. No information was provided about the attempt made to resolve the matter in the course of the Authority's investigation and I am unable to make any assessment of the reasonableness of that attempt or any rejection of it by Mr Shaw.

[16] The Club's letter conveying the Calderbank offer referred to the fact that, at that time, no evidence had been provided to support Mr Shaw's claims to have been bullied by other staff. Nor had evidence been provided of his complaint(s) to management about that bullying. The letter also referred to the difficulty Mr Shaw would have in overcoming the fact that his grievance was raised outside the statutory

90 day limitation period. The offer, which was open for a period of five days, was for

$5,000 and was made on the basis of a full and final settlement.

[17] I am not persuaded that Mr Shaw's refusal of the Calderbank offer constitutes the "extraordinary circumstances" required by s 45(2) of the LSA. I take into account that, at that time the offer was made, the Club was in part relying on the assertion it made, but abandoned during the hearing, that Mr Shaw had not raised his grievance in time. Also, although Mr Shaw failed in his claim, that does not mean his belief that he was constructively dismissed was not reasonably held or that he was unreasonable to have pursued it.

[18] The Authority frequently determines issues of whether an employee's resignation was in reality a constructive dismissal and it does not necessarily follow

that the failure of a claim renders the pursuit of it unreasonable. Nor does it follow that such a failure makes the pursuit of the claim "quite out of the ordinary". I find there are no extraordinary circumstances that would justify an award of costs against Mr Shaw.

[19] The Club has asked the Authority, under s 45(5) of the LSA, for an order specifying what order for costs would have been made against Mr Shaw if it were not for the restriction under s 45(2).

[20] Awards of costs in the Authority are discretionary. It is up to the Authority to decide whether they should be awarded and, if so, in what amount. Underpinning the award of costs are principles that have been developed and applied over many years. Those principles were referred to with approval by the Full Court of the Employment Court in *Da Cruz6* and more recently confirmed by the Full Court in *Fagotti*7.

[21] Among the principles are that costs will normally follow the event; should be modest; and are to be considered in the light of the particular circumstances. They are frequently judged against a notional daily tariff but the tariff should not be applied rigidly without regard to the particular characteristics of the case. Where a party's conduct has unnecessarily increased costs, that may be taken into account in the award that is made, but costs are not to be used as a punishment.

[22] Taking those principles into account, I would have determined it appropriate for an award of costs to be made against Mr Shaw if he had not been legally aided. The starting point for my assessment would have been the Authority's nominal daily tariff which, at the time, was $3,500 per day. For a one and a half day hearing that would be $5,250. I would have considered the Calderbank offer made to him but would not have awarded an uplift to the tariff for the same reasons I have referred to earlier. I would not have considered there to be any other factors that merited an uplift to the tariff.

Determination

[23] I make no order for costs against Mr Shaw on the basis that he was legally aided and there are no exceptional

circumstances that would allow a costs award.

6 *PBO Limited (formerly Rush Security Ltd) v Da Cruz* [2005] NZEmpC 144; [2005] ERNZ 808 (EmpC)

7 *Fagotti v Acme & Co Ltd* [2015] EmpC 135

[24] If s 45(2) of the Legal Services Act 2011 had not applied to his situation, I would have ordered him to contribute the sum of $5,250 to the New Plymouth Club's costs.

Trish MacKinnon

Member of the Employment Relations Authority
