Employment Court of New Zealand

Shortland v Alexander Construction Company Limited [2010] NZEmpC 126 (22 September 2010)

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Last Updated: 3 October 2010

IN THE EMPLOYMENT COURT WELLINGTON

[2010] NZEMPC 126

WRC 33/09

IN THE MATTER OF a challenge to a determination of the

Employment Relations Authority

AND

IN THE MATTER OF an application for costs

BETWEEN JULIE SHORTLAND Plaintiff

AND ALEXANDER CONSTRUCTION COMPANY LIMITED

Defendant

Hearing: on the papers - submissions received 17 May, 4 June and 9 June 2010

Judgment: 22 September 2010

COSTS JUDGMENT OF JUDGE A A COUCH

[1] The plaintiff was successful in her challenge to the Authority's determination and costs should follow the event. In concluding my substantive judgment, I invited the parties to agree costs if possible but, if they were unable to do so, to make written submissions. Counsel have now both filed succinct and helpful memoranda.

[2] For the plaintiff, Mr Petherick gave an update on the plaintiff's application for legal aid. At the time of the hearing, the plaintiff had been refused legal aid for the challenge. On review, and in light of my substantive judgment, that decision was reversed and legal aid granted. As Mr Petherick observed, this had the effect of reducing the plaintiff's costs to $5,587 inclusive of GST. Mr Webster makes the

point that Mr Petherick has not said explicitly that this was the fee accepted and paid

by the Legal Services Agency but that is the natural inference from what Mr

Petherick says in his memorandum and I proceed on that basis.

[3] Mr Petherick also sets out a schedule of "expenses" incurred by the plaintiff for the purposes of the proceeding which total $442.13 inclusive of GST.

[4] The general principles guiding the Court's discretion to award costs are well known and may be summarised briefly. An appropriate starting point is two thirds of the costs actually and reasonably incurred. That may be adjusted up or down to reflect any effect on costs resulting from the manner in which the parties conducted their cases. The ability to pay is also relevant.

[5] In *Reynolds v Burgess*[1], I considered in some detail the application of those principles in a case where the successful party was in receipt of legal aid. I apply here the conclusions I reached in that case.

[6] Although the costs of representation of the plaintiff were paid by the Legal Services Agency, it is proper to regard them as having been incurred by the plaintiff for the purpose of making an award of costs. I therefore find that the costs actually incurred were $5,587.

[7] As to whether that amount was reasonably incurred, it must be presumed that the Legal Services Agency would not approve and pay excessive grants of legal aid. It is well known that the rates paid by the Legal Services Agency are well below those reasonably charged by practitioners retained on a private basis.

[8] Mr Webster invites me to infer from the total amount of costs and the rate per hour at which legal aid was likely to have been granted that a total of 37.25 hours work was paid for. He then suggests, for no specific reason, that this should be seen as excessive because it exceeded the time for which the defendant was charged. Whilst the calculations may be arithmetically correct, I do not accept the submission as a whole. The work to be done on behalf of the parties was inevitably different and a simple comparison of time spent can be of only very limited value.

[9] I find that costs of $5,587 were actually and reasonably incurred by the plaintiff. That suggests, as a starting point, an award of costs of $3,724.

[10] Mr Petherick invites me to depart from that starting point to the extent of total reimbursement of the costs incurred by the plaintiff. In doing so, he appears to rely entirely on the proposition that, were costs assessed in accordance with the High Court Rules, a very much greater sum would be appropriate. I do not accept that submission for two principal reasons.

[11] Although this Court has had regard to the High Court Rules in fixing costs in some cases, it has done so only as an aid to determining what is reasonable, not for the purpose of adjusting the final figure from the notional two thirds starting point.

[12] There is always danger in attempting to apply the High Court Rules because many of the types of proceeding dealt with by the Employment Court are not directly comparable to any proceedings in the High Court. A challenge to a determination of the Authority which is heard de novo is one such proceeding. As a result, attempting to apply the High Court Rules as if a challenge in the Employment Court was a civil proceeding initiated in the High Court produces an excessive figure. An obvious example is that it could never be reasonable to devote three full days' work to drafting and filing a statement of claim challenging a determination of the Authority.

[13] Mr Petherick suggests no other basis for departing from the two thirds starting point. That is appropriate. As I observed in my substantive decision, the case was formulated concisely and conducted efficiently by both parties.

[14] It is appropriate to order payment in full of proper disbursements, that is expenses which involve payment to a third party. The filing fee and the fee paid to Dr Jolly clearly fall into that category. The other sums claimed for toll calls, photocopying and fax charges generally fall into the category of practice overheads and, unless supported by invoices, ought not to be reimbursed.

[15] The defendant is ordered to pay the plaintiff $3,964 being $3,724 for costs and

$240 for disbursements.

Signed at noon on 22 September 2010

A A Couch
Judge

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[1] CC 5A/07, 4 July 2007
