Employment Court of New Zealand

Smith Crane & Construction Limited v Hall [2015] NZEmpC 159 (17 September 2015)

Last Updated: 23 September 2015

IN THE EMPLOYMENT COURT CHRISTCHURCH

[2015] NZEmpC 159

EMPC 263/2014

IN THE MATTER OF a challenge to a determination of the

Employment Relations Authority

BETWEEN SMITH CRANE & CONSTRUCTION LIMITED

Plaintiff

AND ANDREW HALL Defendant

Hearing: (on the papers by submissions filed on 26 June and 7 July 2015) Counsel: T McGinn, counsel for the plaintiff

P Brown, counsel for the defendant

Judgment: 17 September 2015

COSTS JUDGMENT OF JUDGE B A CORKILL

Introduction

[1] In the Court's substantive judgment of 4 June 2015, the challenge brought by Smith Crane and Construction Limited (SCC) was dismissed.1 I found that there was no binding agreement between the parties that the employment of the defendant, Mr Hall, was subject to a 90-day trial period provision; and that he had not represented he would accept a written trial provision, with the consequence that he was now estopped from contending otherwise. As a result, the conclusions of the Employment Relations Authority (the Authority) in its determination2 as to the way in which the dismissal was carried out, and the remedies which flowed from it,

stood.

1 *Smith Crane & Construction Ltd v Hall* [2015] NZEmpC 82.

2 *Hall v Smith Crane & Construction Ltd* [2014] NZERA Christchurch 146.

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[2] I indicated that Mr Hall was entitled to apply for costs in respect of the challenge.

[3] Subsequently, SCC filed an application for leave to appeal the Court's

decision to the Court of Appeal, which was declined in its judgment of

9 September 2015.3

Mr Hall's applications for costs

[4] As Mr Hall's costs were not fixed by the Authority, the Court was asked to do so, based on the daily tariff normally adopted by the Authority. It was submitted that although the Authority's investigation meeting took place over half a day, because of the extensive preparation which led to Mr Hall incurring actual costs of $7,445 plus GST, he should be awarded the sum of $3,500 in the circumstances.

[5] Mr Hall states through his counsel, Mr Brown, that his costs with regard to the challenge totalled $11,320 plus GST. It is submitted that these are fair and reasonable in the circumstances, that 66 per cent of those costs should be taken as a starting point with an uplift to 80 per cent having regard to a Calderbank offer made by the plaintiff to resolve the matter, which it is contended contained an offer which should have been accepted.

[6] In response to the application for costs in the Authority, it was submitted by Mr McGinn, counsel for SCC, that Mr Hall had indicated to the Authority that costs should be ordered in the sum of $1,750 plus a filing fee of $71.56 and that there was now no explanation as to why there had been a change in position. It was accepted that the Court should now determine costs in the Authority.

[7] Mr McGinn submitted in respect of costs in the Court that the actual costs of

$11,320 plus GST were excessive, particularly because one of the invoices appeared to include attendances which were incurred with regard to the proceeding in the Authority, and because the invoices do not disclose the time spent or the hourly rate.

Nor had it been confirmed whether the defendant had paid the costs set out in the

3 *Smith Crane &Construction Ltd v Hall* [2015] NZCA 427.

invoices. By an analysis of time incurred, and an assumed reasonable hourly rate of

$300 per hour, it was submitted that the starting point should be $8,400. Two-thirds of this sum would provide an award of $5,544, with no uplift in respect of the Calderbank being appropriate.

Discussion

[8] I deal first with the issue of costs in the Authority. I note that the Authority stated at the conclusion of the determination:4

The Authority usually awards costs on a daily tariff approach of $3,500 for a full day of hearing. This hearing took half a day and so would usually attract a contribution of $1,750 in legal costs plus reimbursement of the filing fee of

$71.56. ...

[9] The parties were invited to reach agreement on costs. Apparently this did not occur, and Mr Brown filed a submission seeking an order of costs according to the amounts referred to by the Authority itself.

[10] In the recent case of *Fagotti v Acme & Co Limited*,5 the full Court confirmed that the principles which had earlier been identified in *PBO Limited (formerly Rush Security Limited) v Da Cruz*6 remain appropriate. That included the application of a current notional daily rate. Although a discretion may be exercised to increase an award of costs above that rate, I do not consider that the features of the present case justify such an uplift since the rate includes an allowance for preparation.

[11] Accordingly, I determine that the appropriate order for costs in the Authority are those proposed by the Authority Member, being $1,750 for the half-day hearing, plus reimbursement of the filing fee of $71.56, a total of $1,821.56. This was of course as originally submitted by Mr Brown to the Authority.

[12] I turn to the position regarding costs in the Court. There is no controversy between counsel as to the applicable principles. It is well established from Court of

Appeal decisions that the Employment Court is required first to determine whether

4 *Hall v Smith Crane & Construction Ltd*, above n 2, at [50].

5 *Fagotti v Acme & Co Ltd* [2015] NZEmpC 135 at [114].

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

costs incurred by a successful party were reasonably incurred, and then after an appraisal of all relevant factors, decide at which level it is reasonable for the unsuccessful party to contribute to the successful party's costs. Sixty-six per cent is generally regarded as a starting point, although the Court has a discretion to consider whether there are factors justifying an increase or a decrease, given the discretionary

nature of the assessment.7

[13] As neither party raised any issues as to GST, I adopt the approach which I described as GST neutral in *Wills v Goodman Fielder New Zealand Limited*;8 such is the usual practice of the High Court.9

[14] In assessing whether the invoices rendered to Mr Hall produce a fair and reasonable figure for cost purposes, I accept the submission made by Mr McGinn that the first of the two relevant invoices appear to include some attendances with regard to the investigation meeting, which should be excluded. Exercising my discretion, I reduce that invoice to $900 plus GST, which is a little under half of the invoice. Taking that total together with the amount invoiced subsequently, the result is a total of $10,400 plus GST.

[15] Mr Brown submitted that steps taken in the proceedings confirmed attendances which were equivalent to seven days, and that this provided a useful cross check as to the reasonableness of Mr Hall's invoiced fee. Mr McGinn submitted that this assessment of time was excessive, and that the total should be

3.5 days.

[16] Rather than rely on these somewhat subjective assessments, it is more appropriate to consider the result which is obtained by applying schs 2 and 3 of the High Court Rules (HCR). This Court is of course not bound to apply those

Schedules, but from time to time they can be useful when considering the amounts

7 *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); and *Belsham v Ports of Auckland Ltd* [2014] NZCA 206, [2014] ERNZ 66.

8 *Wills v Goodman Fielder New Zealand Ltd* [2015] NZEmpC 30 at [23]- [24].

9 See *Burrows v Rental Space Ltd* [2001] NZHC 770; (2001) 15 PRNZ 298 (HC). This approach has also been confirmed in the Court of Appeal: *Thoroughbred & Classic Car Owners' Club (Inc) v Coleman*, unreported, CA 203/93, 25 November 1993 at 2-3.

which the High Court might award in similar litigation.10 In this case, I regard recourse to the Rules as being of assistance for the purposes of a cross check. In my view, pursuant to schs 2 and 3 of the HCR, this case should be considered as a Category 2, Band B case. Applying the relevant provisions of the Schedules,11 a result is obtained (inclusive of the application for costs) of $14,328, were the present proceeding to be regarded as High Court litigation.

[17] A relevant factor, however, in considering the application of the Schedules of the HCR is the fact that the present proceeding was not a challenge de novo. It was limited to a question as to the application of 67A of the Employment Relations Act

2000. The Court was not required to consider whether the dismissal was justified; nor was it required to fix remedies. Given the restricted nature of the hearing, the figure produced by application of the Schedules of the HCR is not a direct comparator; there would have been justification under those Rules for reducing the figure calculated with reference to the Schedules. The analysis under the HCR produces a figure which is more than that actually incurred by Mr Hall, but when an appropriate reduction is applied, the likely assessment would be equivalent to the costs actually incurred.

[18] Mr McGinn submits that the difficulty of the assessment of Mr Hall's costs is that no information has been provided as to time spent, or the hourly rate. In *Binnie v Pacific Health*, the Court of Appeal observed that while details of time involved in charge out rates are often available and supplied, the provision of such information is not a mandatory matter.12 In the end the Court has to make a judgment, bearing in mind the proper interests of the losing party when considering costs.

[19] Standing back, I consider, for the purposes of the present costs application, that a reasonable and adjusted starting point should be $10,400.

[20] The next issue relates to the effect of a Calderbank offer. Mr Brown wrote to

Mr McGinn on 24 March 2015 proposing resolution of the matter on a Calderbank basis, by way of a payment of $45,000. The offer contained no separate allowance

10 *Burrows v Rental Space Ltd*, above n 9 at [22].

11 High Court Rules, sch 3, items 2, 11, 12, 22, 33 and 34.

12 *Binnie v Pacific Health*, above n 7 at [27].

for costs in the Authority, or in the Court. It was in effect inclusive of those costs. It was declined with Mr McGinn asserting that the offer would in fact put Mr Hall in a better position than if SCC simply withdrew its challenge.

[21] The relevant principles as to offers of this kind are well known, and were conveniently summarised by the Court of Appeal in *Blue Star Print Group (NZ) Limited v Mitchell*.13 In particular, the Court noted that a "steely" approach is

required.14

[22] The assessment of the Calderbank offer should proceed by adding:

a) The amount of the remedies which were fixed in the Authority totalling

$39,093.66.

b. The amount of costs in the Authority which have now been fixed in the amount of $1,821.56.

c. The amount of costs in the Court up to the date of the offer.15 I assess these at $4,000.

[23] The total thereby produced is $44,915.22.

[24] I do not agree with Mr McGinn's point that acceptance of the offer would have placed Mr Hall in a better position than that to which he would be entitled if the plaintiff had simply withdrawn the challenge. SCC had not withdrawn its challenge, and the case was moving towards a hearing. Costs in the Court were incurred by the plaintiff.

[25] The result is that the Calderbank offer is a little more than the quantum of the judgment together with any likely order as to costs as at the date of the settlement

offer. Adopting a steely approach, it is accordingly appropriate to increase Mr Hall's

13 *Blue Star Print Group (NZ) Ltd v Mitchell* [2010] NZCA 385; [2010] ERNZ 466.

14 *Blue Star Print Group (NZ) Ltd v Mitchell*, above n 13, at [20]. See also *Health Waikato Ltd v*

Elmsly, above n 7, at [53].

15 *Rodkiss v Carter Holt Harvey Ltd* [2015] NZEmpC 147, at [35]-[36] adopting the dicta of

Whata J in *Gauld v Waimakarere District Council* [2014] NZHC 956 at [20].

costs above the 66 per cent assessment of reasonable costs. In my view, the appropriate percentage should be 75 per cent, producing a final figure of $7,800 for costs purposes.

[26] Finally, although there is no evidence as to whether Mr Hall has paid the invoiced costs, legal services were rendered and on the face of it Mr Hall is liable for the invoiced costs. Payment of those costs is a civil matter between him and his lawyer.

Conclusion

[27] SCC is to pay Mr Hall:

a. Costs for the purposes of the Authority's investigation meeting in the sum of $1,821.56.

b) Costs for the purposes of the challenge in this Court in the sum of

$7,800.

B A Corkill

Judge

Judgment signed at 10.30 am on 17 September 2015