

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2013] NZERA Christchurch 11
5366432

BETWEEN KERROD SPRATT
 Applicant

A N D CLAN CONSTRUCTION
 LIMITED
 Respondent

Member of Authority: James Crichton

Representatives: Jenny Guthrie, Counsel for Applicant
 Simon Anderson, Counsel for Respondent

Submissions Received: 2 October 2012 and 7 November 2012 from Applicant
 16 October 2012 from Respondent

Date of Determination: 17 January 2013

COSTS DETERMINATION OF THE AUTHORITY

The substantive determination

[1] By determination dated 31 August 2012, the Authority found that Mr Spratt's dismissal for redundancy was justified but considered that Mr Spratt had been underpaid his notice and was entitled to another three weeks' salary in respect of the notice period.

[2] Costs were reserved.

The application for costs

[3] Both parties seek an award of costs. Mr Spratt's application for costs is based in part on his partial success (the award of an extra three weeks' salary for the notice period) but more particularly because of his contention that the whole proceeding was effectively misconceived in that he had been led to believe (erroneously as it turned out) that a supervisor at Clan Construction Limited (Clan) was oblivious of

Mr Spratt's impending redundancy when the evidence the Authority heard (and relied upon) was that that supervisor was intimately involved in the decision to declare him redundant.

[4] The exercise from Mr Spratt's perspective relied on his interpretation of a telephone discussion that he had with the supervisor Mr Elliott wherein the latter allegedly said to Mr Spratt that he knew nothing about the impending redundancy.

[5] Mr Spratt also maintains that he was put to additional cost by the behaviour of the respondent in seeking to have the Ministry of Justice vary the award of legal aid granted to Mr Spratt because of Clan's belief that Mr Spratt was not entitled to a grant of aid by reason of his earnings.

[6] In the result, the Ministry of Justice conducted a full investigation and was satisfied that Mr Spratt did qualify for a grant of aid and that grant was operative for the investigation meeting of the Authority.

[7] It follows that unless Clan can satisfy the Authority that exceptional circumstances exist to justify an award of costs against Mr Spratt as a legally aided person, then the effect of the Legal Services Act 2011 is to preclude, in a practical sense, any award of costs against such a legally aided person.

[8] Notwithstanding that statutory hurdle, Clan does make a claim that there are exceptional circumstances.

[9] The first argument advanced by Clan is that it made a sensible offer to settle costs at the time that the parties were in mediation prior to the Authority's investigation meeting.

[10] Second, it is alleged that Mr Spratt's prosecution of his claim after that point was unreasonable in all the circumstances because his claim was, in essence, without merit. This argument proceeds essentially on the basis that the downturn in the building industry was well known, that there had been proper communication between employer and employee about that downturn, and that even without the communication between the parties, Mr Spratt knew or ought to have known that the genuineness of any redundancy could not be called into question.

[11] Thirdly, it is suggested that the way in which Mr Spratt progressed his claim put the respondent employer to additional and unreasonable cost. Factual errors are highlighted in support of this assertion.

[12] Fourthly and finally, Clan maintains that exceptional circumstances exist because of Mr Spratt's eleventh hour reliance on the contention that one of Clan's supervisors (Mr Elliott), was not aware of the impending redundancy and the proposed selection process and therefore those arrangements were unfair.

[13] Clan also contends that the basis on which Mr Spratt seeks an award of costs for himself is misconceived. In making that submission, there are a number of separate allegations, the first of which is that it cannot be the case that Mr Spratt incurred additional fees in dealing with his entitlement to a grant of civil legal aid. In essence, the contention made by Clan is that no fees would have been charged (or could have been charged) to Mr Spratt in respect of that aspect.

[14] In relation to the claim made by Mr Spratt that because foreman Elliott did not know about the prospective redundancy, it could not be a genuine one, Clan says that the allegation about what Mr Elliott knew or did not know was not raised at all by Mr Spratt until the Authority's investigation meeting and that if it was so important to Mr Spratt, it surely would have been raised earlier. Further, Clan says Mr Elliott was not the foreman to whom Mr Spratt reported, only that there was a family connection between Mr Elliott and Mr Spratt.

[15] Clan says that if Mr Elliott was central to Mr Spratt's view of matters, then it is surprising that Mr Elliott was not called to give evidence. Further, if it is suggested that Mr Elliott has misled Mr Spratt about matters, then his evidence ought to have been heard by the Authority, assuming that that evidence was relevant. Clan correctly points out that the Authority's determination of the substantive matter included a finding that Mr Elliott would have preferred not to get involved in the conflict over the redundancy matter and would not therefore want to engage with Mr Spratt on that subject.

[16] Because the matter seems to have developed a life of its own, Clan has filed an affidavit from Mr Elliott with its submissions and that affidavit, although not considered by the Authority in the substantive determination, is absolutely consistent with the conclusions that the Authority reached from other sources. In particular,

Mr Elliott confirms that because of what he refers to as “*the family connection*”, it was better for him to take a step back and not actively engage with Mr Spratt. Mr Elliott also confirms in that affidavit that Mr Spratt was never part of his building team.

Determination

[17] The principles of law which apply in a costs fixing environment in the Authority are well established and need not be recited in detail here. The leading case is the decision of the Employment Court in *PBO Ltd v. Da Cruz* [2005] 1 ERNZ 808. That decision provides an admirable summary of the relevant considerations.

[18] The particular circumstances of this case also require a consideration of the effect of s.45(2) of the Legal Services Act 2011 and the provision contained therein limiting orders for costs against legally aided persons except in exceptional circumstances. As Clan has made an application for costs against Mr Spratt, the question of whether that provision comes into effect or not, arises.

[19] The Authority also has to deal with an application for costs from Mr Spratt who argued essentially that he was partially successful in his claim and that he was entitled to have costs fixed in his favour because of some of the behaviour of Clan in its defence of the proceeding and in its questioning of whether the legal aid granted to him was appropriately given.

[20] The Authority’s considered view is that Mr Spratt has no entitlement to costs. His primary claim was one of unjustified dismissal for redundancy and that claim was completely unsuccessful. The Authority’s determination that Mr Spratt ought to be paid a longer period of notice can in no sense be evaluated as of equal importance to Mr Spratt’s fundamental claim that he was dismissed unjustifiably. It follows that there can be no consideration of costs for Mr Spratt.

[21] In the alternative, Clan was almost entirely successful in its defence of Mr Spratt’s action. Only in the notice aspect did Clan prove unsuccessful. In the normal course of events then, Clan would have been entitled to an award of costs. However, in order for costs to be awarded to Clan, the Authority first would need to be satisfied that there were exceptional circumstances pursuant to subsection (2) of s.45 of the Legal Services Act 2011. Subsection (3) of the same section sets out some

discretionary questions that the Authority may consider in reaching the conclusion on the matter.

[22] Having reflected both on that provision of the statute and the submissions received from Clan, the Authority is not persuaded that exceptional circumstances exist. In *Awa v. Independent News Ltd* [1996] 2 NZLR 184 the High Court determined there was no intrinsic test for the phrase “ exceptional circumstances..” and that each application needed to be considered on its own merits. That decision was referred to by Judge Shaw in her judgement in *Jack v. Ministry of Justice* (WC 6/05 18 March 2005) wherein Her Honour summarised the High Court’s conclusion as being “ most unfavourable to the defendant ..”

[23] Applying that same logic to the present case, it is difficult to see unmeritorious conduct on the part of Mr Spratt although his application was unsuccessful. While there might be criticism of the way in which he approached the prosecution of his claim the end result was not unduly prolonged. Indeed,. the whole matter was disposed of in an hour and a half. Mr Spratt was entitled to have the matter considered by the Authority and he tried to limit the hearing time by asking Clan to agree to the matter being determined by way of a recommendation from the Authority. While Mr Spratt was mostly unsuccessful in his claim, it is difficult to conclude a “ most unfavourable.” opinion of him, as the High Court did of the defendant in *Awa*.

[24] However, pursuant to subsection (5) of s.45 of the 2011 Act, the Authority may determine what amount of costs would have been made against Mr Spratt if that application were not caught by this section. The Authority’s considered view is that, applying the daily tariff approach that the Authority customarily uses in such matters, an award of costs in the order of \$1,750 would have been appropriate were s.45 of the 2011 Act not operative in the present situation.

[25] That being the Authority’s considered view, effectively costs lie where they fall.

James Crichton
Member of the Employment Relations Authority