New Zealand Employment Relations Authority Decisions

Stevenson v Altus Financial Services Limited (Christchurch) [2017] NZERA 1066; [2017] NZERA Christchurch 66 (1 May 2017)

Last Updated: 20 May 2017

IN THE EMPLOYMENT RELATIONS AUTHORITY CHRISTCHURCH

[2017] NZERA Christchurch 66
5627034

BETWEEN HUNTER ROY STEVENSON Applicant

A N D ALTUS FINANCIAL SERVICES LIMITED

Respondent

Member of Authority: Helen Doyle

Representatives: D Robinson and K Logan, Counsel for Applicant

M Ryan and C Carr, Counsel for Respondent

Submissions Received: 24 March 2017, from the Applicant

10 March 2017, from the Respondent

Date of Determination: 1 May 2017

COSTS DETERMINATION OF THE RELATIONS AUTHORITY

A Hunter Roy Stevenson is ordered to pay to Altus Financial

Services Limited costs in the sum of $7000.

The substantive determination

[1] In its determination dated 24 February 20171, dealing with the real nature of the relationship between the parties the Authority found the applicant was in an independent contracting relationship. The determination was made within the context of more significant litigation in the High Court. The Authority reserved the issue of costs and submissions have now been received on behalf of the applicant and the

respondent.

1 [2017] NZERA Christchurch 29

The respondent's submissions

[2] Ms Ryan refers the Authority to the judgment of the full Court of the Employment Court in *PBO Ltd (formerly Rush Security Ltd) v. Da Cruz2* and the observation that since its inception the Authority has held to some basic tenets when considering costs.3 The Court set out principles in *Da Cruz* that were held to be appropriate to the Authority and consistent with its functions and powers. It is recognised that each case has to be considered in light of its own circumstances and that includes a tariff based approach which is not unduly rigid.4

[3] Ms Ryan refers the Authority to the Employment Court case of *Binnie v. Pacific Health Ltd* 5 which held that 66% of actual costs is the starting point for assessing costs in the Employment Court. Ms Ryan submits that the Authority is not bound by

Binnie but that the Authority can uplift from the daily tariff or award costs in line with *Binnie*.

[4] The respondent seeks an order that costs be awarded by way of an uplift from the daily tariff to recognise the particular circumstances of the case, the complex legal issues, the importance of the issue to be determined, the actual costs and the adversarial nature of the matter and conduct of the applicant which resulted in time and costs in the proceedings being increased.

[5] Ms Ryan submits the respondent incurred actual costs of $41,065.95 including GST and disbursements of $10.95. She sets out the various steps taken which have resulted in those costs. Ms Ryan submits that 66% of actual costs should be awarded which is the sum of $27,103.52.

[6] She submits the increased costs should be on the basis that the hearing before the Authority was only required due to High Court proceedings and was therefore of particular importance from a liabilities/monetary perspective than may usually be the case. She submits that the question for determination therefore had more "riding on

it" than may usually be the case in the Authority.

2 *PBO Ltd v Da Cruz* [2005] NZEmpC 144; [2005] 1 ERNZ 808

3 Above n 2 at [44]

4 At [45] and [46]

5 *Binnie v Pacific Health Ltd* [2012] 1 ERNZ 438 (CA)

[7] Ms Ryan submits that the documentation required to be considered was greater than was normally the case. She submits that discovery in the High Court proceedings had to extend to this issue and attached a memorandum of counsel filed in High Court proceedings outlining the extent of the respondent's discovery.

[8] She submits that additional time and cost was incurred because of an insistence that Mr McDonald give evidence.

[9] The Authority is referred by Ms Ryan to a proposal put to the applicant by letter dated 6 September 2016. The offer made by the respondent, is headed "common interest privilege/ without prejudice save as to costs", and was on the basis that even with a favourable costs order to either the applicant or respondent, both parties would nevertheless end up having expended funds on secondary litigation that may have no benefit in the overall scheme of the matter. It was proposed in that letter that in the interests of both the applicant and the respondent, they work together against the substantive claims brought by the plaintiff in the High Court proceedings.

[10] The applicant was invited to consider this proposed joint approach to the plaintiff and in return the respondent would be willing to drop the cause of action alleging that the applicant had acted outside the scope of his contract for services subject to costs in the Authority lying where they fell. The applicant would be required to undertake not to bring any further employment-related claims against the respondent and if the proposal was accepted the respondent would retain its equitable and fiduciary causes of action against the applicant in reserve but otherwise seek to dispose of the High Court proceedings. The applicant rejected the offer and the investigation before the Authority was therefore necessary.

The applicant's submissions

[11] Mr Robinson submits that it is inappropriate to address costs between the parties at this juncture as the proceedings are part and parcel of litigation in the High Court. Mr Robinson submits that the costs incurred and claimed by the respondent are excessive and that there is no basis to depart from the usual daily tariff.

[12] Mr Robinson refers to the reason for the tariff approach to ensure that costs awards are predictable, consistent and to recognise the unique inquisitorial jurisdiction as opposed to the adversarial jurisdiction.

[13] Mr Robinson also refers to *Da Cruz* and also to the more recent Employment Court judgment in *Fagotti v. Acme & Co Ltd6*. He submits that there is nothing to warrant any departure from the daily tariff and that the hearing lasted for one and a half days including submissions, that there were no complicated issues of fact or law and no suggestion of the proceeding being vexatious.

[14] Mr Robinson also analysed awards in other cases in the Authority and submits that they do not support the level of costs sought by the respondent.

[15] He submits the high point of the respondent's application is the offer expressed "without prejudice save as to costs" but he submits that on examination of that offer, it reserved the right for the respondent to claim against the applicant and required him to concede that his actions arose in his capacity with OFS. Mr Robinson submits that the without prejudice offer cannot have bearing on costs before the Authority because it can only be taken into account if the Authority is satisfied that it involves an outcome equal to, or more advantageous, than the outcome contained in the determination. He submits that the

Authority is not in a position to make a determination of the overall merits of the case between the applicant and the respondent, being the merits of the High Court litigation, because it falls outside the jurisdiction of the Authority.

[16] Mr Robinson does not accept that the context in which the issue arose is relevant to costs and submits that this was a matter that fell within the jurisdiction of the Authority and had to be determined by it in order for the substantive claims to be properly addressed.

[17] Mr Robinson does not accept in his submissions that complex issues arose and that this was largely a matter determined on the facts. He submits that the extent of documents discovered and reviewed and any costs in relation to those documents fall to be determined in the High Court. He does not accept that it is credible that they had to be reviewed afresh for the Authority proceeding given the defence in the High Court was that the applicant was an employee. He further submits that uplift is not necessary to reflect additional evidence briefed by the respondent because Mr

McDonald should have been called in the first instance which would have obviated

6 *Fagotti v Acme & Co Ltd* [2015] NZEmpC 135, (2015) NZELR 1

the need for evidence from Mr Lewis and that even with the full extent of evidence briefed the hearing did not occupy two days.

[18] To the extent that there was reference in Ms Ryan's submission to the High Court proceedings being a multi-million dollar claim, Mr Robinson submits that quantum cannot be addressed and there was no evidence of the quantum and the Authority cannot make an assessment of that. Mr Robinson submits that the respondent had failed to prove the costs actually incurred and that the claim for 66% of actual costs does not reflect the principles from *Fagotti7* and attempts to adopt High Court costs principles which the Authority has expressly eschewed.

Determination

[19] I do not consider it appropriate to leave costs until the resolution of the High Court proceedings and I will therefore proceed to consider the application for costs for the matter in the Authority.

[20] The Authority has a discretion to award costs and the amount of the costs. That discretion is to be exercised in accordance with principle and not arbitrarily.

[21] Costs generally follow the event. In this matter the respondent was successful and is entitled to consideration of costs.

[22] Ms Ryan suggested that the Authority approach the exercise of its discretion essentially on the same or similar basis to the way the Court may approach the exercise although expressed by way of an uplift to the daily tariff. In *Fagotti* the plaintiff advocated a similar position that costs should be approached from a position as the Court would have approached costs.

[23] The full Court of the Employment Court agreed with the defendant that the Authority continues not to be bound by the same principles as apply to the Court. There was reference to a statement from Judge Ford in *Carter Holt Harvey Limited v Eastern Bays Independent Industrial Union of Workers8* that the Authority is not bound by the *Binnie* principles and in general those principles are inappropriate to

costs awards in the Authority. Judge Ford in his judgment compared the costs

7 Above n 6

8 *Carter Holt Harvey Ltd v Eastern Bays Independent Industrial Union of Workers* [2011] NZEmpC 13 at [25] and referred to at n 6 above at [106]

incurred in the context of adversarial litigation in the Court with an investigation meeting as involving different considerations. The full Court was not persuaded in *Fagotti* that the broad principle in *Da Cruz* should be departed from or altered. It was seen as important though that the Authority did not bind itself inflexibly to a daily tariff approach and that it exercised its statutory discretion appropriately.

[24] The appropriate starting point in this matter is the daily tariff for an investigation over two days. The statement of problem was lodged with the Authority in May 2016 when the daily tariff was recognized as $3,500. Consideration should then be given to whether there should be uplift.

[25] I have recorded in my minute book that the first day the Authority investigated from 10.45am to 5.45pm and the second day from 10.50am to 3.46pm with half an hour luncheon adjournment. A full day therefore was required for the first day and about four hours or so for the second day.

[26] An inquiry into the real nature of the relationship between the applicant and respondent arose primarily because of the High Court proceedings. Those proceedings have potentially significant liability/monetary consequences for the applicant and respondent but that fact alone does not automatically lead to uplift in the daily tariff for a matter before the Authority.

[27] The principles for determining the real nature of a relationship in this area are settled and the relevant tests are assessed primarily on the facts and consideration as to how the relationship operated in practice. I accept, as submitted by Ms Ryan, that legal issues about the tests to be applied and the significance of particular facts do arise because they were considered in the context of a shareholder/director relationship.

[28] Ms Ryan submits that more documentation was required to be considered than usual and that the documents generated from the respondent's High Court discovery had to be reviewed and considered in order to identify any material relevant to the Authority proceeding. In order to determine the real nature of a relationship the Authority does place considerable importance on documents. I am not persuaded though that the volume of documents actually provided to the Authority was such that it should justify an increase to the daily tariff.

[29] In terms of review, the types of documents that may assist in the Authority investigation as to the real nature of the relationship would, to a large degree have been fairly apparent. They would have concerned the day to day nature of the relationship and the underlying written arrangements between the parties that may assist to understand the nature of the relationship. I agree with Mr Robinson's submission that it is difficult to ascertain what of the tailored discovery documents reviewed were also required to have been so reviewed for the purpose of the High Court proceedings. Costs for that process are able to be assessed by the High Court.

[30] I am not satisfied that either party contributed to an increase to costs by conduct. The Authority was assisted by the evidence of all the witnesses and certainly that of Mr McDonald.

[31] I am not prepared to take the offer in the nature of the "Calderbank offer" into account in increasing the daily tariff. I find that it was not unreasonable for the applicant in the context of the offer to reject it at the time it was made in favour of obtaining a determination as to the real nature of the relationship as submitted by Mr Robinson. Further this is not a case because of its nature, and because of the High Court proceedings, where a straightforward assessment can be made that the Calderbank offer is equal to or more advantageous than the outcome in the determination.

[32] I do however weigh the importance of the case to the parties and that the legal issues required more detailed submissions from which the Authority derived considerable assistance. I find it would be fair given those matters that an award of costs be assessed, notwithstanding the second day was not a full day, on the basis of two days of investigation in the sum of $7000. Ms Ryan has referred to a disbursement of $10.95 but not what that disbursement was. I make no award for that in the circumstances.

[33] I order Hunter Stevenson to pay to Altus Financial Services Limited the sum of $7000 being costs.

Helen Doyle

Member of the Employment Relations Authority
