Employment Court of New Zealand

Taylor v Milburn Lime Limited [2012] NZEmpC 27 (22 February 2012)

Last Updated: 28 February 2012

IN THE EMPLOYMENT COURT CHRISTCHURCH

[2012] NZEmpC 27

CRC 2/10

IN THE MATTER OF a challenge to a determination of the

Employment Relations Authority

AND

IN THE MATTER OF an application for costs

BETWEEN CHRISTOPHER JOSEPH TAYLOR Plaintiff

AND MILBURN LIME LIMITED Defendant

Hearing: on the papers - memoranda received 6 January and 10 February 2012

Appearances: Andrew Beck, counsel for the plaintiff

Michael Nidd, counsel for the defendant

Judgment: 22 February 2012

COSTS JUDGMENT OF JUDGE A A COUCH

[1] In my substantive decision,[1] I concluded by encouraging the parties to agree costs if possible. They have been unable to do so and memoranda have been filed.

Costs in the Court

[2] The principles usually applied when exercising the Court's discretion to award costs are well known. I summarised them in an earlier decision[2] as follows:

The fundamental purpose of an award of costs is to recompense a party who has been successful in litigation for the cost of being represented in that litigation by counsel or an advocate. A useful starting point is two-thirds of the costs actually and reasonably incurred by that party but that proportion

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may be adjusted up or down according to the circumstances of the case and the manner in which it was conducted. Ability to pay is also a factor to be taken into account.

[3] The first question must be the amount of costs actually incurred by the plaintiff in relation to the proceeding before the Court. In his memorandum, Mr Beck says that the amount was $18,086 but no copies of invoices or other information is provided to support that assertion. It is not even stated whether this figure is inclusive or exclusive of GST. While I do not question Mr Beck's veracity, the Court's experience is that perceptions of what comprises costs incurred in the proceeding vary considerably. Without the ability to verify the amount stated, I am therefore left in doubt about the relevant costs actually incurred by the plaintiff.

[4] Mr Beck submits that costs of $18,086 were reasonably incurred by the plaintiff. In support of this submission, he says:

(a) The case involved a two day hearing with numerous witnesses and a number of legal issues.

(b) Counsel's fees have been reduced from what they might otherwise

have been.

(c) The hearing was adjourned twice at the request of the defendant.

(d) The defendant insisted on the matter going to trial rather than negotiating a settlement.

[5] As to the length of hearing, the record shows that it finished shortly after 1 pm on the second day. It lasted a day and half.

[6] A statement that counsel's fees have been reduced does not assist without

saying what they have been reduced from.

[7] It is correct that the hearing was adjourned twice but the second adjournment was totally unavoidable. In respect of the first adjournment, I fixed costs at the time.

[8] The defendant's reluctance to settle is unsurprising given that the plaintiff's

claim had been entirely rejected by the Authority.

[9] Other than to make those points, Mr Beck has provided no material to assist me in deciding what costs it was reasonable for the plaintiff to have incurred. In particular, I have not been informed how the fee charged was made up and, assuming it was based on the time devoted to the matter by counsel, how that time was spent.

[10] As I also observed in *Merchant,*[3] and other judges have repeatedly said, the principles applicable to the award of costs in this Court are so well known and defined that parties represented by competent counsel, as the plaintiff was in this case, can properly be expected to provide the information necessary to support a claim for costs. They fail to do so at their peril. In such cases, it is open to the Court to make no award of costs but, to be fair to Mr Taylor, I will not do that in this case. Based on my knowledge of the case and general guidelines, I can make a reasoned decision. In doing so, however, I must take a conservative approach to avoid doing injustice to the defendant.

[11] This was not a factually complex matter and there were few documents. As best I can tell from the Authority's determination, the evidence given to the Court was very largely the same as that provided to the Authority. This means that most of the work required to brief Mr Taylor's evidence and record it in a statement had already been done for the Authority's investigation meeting. That appears to have been augmented to some extent by evidence from Mr Taylor in reply to the defendant's witnesses but that was not extensive. There were six witnesses for the defendant but their briefs ran to only eight pages in total. All of those witnesses apparently gave evidence before the Authority It follows that the work necessary to analyse the defendant's case would have been done for the proceeding before the Authority.

[12] There were no contentious issues of law in this case. I recognise, however, that applying the established law to the facts required thoughtful analysis because some of the facts were unusual.

[13] Referring by way of analogy to the categories of proceedings set out in rule

14.3 of the High Court Rules, this case was between categories 1 and 2. It was

largely straightforward but had some elements requiring more skill and experience than might be possessed by a junior practitioner. Having regard to the appropriate daily recovery rates provided for the various categories in schedule 2 of the High Court Rules, I conclude that a reasonable rate to charge for such work would be $285 per hour inclusive of GST.

[14] Allowing for the work which must have been done to prepare the plaintiff's case for the Authority's investigation meeting, I find that the additional time required to adapt the case for presentation in the Court and deal with interlocutory issues should have been no more than 25 hours. Allowing a further 15 hours for one and a half days of hearing, that makes a total of 40 hours. At $285 per hour, that equates to costs of $11,400 inclusive of GST. In the absence of any information supporting a larger figure, I find that to be the amount of costs reasonably incurred by the plaintiff. Two thirds of that amount is $7,600.

[15] I turn then to the proportion of that amount the defendant should pay. The usual starting point is two thirds but Mr Beck submits that this should be increased to

80 percent. In support of that proposition, he makes three further submissions: (a) The defendant has "consistently adopted

an aggressive stance".

(b) The defendant has made it clear that "there would be no settlement without proceedings".

(c) The plaintiff ought to be fully reimbursed for the costs wasted in respect of the first adjournment.

[16] The first two submissions are closely related. They amount to a suggestion that the defendant ought to be punished in costs for taking a robust position in the litigation. It is not the purpose of an award of costs to punish the unsuccessful party. Rather, an award of costs is to compensate a successful party for the costs it has necessarily incurred in the litigation. To the extent that the defendant's attitude may have unnecessarily increased the costs incurred by the plaintiff, it may be relevant but not otherwise.

[17] In my minute to the parties granting the first adjournment,[4] I recorded Mr Nidd's concession that the plaintiff ought to be reimbursed for any wasted costs and/or disbursements resulting from the adjournment. Mr Beck says that granting the adjournment six days prior to the scheduled start of the hearing caused him to waste a full day's preparation time. That is a surprising statement and, without further explanation, I cannot accept that the amount of duplication required for a subsequent hearing was that much. I have, however, made an allowance of three hours in this regard in the figure of 25 hours referred to earlier.

[18] I have already made a fixed award of costs for Mr Beck's appearance on the application for the first adjournment. It would be unprincipled and unjust to make a further award now.

[19] The hearing itself was conducted appropriately by counsel for both parties. In the absence of any indication that the manner in which the defendant's case was conducted unreasonably increased the costs of the plaintiff, there is no reason to depart from the starting point of two thirds of the costs reasonably incurred.

Costs in the Authority

[20] I concluded in my substantive decision that, as the plaintiff's challenge had been successful, the costs award made by the Authority[5] in favour of the defendant must be set aside.[6] As the Authority ordered the plaintiff to pay the defendant $2,700 for costs, Mr Beck submits that I should now make a similar award in favour of the plaintiff.

[21] Mr Nidd opposes such an award for three reasons. He says: (a) The defendant was successful in the Authority.

(b) The Authority preferred the evidence of the defendant's witnesses

over that of the plaintiff.

(c) The plaintiff did not specifically challenge the Authority's costs determination.

[22] The first two points are really the same and overlook the fact that, in my substantive decision, I reached quite different conclusions to those reached by the Authority. It is the final outcome which is the event to be followed in awarding costs at all stages.

[23] As to Mr Nidd's other point, the Court has previously held[7] that, where a de novo challenge is successful, the Court has power to revisit any award of costs made by the Authority and that, logically, it should do so I endorse that view.

[24] As the Authority's award of costs was made on a "daily rate" basis, I agree with Mr Beck that what the Authority found appropriate for one party should be regarded as equally appropriate for the other party.

Disbursements

[25] The plaintiff seeks reimbursement of disbursements totalling $1,591.04. Of these, the filing and hearing fees amounting to $520.44 are undoubtedly proper disbursements.

[26] There is then a claim for "photocopying and binding" of $180.90. If this sum reflects a payment made to a third party, it would be a proper disbursement. If, on the other hand, it is a charge made for the use of in-house facilities, it should be regarded as part of normal office overheads. No information has been provided to indicate which this is and I therefore do not allow it.

[27] There is a claim for $327 for "airfares", again with no explanation of whose airfares they were or why they were incurred. If this relates to Mr Beck's travel to appear as counsel, I do not allow it. There are many capable counsel in Dunedin and, while it was the plaintiff's right to instruct Mr Beck, any additional cost

associated with out of town counsel must be to the plaintiff's account.

[28] Next, there is a claim for "parking fees" of $79.80 which is also unexplained.

It is not allowed.

[29] Finally, there is a claim for "fees for changing flights" of $302. This relates to the cost incurred by Mr Beck to change his flights to Dunedin following the two adjournments granted at the request of the defendant. In my minute granting the first adjournment, I specifically noted that the defendant accepted liability for any wasted costs or disbursements incurred by the plaintiff if the adjournment was granted. I therefore allow the claim for $252 incurred on that occasion. I do not, however, allow the claim for a further $50 in respect of the second adjournment. The adjournment was unavoidable and the need for it unforeseeable. I regard the cost to change Mr Beck's travel on that occasion as an incident of the plaintiff's decision to instruct out of town counsel.

Interest

[30] In my substantive judgment, I did not award interest on any of the remedies granted, although this had been sought by the plaintiff. Mr Beck suggests this may have been an oversight and asks me to recall the judgment to add an order that interest be paid. This was not an oversight. The judgment will not be recalled.

Summary

[31] The defendant is ordered to pay the plaintiff $7,600 for costs in the Court,

$2,700 for costs in the Authority and $772.44 for disbursements.

Signed at 11.00 am on 22 February 2012.

A A Couch
Judge

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[1] [2011] NZEmpC 164.

[2] *Merchant v Chief Executive of the Department of Corrections* [2009] ERNZ 108 at [3].

[3] At [11].

[4] Dated 6 July 2010.

[5] CA 84/10, 9 April 2010.

[6] At [45](f).

[7] See, for example, *Ruddlesden v Unisys New Zealand Limited* WC 5/05.

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