New Zealand Employment Relations Authority Decisions

Tod v Satara Co-operative Limited (Auckland) [2011] NZERA 465; [2011] NZERA Auckland 307 (14 July 2011)

Last Updated: 5 August 2011

IN THE EMPLOYMENT RELATIONS AUTHORITY AUCKLAND

[2011] NZERA Auckland 307 5286229

BETWEEN GRAEME TOD

Applicant

AND SATARA CO-OPERATIVE

GROUP LIMITED Respondent

Member of Authority: K J Anderson

Representatives: D Jacobson, Counsel for Applicant

M Beech and S Grice, Counsel for Respondent

Submissions received: 1 March 2011 from Applicant

29 March 2011 from Respondent

Determination: 14 July 2011

COSTS DETERMINATION OF THE AUTHORITY

[1] In a determination dated 27th January 2011[1] the Authority upheld the two personal grievance claims of Mr Tod. In particular, it was found that the dismissal of Mr Tod was unjustified and that he was entitled to certain remedies, albeit these were reduced by 40% to reflect the contribution made by him towards the situation that gave rise to the unjustifiable dismissal personal grievance. The parties were invited to resolve the matter of costs but a resolution has not been attained. The parties have now filed costs submissions.

The submissions for Mr Tod
[2] Mr Tod incurred costs of $16,629.80 (plus GST), disbursements of $120.00 and the application fee of $70.00. Detailed invoices have been provided. The

Authority's tariff based approach[2] is acknowledged, but it is submitted that there should be a departure from this approach and that indemnity costs (or close to this) should be awarded.

[3] In regard to the tariff based approach of the Authority, the submissions for Mr Tod refer to an Employment Court decision; *Chief Executive of the Department of Corrections v Tawhiwhirangi*[3] where Her Honour Judge Shaw observed that:

In a judgment in November 2006 the Court noted that the Authority's tariff ranged up to about $3,000 per day. Given the passage of time since then, that figure is most likely to be an appropriate starting point for the Authority's tariff rather than an upper figure.

[4] It is submitted that given the effluxion of time since 2008, a higher starting point than $3,000 per day should be applicable. The matter of an appropriate tariff has

recently been addressed by the Employment Court in *Cathy Johnson v Gilligan Business School Limited* (unreported) AC 14/09, 3 April 2009.[4] Judge Travis cited the above passage from the *Tawhiwhirangi* case and he agreed with the observations of Judge Shaw that the higher end of the scale is not to be regarded as a fixed rate but as an appropriate starting point. But Judge Travis then held that:

Applying the principles set out in *PBO,* I find that the award [$3,750] was at the higher end of the range, but that is explainable by the hearing being longer than a normal one day hearing.

Therefore, on the basis of the *Johnson* decision, it remains appropriate for the Authority to continue to use a sum of $3,000 per hearing day as a reasonable starting point. Applying the principles set out in *PBO,* the Authority can then exercise its discretion to increase or decrease the amount awarded, taking into account the particular circumstances of a case.

[5] The investigation meeting took the better part of two days. Therefore, applying a rate of $3,000 per day, a fair and reasonable costs award would be $6,000. The submissions for Mr Tod argue that there are factors involved in this case that should be taken into consideration in regard to increasing the amount to be awarded. The first of these factors is that following a *"Without Prejudice Except as to Costs" (Calderbankf* offer from the respondent (Satara) of the sum of $7,000, Mr Tod responded with a counter *Calderbank* offer of the sum of $10,000. This sum was proposed to be in full and final settlement, including costs.

[6] It is submitted that given that the total monetary remedies awarded to Mr Tod came to $9,928.28 ($2,728.28 wages plus $7,200 compensation),[5] the Authority should "place considerable weight" on the existence of the counter-offer made by Mr Tod; and the fact that the refusal by Satara to accept this offer caused him to incur unnecessary costs. The Authority is referred to *Health Waikato Limited v Elmsly[6]* and *Watson v New Zealand Electrical Traders Limited t/a Bray Switchgear[7]* and the basic principles espoused with those judgments.

[7] Other factors that Mr Tod submits should be taken into account, for an increased award over the usual tariff, are that Satara extended the costs of the investigation process by: raising "unmeritorious" challenges to the admissibility of evidence, unreasonable submissions regarding Mr Tod's entitlements and generally by adopting various methods and tactics that, its is submitted, extended the time required to complete the investigation meeting.

[8] In summary, it is submitted for Mr Tod that he should be awarded 80-100% of the costs he has incurred.

The submissions for Satara

[9] Firstly, Satara submits that due to the fact that the Authority dismissed a number of Mr Tod's claims, and because the remedies awarded to him were reduced by 40% due to his contribution, along with the existence of the *Calderbank* offer made by Satara; costs should lie where they fall.
5 *Calderbank v Calderbank* [1975] 2 All ER 333

[10] In the event that the Authority does not accept this proposition, it is submitted that any award of costs should be made at the maximum of the usual daily tariff but reduced by taking into account that: a. A number of Mr Tod's claims were unsuccessful;

b. Some parts of the claims were not pursued at the investigation meeting; and

c. The actions of Mr Tod had the effect of unnecessarily extending the investigation meeting time.

[11] It is further (and correctly) submitted for Satara that the criteria applying to the Authority, as compared with the Employment Court, in regard to awarding costs, is quite different[8] and that in particular, Mr Tod cannot rely on the *Tawhiwhirangi* judgment to claim an increased costs award, as apart from the different criteria applied by the Authority and the Court, this case can be distinguished by its facts pertaining to the considerable preparation required and the complexity of the circumstances.

[12] It is also submitted for Satara that both parties had "a measure of success." The Authority is referred to *Jenkinson v Oceana Gold (NZ) Limited[9]* and it is submitted that: "*... Judge Couch reduced the costs award to $2,500 to reflect the shorter investigation meeting, which would have been necessary had the plaintiff pursued only those parts of her claim in which she was successful.'"* But I have to say that this is not how I read that part of the judgment [para 12], if indeed that is what counsel for Satara is referring to. Rather the reference is to the Authority's earlier determination of costs, but Ms Jenkinson was successful with her challenge to the Employment Court, which effectively negated the findings of the Authority.

[13] In regard to the *Calderbank* offer made by Satara to Mr Tod, it is submitted that the offer of $7,000 was only $2,928.28 less than the remedies subsequently awarded by the Authority and had Mr Tod accepted the offer, he would have avoided the legal fees incurred by proceeding within the Authority. It is submitted that a "compromise" in regard to appropriate costs for Mr Tod would be that he should be awarded the sum of $2,928.28.

[14] In response to the submissions for Mr Tod that the Authority should consider an award of indemnity costs, Satara says that indemnity costs would be in conflict with the general principle that a costs award should not be punitive.

[15] In summary, it is submitted for Satara that if the Authority is not minded to let costs lie where they fall, then a notional daily rate of $2,000 should be used to calculate costs. Further, account should be taken of the fact that the second day of the investigation meeting was a partial day and that some of the claims pursued by Mr Tod were unsuccessful, hence an appropriate award would be $2,500.

Analysis and Conclusions

[16] In calculating the basic daily tariff, while it is correct that the second day of the investigation meeting was somewhat shorter, it seems to me that it was not that much shorter that a lesser period than two days is appropriate for calculation purposes. Nor do I accept that the daily tariff rate should be less than $3,000, as to use anything much less than this figure would fail to acknowledge that successful parties are entitled to recover a reasonable portion of their costs for representation, calculated on a reasonable fees basis for preparation, and advocacy before the Authority. Therefore, I conclude that Mr Tod is entitled to a basic costs award of $6,000.

[17] I also take into account that Mr Tod made a counter *Calderbank* offer of $10,000 at a reasonable time prior to the investigation meeting and that this sum was only very slightly above the total remedies that he was awarded in regard to his unjustifiable dismissal. That then raises the question as to the weight that should be put on that situation in regard to assessing an award of costs. The circumstances here are similar to those in the case of *Watson v New Zealand Electrical Traders Limited t/a Bray Switchgear*[10] where Chief Judge Colgan held (at para [8]) that:

Although not precisely predictive of the final outcome, I consider that Mr Watson's proposal that Bray Switchgear settle for $6,000 was so close to the actual outcome of the Authority's investigation after much more was spent on costs by the parties, that is a significant consideration in this case. Put another way, had Bray Switchgear paid this sum within a reasonable time of Mr Watson's offer, it would have saved itself significant legal costs as well as those incurred unnecessarily by Mr Watson. It follows, in my conclusion, that there is therefore an obligation on Bray Switchgear to contribute significantly to the post-offer costs that Mr Watson incurred as a result of Bray Switchgear's refusal to settle at an early stage.

And further (at para [9]):

The Court of Appeal has recently remarked that there should be a *"more steely"* approach to costs where reasonable settlement proposals have been rejected: see thejudgment of William Young J in *Health Waikato Ltd v Elmsly* [2004] NZCA 35; [2004] 1 ERNZ 172 (Para [53]).

Judge Colgan went on to increase the costs award made by the Authority ($2,500) to $6,000.

[18] Then there is other authority to suggest that where a fair and reasonable *Calderbank* offer is made and declined, "the usual consequence" is that costs are awarded on an indemnity basis.[11] But I note that Chief Judge Colgan in *Watson* did not follow *Hayward,* and in fact did not mention that there should be a consideration of solicitor/client costs. But in any event, in the circumstances of this case, it seems to me that it would not be a fair and equitable result should Mr Tod be awarded more in costs than he received in remedies for his personal grievance.

[19] More recently in *Jaques v Annandale Logistics Limited*[12] the Authority had cause to take into consideration a legitimate *Calderbank* offer made by the respondent in a costs setting. The Member increased the daily tariff from $3,000 to $5,000.

Determination

[20] Taking into account the above submissions, legal precedent and the overall particular circumstances of this case, in particular the *Calderbank* offer made by Mr Tod, and exercising the inherent discretion of the Authority, I gave consideration to increasing the daily tariff by a similar percentage to that applied in *Watson v New Zealand Electrical Traders Limited t/a Bray Switchgear.*[13] But the effect of that would be that Mr Tod would receive more in costs than he was awarded in remedies for his personal grievance and that does not seem to be equitable and/or conscionable. Therefore, I have adopted the same approach as my colleague in *Jaques v Annandale Logistics Limited*[14] with the effect that the daily tariff of $3,000 per day of hearing is increased to $5,000. The outcome being that, Mr Tod is awarded the sum of $10,000 in costs, along with disbursements and the filing fee.

[21] Therefore, Satara Co-operative Group Limited is ordered to pay to Mr Tod the sum of $10,000 as a contribution to his costs, plus disbursements of $130 and the filing fee of $70.00; a total sum of $10,200.00.

K J Anderson

Member of the Employment Relations Authority

[1] [2011] NZERA Auckland 38
[2] Following *PBO Ltd (formerly Rush Security Ltd) v Da Cruz* [2005] NZEmpC 144; [2005] ERNZ 808
[3] [2008] ERNZ 73
[4] A challenge to a costs award of $3,750 made by the Authority; the argument being that it was too high.
[5] After a 40% reduction for contribution pursuant to s. 124 of the Employment Relations Act 2000.
[6] [2004] NZCA 35; [2004] 1 ERNZ 172
[7] [2006] NZEmpC 118; (2006) 4 NZELR 59
[8] As recognised by the *PBO* judgment.
[9] [2011] ENZEMPC 2
[10] Ibid. A successful challenge to a costs award made by the Authority.
[11] *Hayward v Tairawhiti Polytechnic* (2005) Employment Court, Auckland, AC 43A/05
[12] [2011] NZERA Auckland 207, Member, E Robinson, 16 May 2011.
[13] Ibid
[14] Ibid