New Zealand Employment Relations Authority Decisions

Tuck v Anglican Care (Waiapu) Limited [2011] NZERA 60; [2011] NZERA Auckland 40 (28 January 2011)

Last Updated: 21 February 2011

IN THE EMPLOYMENT RELATIONS AUTHORITY AUCKLAND

[2011] NZERA Auckland 40 5299650

BETWEEN GARY TUCK

Applicant

AND ANGLICAN CARE (WAIAPU)

LIMITED

Respondent

Member of Authority: Representatives:

Memoranda received:

R A Monaghan

M Ryan, counsel for applicant
E Inger, counsel for respondent

16 December 2010 from applicant
6 October 2010 from respondent

Determination:

28 January 2011

COSTS DETERMINATION OF THE AUTHORITY

[4] Mr Ryan accepts that costs should follow the event, but says they should be calculated on the basis of a notional daily rate of $3,000. The application for interim reinstatement was heard on the papers, while the meeting in respect of the substantive matter took a little under two full days.

[5] Both parties referred in support to the principles in *PBO Limited (formerly Rush Security Limited) v da Cruz.1*

The first Calderbank letter

[6] In the first letter headed 'Calderbank letter', and dated 14 April 2010, Anglican Care (Waiapu) Limited (ACW) offered the sum of $10,000 under s 123(1)(c)(i) of the Employment Relations Act 2000 in full and final settlement of all matters relating to the parties' relationship. No response was received.

[7] Mr Ryan submitted that: *the nature and content of the calderbank letter had the effect of providing an incentive to the applicant to pursue his claim.* In general terms I understood the submission to mean Mr Tuck found one or both of the Calderbank letters provocative and reacted accordingly.

[8] I have no information about whether Mr Tuck's view was that the amounts offered were derisory and he proceeded accordingly, or whether his reaction was affected by the remainder of the contents of the 14 April letter in particular. If the

latter was a motivating factor I construe the contents of the letter as setting out the offer, then setting out ACW's view of the litigation risk and explaining why it considered the offer was reasonable.
1 [2005] NZEmpC 144; [2005] ERNZ 808

[9] I have no information about the legal costs Mr Tuck had incurred up to and including the date of the 14 April offer. However I note that a statement of problem together with an application for an order for interim reinstatement and documents in support were filed on 19 March 2010. The parties agreed to attend mediation, and returned to the Authority on 29 March to advise that matter was not resolved. By arrangement the respondent's documents in reply were filed on 15 April. From this material I find it unlikely Mr Tuck's costs had reached $10,000 by the date of the offer, and consider it likely that acceptance of the offer would have left him with something once his costs were covered.

[10] That is a better outcome than the one he achieved, whether with reference to the outcome of the interim application alone, or with reference to the overall outcome.

The second Calderbank letter

[11] In a second letter headed 'Calderbank Letter', and dated 13 May 2010, ACW offered the sum of $5,000 under s 123(1)(c)(i) of the Act and said it would not pursue costs in respect of the application for interim reinstatement. In return, all claims against ACW were to be withdrawn immediately. The settlement was to be a full and final settlement of all matters pertaining to the parties' employment relationship.

[12] The Authority's file indicates that, by that date, Mr Tuck could have incurred additional costs in association with the application for interim reinstatement including: perusing ACW's documents in reply; obtaining further affidavits; and exchanging submissions. Again in the absence of information about Mr Tuck's costs it is difficult to compare the position he would have been in had the offer been accepted at the time, with the position he was in as a result of the final determination. I do, however, record further that the timetable for the filing and service of statements of evidence and documents in support was to commence on 4 June. A statement of Mr Tuck's evidence was filed on that date. I consider it unlikely that, by 13 May, further costs in respect of the substantive matter had been incurred in more than a minimal amount.

[13] In summary, as at the date of the second Calderbank letter Mr Tuck had incurred legal costs of his own, as well as exposure to an order for costs against him, in respect of the application for interim reinstatement. The overall practical effect of the second offer, if accepted, was likely to be that the matter was withdrawn with an agreement covering costs with little, if anything, remaining for Mr Tuck.

[14] The effective rejection of the second offer led both parties to incur further costs while, in the light of that, acceptance of the offer would also have left Mr Tuck with a better outcome than the one he has achieved.

Additional considerations

[15] Mr Ryan made the further submissions that:

> (a) Mr Tuck's illness is such that he is not expected to be able to work for at least the next year, so that any order for costs against him could not be paid; and
> (b) taking into account his health problems, the imposition of an order higher than the notional daily rate would be seen as a sign of disapproval or punishment of him for taking his claim.

[16] Regarding ability to pay in general, I addressed Mr Tuck's financial circumstances in the determination on the application for interim reinstatement and no additional information beyond bare assertions regarding Mr Tuck's ability to work has been provided.

[17] Regarding Mr Tuck's state of health, some medical information was provided in support of the initial request for an extension of time to file a memorandum on costs. I made several requests for further supporting medical information, which was eventually provided in the form of a brief medical certificate asserting that Mr Tuck's state of health was such that he was not expected to be able to work for at least the next 6 months. This information was too sparse to allow me to consider the circumstances in a way that was fair to both parties.

[18] Without better information I am not satisfied Mr Tuck will be unable to meet an order for costs.

[19] Regarding any perception that an order greater than the notional daily rate was disapproving or punitive, such a perception would be wrongly founded. The assessment and resulting order rest on the matters set out in this determination.

[20] Finally, Mr Ryan submitted that the amounts sought by ACW are unreasonable. On their face the amounts are not excessive, particularly in the light of the considerable preparation that the contents of the file indicate was required. Thesums amount to 46% of the total costs of the application for interim reinstatement, and 62% of the total costs of the substantive matter.

Determination

1. Costs

[21] In the absence of the Calderbank letters, I would probably have made an order that Mr Tuck contribute to ACW's costs based on:

(a) recognition of the costs incurred in respect of the application for interim reinstatement, even though the application was determined on the papers; and

(b) a two-day investigation meeting calculated at a notional daily rate of $3,000.

[22] The result would probably have been an order for a contribution to ACW's costs in the total sum of $7,000.

[23] However the Calderbank letters are relevant. In that regard Ms Inger cited some of the authorities on the approach to settlement proposals when costs are being addressed. She referred, for example, to the judgment of the Employment Court in *Watson v New Zealand Electrical Traders Limited t/as Bray Switchgear*[1], where the Chief Judge re-emphasised the need for a steely approach to costs where reasonable settlement proposals have been rejected.

[24] I find the offer in the 14 April letter was reasonable and a more realistic approach in terms of assessing litigation risk should have been taken to it. As no economic or other considerations were cited as reasons for effectively rejecting either of the offers, rather the reason appears to be the one Mr Ryan set out in submissions, I give considerable weight to the 14 April offer. Acceptance of it would have allowed the resolution of the matter at an early stage.

[25] The offer in the 13 May letter gave Mr Tuck an opportunity to walk away which he chose not to take. He was entitled to make that choice, but not to disregard the associated risk.

[26] There are various possible approaches to addressing the application for costs as Ms Inger has quantified it, while bearing the effect of the rejection of the Calderbank offers in mind. The one I take is to stand back and consider the overall outcome of the employment relationship problem, the likely total award had the offers not been made, the total award that has been sought, and the extent if any to which the rejection of the offers should lead to an increase in the award to be made.

[27] To that end, the total award sought is a little over twice the amount likely to be awarded in the absence of any Calderbank offers. For the reasons indicated it is appropriate to take the offers into account and to increase the amount that would otherwise have been awarded. Since a steely approach is required, I do not consider excessive a doubling of the amount generated from what may be a low starting point when compared with costs regimes elsewhere. Nor does the doubling of the amount allow the successful party to recover more than approximately one half of the total costs it incurred in the proceedings, and which on the limited information available to me were incurred reasonably.

[28] With that overview, and in the absence of any distorting features to be taken into account, I do not see a need to embark on further detailed consideration of the way any award should be distributed over the interim and the substantive matters respectively, particularly as ACW was successful in both matters. I conclude that doubling the total award of costs that would otherwise have been made is appropriate.

[29] The resulting amount is $14,000. I order accordingly.

2. Disbursements

[30] Although disbursements and witness expenses were incurred in respect of the Authority's investigation, the above orders incorporate a consideration of these matters and I make no further order.

Summary of orders

[31] Mr Tuck is ordered to contribute to ACW's costs in the sum of $14,000. There will be no interest payable on this order.

R A Monaghan

Member of the Employment Relations Authority

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[1] Employment Court, Chief Judge Colgan, 24 November 2006, AC 64/06
