New Zealand Employment Relations Authority Decisions

Valensky v Idea Services Limited (Auckland) [2012] NZERA 903; [2012] NZERA Auckland 466 (19 December 2012)

Last Updated: 3 May 2017

IN THE EMPLOYMENT RELATIONS AUTHORITY AUCKLAND

[2012] NZERA Auckland 466
5371675

BETWEEN ENVOR VALENSKY Applicant

A N D IDEA SERVICES LIMITED Respondent

Member of Authority: James Crichton

Representatives: Eska Hartdegen, Counsel for Applicant

Paul McBride, Counsel for Respondent

Submissions Received: 16 October 2012 from Applicant

16 October 2012 from Respondent

Date of Determination: 19 December 2012

FURTHER COSTS DETERMINATION OF THE AUTHORITY

History

[1] This is the second costs determination in this matter, the first of which issued on 12 October 2012 under reference [2012] NZERA Auckland 363.

[2] The issue of that initial costs determination resulted in a memorandum from counsel for the respondent urging the Authority to reconsider the costs determination.

[3] Counsel for the applicant responded by indicating that the Member was *"functus officio"*, the Authority having disposed of the matter, and if the respondent took exception to the Authority's determination, the proper course was to challenge the determination.

[4] Notwithstanding those observations, the Authority issued a Minute dated

22 November 2012 referring to the matter and inviting more detailed submissions

from the applicant, on the footing that the Authority was *"minded to review the original determination"*.

[5] The Minute traversed the exchanges between the parties after the costs determination issued and amongst other things noted that after the exchange between counsel just referred to, the Authority Member was overseas for an extended period and, in consequence, not able to deal with the matter until his return.

[6] The Minute makes the point that the Authority does have power to *"vary or alter a costs order"* pursuant to Schedule 2 clause 15(2) of the Act and it was in that context that the Authority proposed to reconsider the matter.

[7] In the result, counsel for the applicant has chosen not to respond further in any detailed way save to note that the

applicant's costs submissions were provided to the respondent's counsel and that the Member cannot reopen the matter on *"whim"*.

[8] The contention that counsel for the respondent had received the applicant's submissions is based on an email the Authority's support officer sent to counsel for the respondent scanning a copy of the applicant's submissions, the hard copy of which, for whatever reason, had not been received by counsel for the respondent.

[9] That email was sent on 27 September 2012, fully two weeks before the costs determination issued and so Ms Hartdegen's point is that Mr McBride would have had access to her submissions and could have filed supplementary submissions of his own, had he chosen to. It follows, according to counsel for the applicant, that the Authority's basis for reconsidering the costs order is misplaced because it rested squarely on the conviction that Mr McBride had not seen Ms Hartdegen's submissions and as he alleges that they were to some extent controversial, he was unable to deal with those matters before the Authority's determination issued.

[10] Set against that analysis is the unequivocal statement from counsel for the respondent in an email to counsel for the applicant dated 16 October 2012 and copied to the Authority in the following explicit terms:

For clarification, we have never received the documents from you in any form. After we inquired of the Authority (well after the event), Damian [the relevant Authority support officer] *sent those to us.*

[11] It follows then that there is a factual dispute between counsel as to whether Mr McBride had an opportunity to consider Ms Hartdegen's submissions prior to the issue of the Authority's costs determination, or not.

Mr McBride's memorandum

[12] Mr McBride makes three broad assertions in his memorandum seeking a variation of the original costs award. The first is that the Authority failed to properly identify the facts of the case and that because respondent counsel had not received the submissions and supporting affidavit evidence from the applicant's counsel prior to the issue of the costs determination, the respondent was unable to comment on the matters referred to in that material.

[13] The first point to make in respect of this head is that, as Ms Hartdegen has identified, it would seem that counsel for the respondent is mistaken in his contention that he did not obtain a copy of the applicant's material prior to the determination issuing, that in fact a scanned version of that material was provided by the Authority fully two weeks before the determination issued, so it would have been available for the respondent to either make urgent submissions in reply or seek further time from the Authority (which would have readily been granted) in order to furnish further submissions.

[14] It is difficult to understand how a scanned copy of the material was forwarded by the Authority to Mr McBride's office and that material did not become available to him, particularly when there is no evidence in the Authority's system of any defect in the email system at the time or any apparent difficulty in transmitting that particular message.

[15] That aside, Mr McBride argues that the views advanced by the applicant in his affidavit and by counsel for the applicant in support are at variance with the facts in dispute, facts which would have been familiar to the Authority Member if the matter had proceeded to hearing in the normal way. But the particular circumstances of this matter were that the applicant withdrew the matter from investigation by the Authority on the day before the invest igation meeting was set down. It follows that none of the evidence which would have been heard by the Authority at that investigation meeting was before the Authority in any formal way.

[16] The Authority took the view that it could not properly rely on unsworn, untested briefs of evidence prepared for an investigation meeting that did not take place for establishing the factual matrix on which the parties might seek to rely in a costs setting. Rather, the Authority took the view that it ought to place reliance on the submissions of counsel (both officers of the Court) and supporting affidavit evidence (if any).

[17] Mr McBride is alleging that some of the matters advanced by the applicant in his submissions are *"a convenient rewriting of history"* and that the Authority ought to have had regard to the applicant's *"own intended evidence"* to demonstrate that.

[18] As to the second area of complaint, this relates to the applicant's means (or more accurately the lack of them). Mr McBride contends that the applicant must have been fully aware of his own financial circumstances when he undertook the litigation and to cry poverty now is unjust.

[19] But in a costs fixing environment, the Authority has an obligation to consider the circumstances of the unsuccessful party; those circumstances have been put before the Authority fair and square and the Authority would be failing in its duty not to consider the means of the applicant as part of the decision-making mix.

[20] The final aspect is a complaint about the Authority's reliance on two decisions of the Court being *Bay Milk Distributors Ltd v. Jepson* [2010] NZEmpC 34 per Chief Judge Colgan and *Tourism Holdings Ltd v. Charlesworth* [2012] NZEmpC 39 per Travis J. In effect, Mr McBride contends that the Authority has gone further than the Court. This is not accepted.

[21] In *Charlesworth*, the Court held (at para.[51]) that:

... a reasonable contribution for the defendant to make to the plaintiff's costs, ... should be the sum of $10,000. This order will take effect one month after the defendant has obtained full time or substantially full time remunerative employment at the rate of $100 per week. Leave will be reserved to vary the weekly amount if there is evidence that it should either be raised or reduced.

[22] In the present matter, at para.[27], the Authority directed as follows:

The Authority orders that Mr Valensky is to pay to Idea the total sum of $2,500 inclusive of disbursements and that that amount is to be satisfied by a payment at the rate of $50 per week, such payments to

commence one month after Mr Valensky obtains full time remunerative employment.

[23] Furthermore, the Authority provided, as did the Court, that leave was reserved to either party to come back to the Authority to vary those amounts if there was a relevant change in circumstance. In the Authority's opinion then, the determination it has made in the matter is on all fours with *Charlesworth*.

Determination

[24] The Authority is not persuaded that it ought to disturb the orders made in its original costs determination in this matter. The Authority's decision contained in the

12 October 2012 determination referenced as [2012] NZERA Auckland 363 therefore stands.

[25] The Authority does not accept Mr McBride's contention that the Authority has exceeded its remit by going further than *Charlesworth*, the Authority does not accept that it could properly ignore an affidavit of means from Mr Valensky and the Authority is not persuaded that, contrary to his submission, Mr McBride could not have filed additional submissions in reply to Mr Valensky's material, once he became aware of its content. Nor does the Authority accept Mr McBride's contention that it ought to have had regard to the untested briefs of evidence prepared for the investigation meeting in preference to the submissions of counsel.

[26] In the end, Mr McBride makes a number of trenchant criticisms of the Authority's determination. The Authority is not persuaded that those criticisms stand up. In the unusual circumstances of this case, the proper course is for Mr McBride to challenge the Authority's determination which will presumably allow the matters that trouble Mr McBride to be appropriately tested in a judicial forum.

James Crichton

Member of the Employment Relations Authority
