Employment Court of New Zealand

Wanaka Pharmacy Limited v McKay [2021] NZEmpC 181 (19 October 2021)

Last Updated: 27 October 2021

IN THE EMPLOYMENT COURT OF NEW ZEALAND CHRISTCHURCH

I TE KŌTI TAKE MAHI O AOTEAROA ŌTAUTAHI

[2021] NZEmpC 181
EMPC 205/2020

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
AND IN THE MATTER OF	an application for costs
BETWEEN	WANAKA PHARMACY LIMITED First Plaintiff
AND	WANAKA SUN (2003) LIMITED Second Plaintiff
AND	NICOLA JANE MCKAY Defendant

Hearing:	On the papers
Appearances:	T Mackenzie and J Grant, counsel for plaintiffs R Towner, counsel for defendant
Judgment:	19 October 2021

COSTS JUDGMENT OF JUDGE KATHRYN BECK

[1] Wanaka Pharmacy Ltd and Wanaka Sun Ltd were successful in their challenge to the total holiday pay entitlement found to be owed to Ms McKay in the Employment Relations Authority.1 The amount found to be owing was reduced, although to a significantly lesser extent than was sought by the companies. Costs were reserved.

1. *Wanaka Pharmacy Ltd v McKay* [2021] NZEmpC 112; a non-de novo challenge to *McKay v Wanaka Pharmacy Ltd* [2020] NZERA 230 (Member Doyle).

WANAKA PHARMACY LIMITED v NICOLA JANE MCKAY [2021] NZEmpC 181 [19 October 2021]

[2] The parties were unable to agree costs and the companies have now applied for costs to be fixed by the Court. The proceeding had been provisionally assigned a Category 1A categorisation.

[3] Mr Mackenzie, for the companies, notes that the proceedings before the Court were on a non-de novo point on which the companies had been successful. He submits that a Category 2B categorisation is more appropriate given the difficult factual matters and the complexity of the legal issues involved. The amount sought is

$20,076. Mr Mackenzie certifies that actual costs exceed that amount.

[4] Mr Towner, for Ms McKay, opposed the application on strong terms and argues that it was actually Ms McKay who was successful and should be awarded costs. He notes that the award made in the Court was significantly closer to the award made by the Authority (and defended by Ms McKay in these proceedings) than the amount suggested by the companies.

[5] The wider circumstances of the litigation are also cited by Mr Towner as relevant to the Court's exercise of its equity and good conscience jurisdiction. The failure of the companies to make any payment of the amount awarded in the Authority or, in the alternative, to seek a stay of that award, resulted in Ms McKay being forced to undertake compliance proceedings. The awards of holiday pay, as well as the penalties and costs awarded in the compliance proceedings, are said to remain outstanding.

[6] Ms McKay's actual costs were said to be $4,398.75, less than what would be payable under the Scale. It should be noted that, while Ms McKay has undoubtedly incurred costs, she was not represented at the hearing. Mr Towner suggests applying the "yardstick" of two-thirds of costs actually and reasonably incurred. An award of

$3,000 in Ms McKay's favour is sought.

Assessment

[7] The starting point for the assessment of costs is cl 19 of sch 3 to the Employment Relations Act 2000. It confers a broad discretion. As the parties have

noted, the Court has adopted a scale to guide the setting of costs. This scale is not intended to replace the Court's ultimate discretion as to costs.

Success

[8] In considering costs, the starting point is that the losing party should make a contribution to the costs of the successful party, absent exceptional reasons.2 This includes situations in which the success is only partial.3

[9] Determining which party has been successful can be a problematic exercise. Where both parties have had a measure of success, determining which of them is entitled to costs is often a nuanced assessment of competing considerations.4 It is clear that both parties considered they were the successful parties. Both appear to have applied a somewhat simplistic approach to what constitutes success and failure.

[10] The Court of Appeal in *Health Waikato Ltd v Elmsly* noted it is possible, and not uncommon, for parties to have mixed success and for no costs order to be made as a result (costs lying where they fall).5

[11] The companies claim that the challenge was brought on a specific non-de novo point; a point on which the Court found in their favour. They say that simply because the Court found a different figure did not make the challenge unsuccessful. It was argued that this was symptomatic of the difficulty of historical holiday liability disputes. It was also noted that Ms McKay made a late, and unsuccessful, claim for interest on the holiday pay owing, payable from the date of termination.6

[12] Mr Towner points out that, while the quantum owing was reduced, it was only reduced by 27 per cent, where the companies' calculation would have had it reduced by 72 per cent. He submitted that what occurred was not a situation where the

2 *Weaver v Auckland Council* [2017] NZCA 330 at [20].

3. *Health Waikato Ltd v Elmsly* [2004] NZCA 35; [2004] 1 ERNZ 172 CA) at [40]; see also the discussion in *Coomer v JA McCallum and Son Ltd* [2017] NZEmpC 156.

4 *Coomer*, above n 3, at [37].

5. *Elmsly*, above n 3, at [39]; and see for example *Morgan v Tranzit Coachlines Wairarapa Ltd* [2021] NZEmpC 3.
6. That application was, in fact, partially successful. Interest was granted on the holiday pay arrears from the date of judgment.

companies succeeded but to a more limited extent than was claimed. Instead, he characterises it as a challenge in which the plaintiffs were liable to pay the defendant holiday pay and the issue was how much.

[13] I consider that characterisation forced. The companies brought a challenge on specific issues – broadly, the approach to quantification taken by the Authority and the quantum that resulted. Ms McKay, as was her right, opposed the challenge, saying that there was no error of law and that no further deduction in terms of holidays taken was appropriate. Neither of those positions taken by her can be said to have been successfully defended.

[14] In *Water Guard NZ Ltd v Midgen Enterprise Ltd* the Court of Appeal overturned a finding that the plaintiff, which failed in most of its claims and recovered only $68,000 of its pleaded $500,000, was 'unsuccessful'.7 It was said that a party does not lose its status as the successful party just because it failed on other issues or did not achieve the measure of

success contemplated by its pleadings. Those considerations can be properly recognised in other ways such as reducing costs otherwise payable or ordering that costs lie where they fall. That is the approach which I intend to take.

[15] The only parties to have succeeded by any "realistic appraisal" were the companies. While it is true that they did not succeed in reducing the holiday pay owing to the extent sought, but by approximately 27 per cent, they were correct in asserting that the Authority had erred and that more holidays had been taken than those determined by it. As a result, the quantum was reduced. As noted in similar circumstances in *Weaver v Auckland Council*, success on more limited terms is still success.8

[16] The companies were the successful parties. I do not see a basis for departing from the usual rule that a party with respect to a proceeding should pay costs to the party who succeeds.

7 *Water Guard NZ Ltd v Midgen Enterprises Ltd* [2017] NZCA 36 at [13].

8 *Weaver*, above n 2, at [26].

Categorisation

[17] Mr Mackenzie says that the provisionally assigned category 1A is inadequate given the complexity of the matter and should be increased to 2B accordingly. I do not agree that is the case. The legal issues involved were not difficult – Ms McKay was able to appear in person at the hearing and competently make her case, although I accept she received support from Mr Towner.

[18] Nor were the facts complex. The areas of disagreement were straightforward and, where appropriate, concessions were made at the hearing. The most significant difficulty was in the calculations required as a result of the factual findings in relation to leave taken but these were not so onerous as to justify a higher categorisation. The provisional 1A categorisation is confirmed.

[19] Mr Mackenzie prepared a table calculating costs on a 1A basis. It makes an appropriate concession for a stay application filed, and quickly abandoned, by the companies, but to which Ms McKay did file a notice of opposition:9

Item	Proceedings	Days
Commencement		
1	Commencement of proceedings	1.5
Case management		
11	Preparation for first directions conference	0.2
12	Filing memoranda for directions conference	0.2
13	Appearance at conference	0.2
Trial Preparation and hearing		
36	Preparation of briefs of evidence	1
37	Preparation of bundle for hearing	1
39	Preparation for hearing	1.5

9. A table calculating costs on a 2B categorisation was also prepared but it was not necessary to reproduce it in the circumstances.

40	Appearance at hearing	1
(29)	Opposition to interlocutory application	(0.3)
	Total	**6.3**
	Daily rate of $1,590	**$10,017**

[20] I am satisfied that this calculation is appropriate. However, that is not the end of the exercise. Adopting the approach in *Coomer*, having set out the costs which would ordinarily be due to the companies, that figure can then be adjusted to reflect any measure of success that Ms McKay had.10

[21] As Mr Towner spelled out, the reduction in the holiday pay arrears which the companies received fell well short of the reductions originally sought. It is not uncommon that, for example, a compensatory award under s 123(1)(c)(i) might be significantly lower than was sought without this factoring into the assessment of costs. This is not one of those cases. It dealt explicitly with the quantification of Ms McKay's outstanding holiday entitlements. As it happened, the final total was significantly closer to the figure defended by Ms McKay.

[22] Part of the reason for this was that the companies ran an argument that, because Ms McKay's administrative role included responsibility for the payroll, and she had allowed the entitlement to burgeon over time, her entitlement should be reduced to one week per year. This argument was rejected as being without a factual or legal basis. Had it been successful, it would have resulted in a significant reduction in the holiday pay owing.

[23] There is a criticism implicit in Mr Mackenzie's submissions that Ms McKay should not have opposed the challenge if she did not want to risk a liability for costs. That criticism fails to take into account the fact that Ms McKay was confronted by a claim seeking to reduce her holiday pay award by 72 per cent and supplemented with arguments which, in the face of the legislation, were ambitious. Further, it was only

10 *Coomer*, above n 3, at [45].

during the hearing itself that the companies' position in relation to how many holidays they claimed Ms McKay had taken became clear.

Conclusion

[24] While the companies may have been the successful parties, Ms McKay had significant partial success in maintaining the majority of the arrears awarded to her in the Authority, and in rejecting the claims that her entitlement should be reduced due to its age and her responsibility for the payroll. I consider a reduction of 50 per cent in the costs payable to the companies is an appropriate allowance in the circumstances.

Outcome

[25] Unless otherwise agreed by the parties, Ms McKay is to pay $5,000 in costs to Wanaka Pharmacy Ltd and Wanaka Sun Ltd within 21 days of the date of this judgment.

[26] There is no order for costs on costs.

Kathryn Beck Judge

Judgment signed at 4.45 pm on 19 October 2021
