Employment Court of New Zealand

Williams v The Warehouse Limited AC 32A/08 [2008] NZEmpC 107 (17 November 2008)

Last Updated: 22 November 2008

IN THE EMPLOYMENT COURT

AUCKLANDAC 32A/08ARC 8/08

IN THE MATTER OF a challenge to a determination of the Employment Relations Authority

AND

IN THE MATTER OF a claim for costs

BETWEEN KERRY CHARLES WILLIAMS
Plaintiff

AND THE WAREHOUSE LIMITED
Defendant

Hearing: Memoranda received 26 September and 4 November 2008

Appearances: Mark Ryan, counsel for plaintiff
Penny Swarbrick, counsel for defendant

Judgment: 17 November 2008

COSTS JUDGMENT OF JUDGE A A COUCH

[1] In my substantive judgment in this matter (AC 32/08), I dismissed the plaintiff's challenge and reserved costs. I encouraged the parties to agree on costs but they were apparently unable to do so. I have now received memoranda from both counsel.
[2] The substantive case was unremarkable. Mr Williams had been dismissed for serious misconduct. The Authority determined that his dismissal was justifiable. He challenged the whole of that determination and sought a hearing *de novo*. The hearing took 1½ days. The case for both parties was presented economically.
[3] Ms Swarbrick says that the work done by counsel for the defendant occupied 34 hours and that the charge made to the defendant for this work exceeded $12,000 plus GST. This suggests an hourly rate in excess of $350 plus GST per hour.
[4] Clause 19(1) of Schedule 3 to the Employment Relations Act 2000 confers on the Court a broad discretion to

make orders as to costs but, as with all such discretions, it must be exercised judicially and in accordance with principle. The key principles applicable to the Court's discretion to award costs have been set out by the Court of Appeal in three very well known decisions: *Victoria University of Wellington v Alton-Lee* [2001] NZCA 313; [2001] ERNZ 305, *Binnie v Pacific Health Ltd* [2003] NZCA 69; [2002] 1 ERNZ 438 and *Health Waikato Ltd v Elmsly* [2004] NZCA 35; [2004] 1 ERNZ 172.

[5] 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 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.

[6] Ms Swarbrick submits that the costs actually incurred by the defendant were reasonable in their entirety and, apparently on that basis, seeks an award of costs of $8,000. On behalf of the plaintiff, Mr Ryan accepts that the defendant is entitled to an award of costs but submits that the costs actually incurred were excessive and therefore unreasonable to an extent. He submits that an appropriate award would be $5,000.

[7] On the face of it, $12,000 is a large amount of costs to incur, given the nature of this case. The evidence had very largely, if not entirely, been prepared for the hearing before the Authority. The issues were clear. There were no significant issues of law involved. As a result, the matter should have required only a modest amount of preparation for hearing in the Court. In these circumstances, a detailed explanation of the actual time spent and costs incurred was required if the defendant wanted to persuade the Court that the costs actually incurred were entirely reasonable.

[8] Other than a statement of the amount of counsel's time devoted to the matter, I was provided with no information to assist me in assessing the extent to which the costs actually incurred were reasonable. Rather, Ms Swarbrick submitted:

"The hearing required 1.5 days of the Court's time. Using the multiplier of 2.5-3 hours preparation for every hour of Court time, the costs incurred fall within the parameters of what has previously been considered reasonable by this Court."

[9] There are two difficulties with that proposition. The first is that taking a "multiplier" approach is inconsistent with the clear guidelines provided by the Court of Appeal in the cases I have referred to earlier.

[10] The second difficulty is that the cases in which the "multiplier" approach to fixing costs was taken were almost exclusively decided under the Employment Contracts Act 1991. The dynamics of such cases were distinctly different to a *de novo* challenge under the current legislation. Appeals from decisions of the Employment Tribunal tended to have relatively short hearing times but usually required extensive consideration of a transcript of evidence and detailed submissions. Cases heard by the Court at first instance required full preparation of the evidence. If a multiplier were to be used in cases such as this, an appropriate figure would perhaps be 1.5 hours of preparation time per hour of hearing time.

[11] An alternative approach which can be taken in some cases is to apply the costs provisions of the High Court Rules. As the High Court conducts no proceedings similar to a hearing *de novo* before this Court, however, it is difficult to do so in this case.

[12] In these circumstances, I am left with little option but to fix a figure which I regard as reasonable. I fix that figure at $9,000 exclusive of GST. I therefore take a starting point for an award of costs of $6,000.

[13] Ms Swarbrick made a number of submissions apparently in support of an adjustment upwards of that figure. In his memorandum, Mr Ryan responded to those submissions. Without setting them out in detail, I am not persuaded that any of those submissions warrant an alteration to the two thirds starting point.

[14] Although Ms Swarbrick referred to the defendant having incurred disbursements, none were identified either by amount or by nature. I therefore cannot order the reimbursement of any disbursements.

[15] The plaintiff is in employment and there is no suggestion that he is unable to pay a reasonable award of costs.

[16] The plaintiff is ordered to pay the defendant $6,000 by way of costs.

A A Couch

Judge

Judgment signed at 5.00pm on 17 November 2008