IN THE EMPLOYMENT COURT
CHRISTCHURCH

[2011] NZEmpC 86
CRC 29/10

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
AND	
IN THE MATTER OF	an application for costs
BETWEEN	SUSAN LEE WILSON Plaintiff
AND	ABC DEVELOPMENTAL LEARNING CENTRES (NZ) LIMITED Defendant

Hearing: on the papers - memoranda filed 23 December 2010, 14 January 2011, 1 February 2011 and 18 February 2011 - affidavits received 17 June 2011

Judgment: 13 July 2011

COSTS JUDGMENT OF JUDGE A A COUCH

---

[1] The plaintiff's original claims against the defendant comprised a personal grievance alleging unjustifiable dismissal, a second personal grievance alleging unjustifiable disadvantage and a claim for arrears of holiday pay. The Authority dismissed all three claims and reserved costs.[1]

[2] The plaintiff challenged the determination of the second and third claims but not the first. Thus, the issues before the Court were a claim for holiday pay and a disadvantage personal grievance. They were the subject of a de novo hearing on 9 December 2010, at the conclusion of which I gave an oral judgment. I reserved

[1] CA 127/10, 28 May 2010.

costs, inviting the parties to agree if possible or, failing agreement, to file memoranda.

[3] Initially, counsel both filed memoranda which did not relate to the well known principles guiding the Court's discretion to make awards of costs. I issued a minute giving counsel a further opportunity to address those issues and each filed another memorandum.

Costs in the Authority

[4] An issue which then arose was whether costs relating to the Authority proceeding were settled. From their several memoranda, it appeared that counsel were proceeding on differing understandings of the facts. In these circumstances, I issued a further minute to the parties, the operative part of which was:

> [2] In her memoranda on behalf of the plaintiff, Ms Thomas seeks awards of costs for both the proceeding before the Court and that previously before the Authority. An issue arises with the proceeding before the Authority. In her second memorandum, Ms Douglas asserts that all issues of costs there were settled by agreement and submits that the Court therefore has no jurisdiction to make an order. Ms Thomas accepted in her first memorandum that there had been such an agreement but asserted that the respondent "'withdrew' its agreement to this", the implication being that the agreement is no longer binding. She notes that, after the agreement was reached, the respondent filed an application to the Authority for an award of costs. It appears the Authority did not determine that application but the reasons for not doing so are unclear.
>
> [3] Whether the issue of costs in the proceedings before the Authority was effectively settled or not is of considerable importance in my consideration of the claim for costs now made by the plaintiff. There are really two questions to be answered:
>
> a) Did the parties enter into an unconditional agreement regarding costs in the Authority proceeding?
>
> b) If so, was that agreement effectively set aside?
>
> [4] These are both issues of mixed fact and law. Assertions of fact made by counsel in memoranda to the Court are usually uncontroversial and are accepted on that basis without supporting evidence. Where the relevant facts are disputed or unclear, however, the Court can only decide the matter on the basis of evidence.
>
> [5] The parties are invited to provide affidavits setting out the evidence available to them relevant to the two questions I have set out above. Counsel

> may also make further brief submissions on the relevant legal principles if they wish to do so. ...

[5] In response, both Ms Thomas and Ms Douglas swore affidavits setting out the sequence of events and attaching relevant correspondence. From that evidence, the following picture of events emerges:

(a) In its substantive determination dated 28 May 2010, the Authority reserved costs.

(b) On 4 June 2010, Ms Douglas initiated correspondence with Ms Thomas proposing that costs in the Authority be settled by agreement. On 14 June 2010, Ms Douglas offered on behalf of the defendant to accept $1,500. On 22 June 2010, a solicitor in Ms Thomas' firm, Mr Richardson, accepted that offer on behalf of the plaintiff. Both the offer and the acceptance were unconditional. On 23 June 2010, Ms Douglas sent an email asking for payment.

(c) On 25 June 2010, the plaintiff initiated her challenge but did not pay the agreed sum of $1,500. On 29 July 2010, Ms Douglas again wrote to Ms Thomas asking for payment. Mr Richardson responded, saying that Ms Thomas thought it appropriate to withhold payment until the outcome of the challenge was known. Ms Douglas replied that this was unacceptable to the defendant.

(d) On 9 August 2010, Ms Douglas filed a memorandum in the Authority on behalf of the defendant seeking an award of costs of $6,000. Such an order was sought "in light of the [plaintiff's] failure to make any payment towards the [defendant's] costs." Ms Thomas did not respond on behalf of the plaintiff and the Authority made no determination as to costs.

[6] The offer of 14 June 2010 and the acceptance of 22 June 2010 created a contract between the parties. That contract was unconditional and effectively settled the issue of costs in the Authority to that point. That contract could only be set aside by agreement. The evidence does not establish that ever happened. The Court has

no authority to set that contract aside. It follows that the contract of settlement remains intact and effective. Pursuant to it, the plaintiff owes the defendant $1,500.

[7] The difficult issue which now arises is whether the Court should make an order for costs in the Authority to take effect alongside the settlement agreement. While the Court's discretion to make awards of costs is unfettered by statute, it must be exercised in a principled way. The Court will normally be reluctant to make an order for costs which has the effect of undoing or modifying an agreement freely reached between the parties. In this case, it is difficult to understand why the plaintiff entered into the settlement agreement when, presumably, she intended to pursue the challenge which was filed three days later. No explanation has been provided.

[8] On the other hand, it is clearly inequitable that the plaintiff should pay costs in relation to the issues on which she has ultimately been successful. In this regard, I note s 189 of the Employment Relations Act 2000 which requires the Court to make such decisions "as in equity and good conscience it thinks fit."

[9] A further consideration to be taken into account is that a substantial part of the Authority's investigation concerned the plaintiff's claim that she had been unjustifiably dismissed. She was unsuccessful in that claim and did not challenge that aspect of the Authority's determination. It follows that the defendant remains entitled to some contribution to the costs it incurred in resisting that claim.

[10] In the unusual circumstances of this case, I think a just outcome is that costs should lie where they have fallen in relation to the proceeding before the Authority. To achieve that end, I make an order that the defendant pay the plaintiff $1,500 for costs incurred in the Authority.

Costs in the Court

[11] Turning to the proceeding before the Court, the plaintiff has incurred costs of $5,750 inclusive of GST and seeks full reimbursement of that amount.

[12] The usual starting point for fixing costs in the Court is two thirds of the costs actually and reasonably incurred by the successful party. That may then be adjusted up or down to reflect any aspect of the manner in which the case was conducted which unnecessarily affected the costs incurred by the other party.

[13] I am satisfied from the invoices attached to Ms Thomas' second memorandum that costs of $5,750 were actually incurred by the plaintiff. This reflected attendances by Ms Thomas as counsel at a rate of $300 plus GST per hour. I accept Ms Thomas' submission that, having regard to the nature of the proceeding, it was appropriate that the plaintiff be represented by experienced counsel and that the rate charged was reasonable for such counsel. The costs incurred equate to 16.7 hours of counsel's time at that rate. While the issues in this case were not complex or novel, I regard that as a reasonable time for preparation and appearance for a full day's hearing.

[14] In reaching that conclusion, I have had regard to Ms Douglas' submission that some of the time spent by the plaintiff's counsel was unnecessary. In particular Ms Douglas referred to time involved in preparing an amended statement of claim ordered by the Court to remedy deficiencies in the original document and time spent briefing the evidence of witnesses not called. I agree that costs associated with such activities were not reasonably incurred but it is apparent from the invoices to the plaintiff that her solicitors charged for only some of the time actually spent on this matter. Making no allowance at all for that those activities, I find that 16.7 hours was a reasonable time to spend on the necessary aspects of the matter.

[15] It follows that I find the plaintiff actually and reasonably incurred costs of $5,750. On a two thirds basis, this suggests a starting point for an award of costs of about $3,800.

[16] For the plaintiff, Ms Thomas submitted that a greater award ought to be made but did not point to any aspect of the defendant's conduct of the case which would justify such an increase. On the other hand, Ms Douglas submitted that there were two aspects of the manner in which the plaintiff's case was conducted which warranted a reduction of any award from a two thirds starting point:

(a) Deficiencies in the statement of claim which required the Court to direct that amended statement of claim also meant that the defendant had to file a further statement of defence.

(b) The plaintiff's failure to properly quantify her claim for arrears of wages made it more difficult for the defendant to prepare its response.

[17] There is substance in the first of these points and I allow the defendant $300 to compensate it for the costs of preparing a second statement of defence. As to the second point, both parties missed the point in the way they prepared their cases and I am not satisfied that the plaintiff's failure to detail her claim for wages added significantly to the defendant's costs.

Disbursements

[18] For the plaintiff, Ms Thomas claimed the following disbursements:

(a) Counsel's accommodation in Queenstown - $280.00

(b) Photocopying - $135.90

(c) Toll calls - $4.79

(d) Filing fee - $200.00

[19] The filing fee is obviously a proper disbursement and must be allowed.

[20] The claims for photocopying and toll calls are not true disbursements in the sense that they reflect the payment of money to a third party for goods or services. Rather they are part of the normal office overheads of a solicitor's practice. Those claims are not allowed.

[21] As to the claim for counsel's accommodation, Ms Douglas submitted that this ought not to be allowed because the plaintiff could have instructed counsel resident in Queenstown. While that may be so, any saving in cost by doing so would have been greatly exceeded by the additional costs associated with new counsel having to

become familiar with the file. I also accept Ms Thomas' proposition that there are few if any practitioners in Queenstown with experience in Employment Court litigation. The claim for accommodation is allowed.

Conclusion

[22] In summary, my judgment is:

(a) The plaintiff remains indebted to the defendant for $1,500 pursuant to the settlement reached between the parties on 22 June 2010.

(b) The defendant is ordered to pay the plaintiff $1,500 for costs in the Authority.

(c) The defendant is ordered to pay the plaintiff $3,500 for costs in the Court.

(d) The defendant is ordered to pay the plaintiff $480 for disbursements.

A A Couch
Judge

Signed at 12.30pm on 13 July 2011