IN THE COURT OF APPEAL OF NEW ZEALAND

CA320/2010
[2010] NZCA 399

BETWEEN	BRIAN EDEN Applicant
AND	RUTHERFORD & BOND TOYOTA LIMITED Respondent

Hearing: 17 August 2010

Court: Arnold, Ellen France and Stevens JJ

Counsel: Applicant in person
N E Flint for Respondent

Judgment: 30 August 2010 at 2.30 pm

JUDGMENT OF THE COURT

A The application for leave to appeal is dismissed.

B The applicant must pay the respondent costs for a standard application on a band A basis together with the usual disbursements.

REASONS OF THE COURT

(Given by Stevens J)

Introduction

[1] For decision is an application by Mr Eden (the applicant) for leave to appeal against a decision of the Employment Court that he must pay costs to Rutherford & Bond Ltd (the respondent) totalling $6,000.[1] The application is opposed on the basis that the applicant has not identified a question of law of general or public importance arising from the decision of the Employment Court.

Factual and procedural background

[2] The applicant brought a personal grievance under the Employment Relations Act 2000 (ERA) against his former employer, the respondent. On 26 August 2009, one day before the scheduled investigation before the Employment Relations Authority (the Authority), the applicant abandoned the grievance. By that stage, the respondent had incurred $11,870 in costs.

[3] Several months prior to the date when the Authority was due to consider the personal grievance, the parties were involved in a pre-investigation conference. It is not in dispute that one of the topics discussed at the conference was the fact that, if the applicant were unsuccessful, he faced the prospect that an award of costs might be made against him. What was in dispute was the alleged failure by the Authority to explain fully the costs consequences, in particular that the appellant might be liable for costs even if he withdrew his grievance prior to the scheduled investigation by the Authority.

[4] The Authority heard an application for costs by the respondent.[2] It rejected the applicant's contention that he had only decided to abandon the grievance after the Authority refused an adjournment to examine new evidence. However, the Authority also rejected the respondent's contention that the applicant intended to put the respondent to unnecessary expense. It awarded the respondent $4,500 in costs to reflect the applicant's conduct in delaying his decision until the last minute. The applicant appealed against the Authority's decision.

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1 *Eden v Rutherford & Bond Ltd* [2010] NZEMPC 43.

[5] In the Employment Court, the applicant claimed that the Authority had acted contrary to natural justice and thus breached s 157(2) of the ERA by not giving him adequate notice that the respondent could still claim costs even though the personal grievance had been abandoned. Section 157(2) provides:

> The Authority must, in carrying out its role,—
>
> (a) comply with the principles of natural justice; and
>
> …
>
> (d) generally further the object of this Act.

[6] Chief Judge Colgan rejected the applicant's submission:[3]

> There is no statutory requirement for the Authority to so advise a party even if, as in this case, that party is not professionally represented. The issue is governed by cl 15 of Schedule 2 to the [ERA] which provides generally that the Authority "may order any party to a matter to pay to any other party such costs and expenses … as the Authority thinks reasonable." A "party" can include a party to discontinued proceedings. Mr Eden must be presumed to have been aware of the legislation governing the process in which he was engaged.

[7] The Judge also rejected a raft of further grounds that the applicant put forward in challenging the Authority's determination. He refused to consider the respondent's submissions that the amount of costs awarded to it be increased because there was no cross-appeal and the point was raised for the first time in final submissions. He awarded the respondent costs of $1,500 before the Court.

[8] The applicant now seeks leave to appeal to this Court under s 214 of the ERA. Section 214(3) provides:

> The Court of Appeal may grant leave accordingly if, in the opinion of that Court, the question of law involved in that appeal is one that, by reason of its general or public importance or for any other reason, ought to be submitted to the Court of Appeal for decision.

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2 *Eden v Rutherford & Bond Ltd* ERA Wellington WA152/09 5128008, 9 October 2009.
3 *Eden v Rutherford & Bond Ltd* [2010] NZEMPC 43.

Grounds of appeal

[9] The main ground of appeal concerned the nature and scope of the observations of the Authority on costs during the pre-investigation conference.

[10] In his reply to the respondent's notice of opposition, the applicant sought to advance seven further propositions. Although counsel for the respondent challenged most of these as being additional grounds, we propose to treat them as elaborations upon the key natural justice ground.

[11] In his written and oral submissions the applicant contended that the Employment Court erred in failing to give serious consideration to or an explanation of whether the Authority had breached the requirements in s 157(2) of the ERA. The essence of his complaint is that, had he known he would be liable for costs even after withdrawing the grievance, he never would have taken that step in the first place. He claimed that this issue is important for self-represented employees generally as they are reliant on the information and guidance provided by the Authority.

[12] Counsel for the respondent submitted that the applicant had failed to identify an error of law of general or public importance in the Employment Court's judgment as required by s 214(3) of the ERA. Counsel further submitted that there was no error in the Court's finding that the Authority had not erred in awarding costs for the reasons it did. Rather, the applicant seeks to have this Court re-examine the factual aspects of a discretion that was properly exercised by the Authority. Moreover, his proposed ground of appeal is essentially the same as was before the Employment Court.

Discussion

[13] There is no dispute as to the Authority's power to award costs. Clause 15 of Schedule 2 of the ERA provides for a broad discretionary power as follows:

> **Power to award costs**

> (1) The Authority may order any party to a matter to pay to any other party such costs and expenses (including expenses of witnesses) as the Authority thinks reasonable.
>
> (2) The Authority may apportion any such costs and expenses between the parties or any of them as it thinks fit, and may at any time vary or alter any such order in such manner as it thinks reasonable.

[14] Any challenge to the exercise of such discretionary power must demonstrate that the decision considered irrelevant matters or omitted to consider relevant matters, was exercised on an erroneous basis or was plainly wrong.[4] Here the question of the applicant's liability to pay costs was considered not only by the Authority, but also on appeal by the Employment Court. The natural justice ground raised by the applicant was fully considered by Judge Colgan.

[15] We agree with the observations of Judge Colgan quoted at [6] above. It may be entirely proper for the Authority, in the course of a pre-investigation conference, to raise with a party considerations of costs. It will be appropriate in that context for the Authority to make comments or observations which may be of assistance to the parties as to the risks involved and the likely costs consequences. But this does not require the Authority, or the Employment Court for that matter, to give the parties a comprehensive and fully nuanced outline of the costs principles.

[16] We are satisfied that the applicant has not shown that either the Authority or the Employment Court exercised their respective discretions as to costs on an unprincipled or erroneous basis. Neither has the applicant shown that there was any breach of natural justice (or any aspect of s 157(2) of the ERA).

[17] It follows that the applicant has not established that there is a question of law involved in this case. Even if we had been able to discern a question of law in the Employment Court's decision, s 214(3) of the ERA requires that it must be a question of general or public importance. We accept the respondent's submission that there is no such question raised here. Moreover, we are satisfied that no other

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[4] The relevant principles in employment cases were referred to in *Lewis v Howick College Board of Trustees* [2010] NZCA 320.

reason has been established by the appellant as to why the matter should be submitted to this Court for decision on appeal.

Result

[18] The application for leave to appeal must therefore be dismissed. Costs should follow the event; the applicant must pay the respondent costs for a standard application on a band A basis and usual disbursements.

Solicitors:
Davis O'Sullivan, Wellington for Respondent