IN THE EMPLOYMENT COURT
CHRISTCHURCH

[2017] NZEmpC 156
EMPC 140/2017

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	WILLIAM COOMER Plaintiff
AND	JA MCCALLUM AND SON LIMITED Defendant

Hearing: on the papers 18 October, 2 November and 10 November 2017

Representation: R Donnelly, counsel for the plaintiff
M O'Flaherty, counsel for the defendant

Judgment: 8 December 2017

JUDGMENT OF JUDGE K G SMITH

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[1] William Coomer was successful in his personal grievance proceeding in the Employment Relations Authority but costs of $4,500 were awarded against him. The Authority ordered Mr Coomer to pay those costs to JA McCallum & Son Limited within 10 days of the date of the determination.[1] He is challenging that decision as wrong in principle because, he claims, he was successful and should be entitled to an order for costs.

[2] This proceeding is a de novo challenge to the Authority's determination. It was dealt with on an agreed statement of facts and by written submissions. If Mr Coomer is successful, the Court is invited to substitute an amount for costs considered appropriate but no specific sum has been claimed.

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1 *Coomer v JA McCallum & Son Ltd* [2017] NZERA Christchurch 84.

Employment and illness

[3] Mr Coomer was employed by McCallum & Son in 2005 to work as a delivery driver. There was no written employment agreement between them although he had signed a document called "Driver's Responsibilities".

[4] Mr Coomer suffered a significant stroke in January 2015 which rendered him unable to work. Shortly afterwards Mr Wayne McCallum, a director of McCallum & Son, told Mr Coomer that any replacement employee would be employed on a fixed term ending when Mr Coomer was able to return to work.

[5] As part of Mr Coomer's rehabilitation his doctor recommended a resumption of some work. To meet this recommendation Mr Coomer agreed with McCallum & Son to occasionally work on a voluntary basis, meaning without pay, in its factory. That voluntary work took place between 30 March 2015 and 15 February 2016.

[6] On 16 February 2016 Mr Coomer met with Mr Errol Proffit, a McCallum & Son manager, about his return to paid work. At that meeting he was accompanied by his wife, Darlene Coomer, and an occupational therapist, Jane Lyall. Mr Proffit was accompanied by an administrator, Marcie Evans. It is this meeting the Authority concluded led to a personal grievance for an unjustified disadvantage under s 103(1)(b) of the Employment Relations Act 2000 (the Act).

[7] On 4 April 2016, Mr Coomer met with Mr McCallum to discuss his employment. Ms Evans was again present. Mr Coomer was accompanied by his wife and a legal representative from Community Law. The prospect of Mr Coomer returning to work as a driver was discussed at this meeting as it had been at the meeting on 16 February. The agreed statement of facts does not describe in any detail what occurred at this meeting but it was sufficient for Mr Coomer to request that Mr Proffit not supervise him. Mr McCallum declined that request.

[8] On 15 April 2016, Mr McCallum wrote to Mr Coomer offering him a position working in the factory. The proposed hours of work were to be between 6.00 am and 9.00 am for three days a week. That offer was consistent with conditions for

a resumption of work set by Mr Coomer's doctor and occupational therapist. The proposal was for Mr Coomer to work under the Apparelmaster, that is Mr McCallum.

[9] Mr Coomer resigned on 21 April 2016. On 12 May 2016, he was asked to reconsider his resignation but declined to do so. A personal grievance was raised on his behalf on 13 May 2016.

[10] In the Authority Mr Coomer's case was:

(a) That McCallum & Son should be required to pay wages for the work undertaken in its factory;

(b) a penalty should be imposed on McCallum & Son because there was no signed employment agreement; and

(c) he had been constructively dismissed and was entitled to remedies.

[11] The claim of constructive dismissal was based on his treatment by McCallum & Son as he attempted to return to work as a delivery driver. While Mr Coomer was pursuing a constructive dismissal case closing submissions to the Authority invited it to consider an alternative personal grievance if one was thought to have occurred.

[12] McCallum & Son's defence was:

(a) Mr Coomer was not entitled to payment for the hours worked because he was a volunteer;

(b) while there was no signed employment agreement one had been provided to Mr Coomer. He had signed the "Drivers Responsibilities" form and, while that was limited, it set out responsibilities Mr Coomer had and some conditions the company had to maintain; and

(c) at all times it acted as a fair and reasonable employer.

The substantive determination

[13] On 15 May 2017, the Authority released a substantive determination finding that Mr Coomer had not been constructively dismissed but had been unjustifiably disadvantaged and was entitled to remedies.[2] His claim for wages for the rehabilitative activities undertaken in the factory failed because he was found to be a volunteer. The Authority declined to impose a penalty.[3] Costs were reserved.

[14] The Authority's conclusion that there was a personal grievance for an unjustifiable disadvantage resulted from the meeting of 16 February 2016.[4] A finding was made that Mr Proffit's behaviour at that meeting led Mr Coomer to have a sense of frustration and to believe Mr Proffit wished to get rid of him. The Authority held that what occurred was not what a fair and reasonable employer could have done in all the circumstances at the time. McCallum & Son was ordered to pay Mr Coomer $8,000 pursuant to s 123(1)(c)(i) of the Act.

[15] On the face of the determination, therefore, Mr Coomer had been successful in a monetary sense although not to the extent he may have desired.

Costs determination

[16] The parties were unable to agree on costs so a decision about them was required. Mr Coomer sought a contribution of $8,000 towards his costs based on applying the Authority's daily tariff for a two-day investigation meeting.[5] The Authority was also asked to award Mr Coomer's disbursements of $234.89.

[17] That application was premised on costs following the event. Mr Coomer believed he had been successful and was, prima facie, entitled to an award in his favour.

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2 *Coomer v JA McCallum & Son Ltd* [2017] NZERA Christchurch 75.
3 Determinations A, B, C and D.
4 At [87].
5 *Coomer*, above n 1, at [4].

[18] In response McCallum & Son sought costs of $37,087.45.[6] They were calculated on the basis of fees incurred by McCallum & Son for its representative and a claim of $25,000 for business interruption, said to have arisen because it was necessary for its Group Managing Director to attend the investigation meeting.

[19] The Authority referred to its power to award costs in cl 15 of sch 2 to the Act and to the factors to consider when deciding them in the full Court decision in *PBO Ltd (formerly Rush Security Ltd) v Da Cruz*[7] as subsequently affirmed in *Fagotti v Acme & Co Ltd*.[8]

[20] Drawing on *Best Health Products Ltd v Nee*[9] the Authority decided that the case was one of mixed success. On considering the outcome of the substantive determination, it concluded McCallum & Son had been largely successful because Mr Coomer's case related, mostly, to his unsuccessful claim of being constructively dismissed. That claim took up the majority of the time in the investigation meeting.

[21] A broad-brushed assessment was made. The Authority said:[10]

> On standing back, however, I am satisfied that the majority of the time spent in the investigation meeting was spent on allegations which were either found not to be correct, or which did not result in a positive outcome for Mr Coomer. In agreeing that the usual approach of costs following the event should apply, I find that the respondent was "more successful" than Mr Coomer. Therefore, the respondent is eligible for a costs award from Mr Coomer.

[22] Having reached that conclusion, the Authority analysed McCallum & Son's costs claim. There was no basis for the company to be indemnified or for the claim for alleged losses. Credit was given for Mr Coomer having been partly successful. There were no *Calderbank* offers to consider.

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6 At [5].
7 *PBO Ltd (formerly Rush Security Ltd) v Da Cruz* [2005] ERNZ 808 (EmpC).
8 *Fagotti v Acme & Co Ltd* [2015] NZEmpC 135, (2015) NZELR 1.
9 *Best Health Products Ltd v Nee* [2016] NZEmpC 16, [2016] ERNZ 72.
10 *Coomer*, above n 1, at [10].

[23] The Authority decided that it was appropriate to award McCallum & Son the equivalent of the first day's daily tariff of $4,500 and made an order accordingly.

This challenge

[24] Mr Coomer says the Authority made three errors because it failed to:

(a) properly take into account the financial result of its substantive decision;

(b) recognise the plaintiff's claim could not be considered in isolation; and

(c) correctly apply *Best Health Products v Nee* to justify a reversal of the ordinary principle that costs follow the event.

[25] Not surprisingly, McCallum & Son maintains that the Authority's costs decision is a proper exercise of the power in cl 15 of sch 2, and that it was the successful party. It submitted that the Court should not interfere with the decision.

[26] While both parties analysed the Authority's reasons for making the order, which invites a limited challenge addressing the exercise of discretion, the plaintiff has filed a de novo challenge under s 179(1) of the Act. The Court must make its own decision.[11]

[27] Mr Coomer's submissions relied almost exclusively on maintaining he was the successful party and, therefore, no proper basis existed to either make an order against him or to reduce the amount that he would ordinarily be entitled to receive. This success, it was said, stems from the finding that he had suffered a personal grievance. He achieved not only the benefit of that decision but compensation. Reliance was placed on the Court of Appeal decision in *Weaver v Auckland Council.*[12]

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11 Employment Relations Act 2000, s 183(1).
12 *Weaver v Auckland Council* [2017] NZCA 330.

[28] *Weaver* was complex litigation about a leaky home in Auckland. The appellants had sued the vendor and Auckland Council. Other parties had been joined to the proceeding. The appellants succeeded against the Council but only for about half the pleaded loss.[13] That sum was significantly less than the amount offered to them jointly by the defendants and third parties in a *Calderbank* letter about three months before trial.

[29] The High Court Judge ordered costs but divided the assessment of them between the time before and after the *Calderbank* offer was made. The appellants were to pay the Council's costs, including a 50 per cent uplift, for the period after the *Calderbank* offer. The Council was to pay scale costs with an uplift to a third party.

[30] The Court of Appeal began its decision by recording that costs are discretionary.[14] Dealing with who is entitled to costs the Court said: [15]

> But is well settled that the party that lost should pay the costs of the party that won. The Supreme Court in *Shirley v Wairarapa District Health Board*, in referring to what is now r 14.2(a), made clear that the "loser, and *only the loser*, pays", unless there are exceptional reasons.

[31] The appellants were successful: [16]

> In the present case however, the only party to have succeeded by any "realistic appraisal" were the appellants. It is true that they did not succeed to the full extent of their claim but only to roughly half that extent, yet success on more limited terms is still success. We do not therefore see a proper basis upon which the usual rule that the party who fails with respect to a proceeding should pay costs to the party who succeeds should not apply. That said, it is appropriate that the costs ultimately awarded to the appellants should be reduced in accordance with r 14.7(d) because, although the appellants succeeded, the time and resources necessary for the respondent to meet ultimately unsuccessful arguments significantly increased its costs.

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13 At [1].
14 At [19] and see also *Water Guard NZ Ltd v Midgen Enterprises Limited* [2017] NZCA 36.
15 At [20] (footnotes omitted).
16 At [26].

[32] The Court held that limited success, and unreasonable behaviour, can be provided for by reducing costs even, if necessary, to zero.[17]

[33] While acknowledging that *Weaver* was considering costs where the High Court Rules apply the submission for Mr Coomer was that the same principle ought to apply here. Without initiating the proceeding he would not have had either a decision in his favour or compensation. It follows, therefore, that while he had not been completely successful, the events giving rise to the disadvantage grievance were inextricably connected to the other matters investigated.

[34] Conversely, McCallum & Son believes it was more successful when the proceeding in the Authority is fully considered. Reliance was placed on the remedies sought by Mr Coomer, which he did not achieve, to show it had done better than he had. The company pointed out that he had unsuccessfully claimed $15,000 for compensation pursuant to s 123(1)(c)(i) of the Act, payment for 254 hours of work, three months' wages, a $5,000 penalty and costs.

[35] Turning to *Weaver*, McCallum & Son said the case has little or no application because it concerns costs under the High Court Rules. In contrast, it was said, the principles to apply come from *Da Cruz*.

[36] Importantly, McCallum & Son said that establishing the success of one or other party for the purposes of determining costs should not be characterised as a simple economic equation. That submission was to blunt the effect of the financial award. It was also submitted that the determination was consistent with at least one other determination from the Authority.[18]

Who succeeded?

[37] Determining which party has been successful can be problematic. 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. In *Weaver*, the Court said that the appellants were the only party to have succeeded by any "realistic appraisal". That conclusion followed because they obtained a monetary award and a

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17 At [28].

18 *O'Hagan v Waitomo Adventures Ltd* [2011] NZERA Auckland 111.

finding the Council had breached a duty owed to them. It was immaterial that they had not succeeded to the full extent of their claim because "…success on more limited terms is still success".

[38] In the earlier decision of *Health Waikato Ltd v Elmsly*, the Court of Appeal considered costs in the Employment Court, stating they usually follow the event.[19] It observed that in most cases it is clear who has been successful and is, prima facie, entitled to an award.[20] The Court said cases where the parties have mixed success are by no means rare and: [21]

> … in such instances it is not necessarily easy to determine who "won" the case so as to be entitled presumptively to costs.

[39] That difficulty is illustrated by the costs order that was made. In *Elmsly* both parties had spent approximately the same amount of money on the case. Most of that was spent in arguing about issues where, in the end, Health Waikato was successful.[22] However, Health Waikato was required to pay a contribution towards Dr Elmsly's costs.

[40] The Court of Appeal said that the trial Judge's implicit conclusion, that Dr Elsmly had sufficient success at trial to warrant an award of costs, was open to him. The Court had this to say on the entitlement to costs:[23]

> The result of the present case was that Dr Elmsly was awarded relief and it would appear (given that there was no *Calderbank* letter) that he had to go to Court to receive that relief. Conventional practice (probably influenced by the way in which the old payment in rules used to operate) has been to regard a plaintiff in this situation as having an entitlement to costs. While this is no doubt a simplistic and not entirely logical approach, it is reasonably straightforward to apply. Further, it is not unjust to defendants, providing Judges are prepared to react appropriately where there has been a *Calderbank* offer. In any event, whatever the merits of current costs practice,

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19 *Health Waikato Ltd v Elmsly* [2004] 1 ERNZ 172 (CA) at [35], decided before the introduction of the Court's Guideline Scale.
20 At [35].
21 At [35].
22 At [36].
23 At [40].

> there is nothing out of the ordinary in the conclusion of the Judge that Dr Elmsly was entitled to costs.

[41] The comments in *Elmsly* were echoed by the Supreme Court in *Manukau Golf Club Inc v Shoye Venture Ltd*.[24] The Court held that a fundamental principle applying to the determination of costs, in all the general courts in New Zealand, is that they follow the event.[25]

Conclusion

[42] While I accept the submission for McCallum & Son that the Authority is not a court, the fixing of costs by it is subject to the principles in *Da Cruz* and *Fagotti* which acknowledge that costs generally follow the event. Inevitably that involves assessing which party has succeeded. *Weaver* is an illustration of that principle.

[43] I agree with the Authority that it was appropriate to consider costs in this case by standing back and looking at things "in the round" and, in doing so, to conclude there had been mixed success. That only takes this assessment so far. The agreed statement of facts, and the determination, do not disclose why Mr Coomer's success in establishing his personal grievance and being awarded compensation was outweighed by what was perceived to be the company's success. His success, limited as it was, could not have been achieved without lodging a claim in the Authority. Furthermore, there is no evidence Mr Coomer behaved in some inappropriate way or engaged in practices which unreasonably prolonged the investigation.

[44] I find Mr Coomer was the successful party. He is entitled to an award of costs. That conclusion rests entirely on the success he had with his personal grievance and the award made to him.

What to order?

[45] The parties made no submissions on the costs Mr Coomer might be entitled to if an order in his favour is to be made. The approach I take is to adopt the tariff in the Authority, but to reduce it to reflect the measure of success McCallum & Son had. The Authority investigated for two days. Applying its tariff of $4,500 for the

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[24] *Manukau Golf Club Inc v Shoye Venture Ltd* [2012] NZSC 109, [2013] 1 NZLR 305.
[25] At [8].

first day and $3,500 for each subsequent day, that is $8,000. It is appropriate to reduce that sum to $4,500 representing the first day of the investigation to reflect his limited success. Mr Coomer is also entitled to disbursements.

Outcome

[46] Mr Coomer's challenge is successful. The Authority's determination is set aside and this judgment stands in place of it.

[47] McCallum & Son is ordered to pay to Mr Coomer costs of $4,500 for the Authority's proceeding together with disbursements of $234.89.

[48] Costs are reserved. If the parties are unable to reach agreement memoranda can be filed.

K G Smith
Judge

Judgment signed at 4.30 pm on 8 December 2017.