



Employment Relations Tribunal

Decision

Title of Matter: Daniel Sanchez
v
Sheraton Fiji Resorts

Section: Section 236 *Employment Relations Act 2007*

Subject: Costs Decision

Matter Number: ERT Grievance No 165 of 2014
Appearances: Ms M Muir and Ms A Tuiwawa, for the Grievor
Ms M Vasiti and Mr R Singh, for the Employer

Date of Hearing: Thursday 1 November 2018
Friday 2 November 2018

Before: Mr Andrew J See, Resident Magistrate

Date of Decision: 17 July 2019

KEYWORDS: Section 236 Costs Application; Probono Representation; Application of Magistrates Court Rules.

CASES CONSIDERED

1465778 Ontario Inc et al v 1122077 Ontario Ltd et al 82 O.R. 93d) 757
King v King & Ors [2012] QCA 81 (Appeal No 7123 of 2011)
Police Service Commission v Beniamino Naiveli Civil Appeal No ABU0052U/95S (16 August 1996)
Zeman v Quickelberge and Another (C45/2010) [2010] ZALC 122; 2011) 32 ILJ 453 (LC) (23 August 2010)

Background

[1] On 16 January 2019, this Tribunal issued a decision finding that the Grievor had been unjustifiably dismissed in his employment and awarded that the Employer pay compensation in the amount of \$37,670.00.

[2] In these proceedings now before the Tribunal, Solicitors for the Grievor have filed a Notice of Motion (Motion for Costs) seeking costs in the sum of \$7,609.00. This application is a novel one, as the law firm representing the Grievor was on the record as having appeared on a pro bono basis. For that reason, the question of costs as it now arises, raises some interesting issues and requires a look at the powers of the Tribunal more broadly, to consider on what basis, if any, it is to award costs to a successful party.

[3] In the first place it is important to understand what it is that we refer to, when the words 'pro bono' are used. The term comes as a short form expression from the latin phrase 'pro bono publico' which translated into English, means for the good of the public. Whilst it has been said that the pro bono tradition dates to the very beginnings of the legal profession in medieval Europe¹, the widespread usage of the term, has only been located since the 1970's².

[4] It is also noted that even the term 'pro bono' as it is used, has a mixed use meaning and on occasions, is mistakenly used to indicate where work is being 'performed free,' or even for friends at a 'discounted rate',³ rather than for a public good.

[5] Minds will differ as to what the public good actually is, however for the legal fraternity, ordinarily services will be provided pro bono, in cases where otherwise a person would be denied justice because of impecuniosity, or where an issue of public importance needs to be advocated against a backdrop of indifference. In the present case, the subject matter was one where it could be argued had some of the features of a case for the public good, insofar as it dealt with a foreign worker who was recruited and then terminated in his employment in a country far away, in circumstances that were regarded as unjustifiable.

Treatment of the Courts in Similar Cases

[6] Counsel for both parties, have provided the Tribunal with a range of interesting cases that deal with the question of whether or not costs should be awarded to a successful litigant, where that party is being represented pro bono. In the Queensland Court of Appeal case of *King v King & Ors*,⁴ it was held that where a lawyer-client cost agreement had made no provision for fees to be charged and was altered 15 minutes prior to judgment so as to allow legal costs to be recovered, would not justify the awarding of costs on several grounds. Firstly, it was argued that to amend a cost agreement that was required to be in place by virtue of Section 308 of the *Legal Profession Act 2007*, in the manner in which it was, would likely render such amendments invalid, as the promise to accept a retrospective obligation was unsupported by past consideration. Secondly and what was referred to as the 'circularity' of the proposition, was resisted on the basis that, there was no obligation for an applicant to pay costs until a costs order was made and a costs order could not be made until there is a liability in the successful litigant to pay her or his own lawyer's costs. Put simply, no accrued entitlement, no claim.

[7] On the other hand, in the Ontario Court of Appeal, it was held that there was no prohibition on awarding costs in favour of parties who are represented by pro bono Counsel, as the costs were an award to that party and not to its Counsel⁵. Of course an obvious danger to all of this, is that the notion of pro bono representation can become blurred with that which is often referred to as 'no-win no-fee' or speculative representation. Certainly in the present case before this Tribunal, there is no evidence of any cost agreement being in place and so to that extent, the case may be distinguishable from *King's* case. Whether Section 77 of the *Legal Practitioners Act 2007*, would also prevent a 'change of position' in circumstances similar to that of *King's* case, is also something that may need to be considered.

¹ See Feldman J A in *1465778 Ontario Inc et al v 1122077 Ontario Ltd et al* 82 O.R. 93d) 757 at [13]

² See Pearce R in *Lawyer and Public Service, The Historical Perspectives on Pro Bono Lawyering* 9 Am. U. J. Gender Soc. Pol'y & L. 171 (2001)

³ Gratton, N, "Pro bono - a long history" [2000] LawIJV 23; (2000) 74(1)

⁴ [2012] QCA 81

⁵ *1465778 Ontario Inc et al v 1122077 Ontario Ltd et al* 82 O.R. 93d) 757

[8] The Tribunal is of the belief that the preferred situation in such cases, would be for the Pro Bono Cost Agreement to make provision for the recovery of costs, in the event that the legally assisted client is successful. In that way, issues of accrued entitlement that appear of concern in *King's* case, could be avoided. Certainly, the arguments of the Employer in the present case, do not appear to take issue with the right to recover advances. It is hard to comprehend in what other way the Employer would be prejudiced, if the right to costs is available. Certainly costs should be available, where matters have been unnecessarily prolonged and additional costs expended, as a direct result of the unsuccessful party. In other cases, costs should be determined based on the special circumstances and facts of the case.

What Should be the Basis for Making the Award of Costs if One Was to be Awarded?

[9] Section 238 of the Act provides as follows:

(1) The Chief Justice may from time to time make rules for the purpose of regulating the practice and procedure of the Tribunal or the Court.

(2) In the absence of such rules, or where no provision is made for a particular circumstance—

(a) the Magistrates' Courts Rules apply to the proceedings before the Tribunal; and

(b) the High Court Rules apply to the proceedings before the Employment Relations Court.

[10] Whilst the parties have directed the Tribunal to the Schedule 1 of the *Magistrates Court Rules* for the purposes of assessing the costs that can be paid to a Legal Practitioner, this may be a case of 'jumping the gun'. The language of Section 238(2) of the Act needs to be deconstructed. The lacuna must firstly come about in the absence of the Chief Justice making rules for the practice and procedure of the Tribunal **and** where no provision is made for a particular circumstance. It is the second aspect of that qualification that is a stumbling block to automatically accessing the *Magistrate Court Rules*.

[11] In this instance, Section 236 of the Act is a provision that has been made for a particular circumstance, where it states:

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

[12] This provision is clear, as well as prescriptive. It varies in its simplicity from that which is set out within the taxing arrangements of the *Magistrates Court Rules*, yet consistent with the philosophy of the Act and the way in which the Tribunal conducts itself, requires decisions to be made that are reasonable, whilst also allowing for an apportionment of costs where the Tribunal sees fit. The legislators could have easily directed the Tribunal to award costs on a scale basis, or on a solicitor and client basis,⁶ but have not done so.

⁶ Note here the decision of *Police Service Commission v Beniamino Naiveli* Civil Appeal No ABU0052U/95S (16 August 1996) insofar as an award of costs on an indemnity basis is to be understood to be an award in terms of Order 62 Rule 26(1).

[13] As the Employer's Submissions at Paragraph [16] demonstrates, the Tribunal has adequately relied on Section 236 of the Act in previous decisions and on that basis, there is no reason to venture away from that practice. Of course when forming its view as to what is reasonable, the Tribunal would and should rely on a range of guides including, to the extent that it may be relevant, the practice of the Magistrates Court.

The Claim by the Grievor

[14] In its submission, the Grievor has sought costs in the amount of \$5,609.00, including the sum of \$609.00 for disbursements. In many respects the cost of \$5,000.00 for legal services provided by a prominent law firm, is quite modest⁷. It is also noted that the Notice of Motion filed on 13 February 2019, had sought the amount of \$7,609.00.

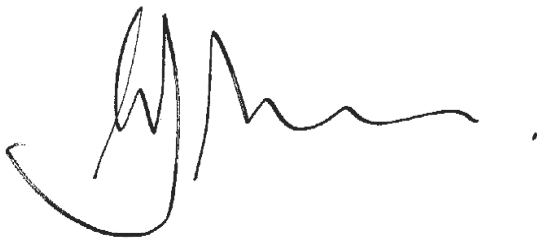
[15] The Tribunal accepts the submission of the Employer, that when assessing what is reasonable, that provisioning for only one lawyer and not two, would be appropriate. An amount of \$1500 per day will therefore be allowed for the legal representation, together with the \$609.00 for disbursements.

[16] In light of the unique factual backdrop to this case, the amount of \$3,609.00 for costs, shall be awarded to the Grievor. That amount should be paid into the trust account of the Solicitors within 28 days hereof. An Order to give effect to this decision will be issued to the parties.

Decision

[17] It is the decision of this Tribunal that:-

- (i) The Employer pay the costs of the Grievor in the sum of \$3,609.00 within 28 days.



Andrew J See
Resident Magistrate



⁷ Although of course that is not the test of reasonableness.