IN THE COURT OF APPEAL OF NEW ZEALAND

CA468/2016
[2017] NZCA 34

BETWEEN	SUNE FARRIMOND Applicant
AND	CAFFE COFFEE (NZ) LIMITED Respondent

Hearing:	27 February 2017
Court:	Kós P, Wild and Brown JJ
Counsel:	C T Patterson for Applicant D J Clark and J S Clark for Respondent
Judgment:	27 February 2017 at 3.22 pm

ORAL JUDGMENT OF THE COURT

A The application for leave to appeal is declined.

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

REASONS OF THE COURT

(Given by Brown J)

Introduction

[1] The applicant, Mr Farrimond, applies for leave to appeal under s 214(1) of the Employment Relations Act 2000 against a costs decision of Judge Corkill in the

Employment Court.[1] Leave may be granted if, in the opinion of this Court, a question of law involved in the proposed appeal is one that, by reason of its general or public importance or for any other reason, ought to be submitted to this Court for decision.[2]

Background

[2] The respondent, Caffe Coffee (NZ) Limited (Caffe Coffee), employed Mr Farrimond in its coffee roasting business. After Mr Farrimond departed to establish his own coffee roasting business, the Village Roaster Limited, Caffe Coffee became aware of what it considered to be numerous breaches of his employment obligations and brought proceedings in the Employment Relations Authority (the Authority). The Authority determined that there had been only one minor breach by Mr Farrimond, namely the incorporation of the Village Roaster without written consent.[3] It concluded that the imposition of a penalty was not justified in the circumstances,[4] and ordered Caffe Coffee to pay Mr Farrimond $14,000 towards his legal costs.[5]

[3] Caffe Coffee challenged the Authority's determinations in the Employment Court on a de novo basis.[6] Judge Corkill ruled that Mr Farrimond breached his contractual obligations when he incorporated the Village Roaster, when he was concerned in its business without the prior written consent of the chief executive of Caffe Coffee and by failing to report to the chief executive on matters that impacted on the performance of Mr Farrimond's duties.[7]

[4] The Judge was not satisfied that the remaining allegations concerning the undertaking of preparatory steps were established and dismissed the causes of action relating to the use of confidential information post-employment and breach of

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1 *Caffe Coffee (NZ) Limited v Farrimond* [2016] NZEmpC 105 [Employment Court costs judgment].
2 Employment Relations Act 2000, s 214(3).
3 *Caffe Coffee (NZ) Limited v Farrimond* [2015] NZERA Auckland 186 at [40] and [65] [Authority substantive judgment].
4 At [72]–[73].
5 *Caffe Coffee (NZ) Limited v Farrimond* [2015] NZERA Auckland 328 [Authority costs judgment].
6 Employment Relations Act, s 179(3)(b).
7 *Caffe Coffee (NZ) Limited v Farrimond* [2016] NZEmpC 65 at [120] [Employment Court substantive judgment].

intellectual property rights. While the claim for damages was dismissed, penalties totalling $10,000 were imposed, half of which were to be paid to Caffe Coffee.[8]

[5] Each party claimed to be successful and sought costs. Mr Farrimond also asserted that Caffe Coffee had unreasonably rejected a Calderbank offer made soon after its challenge was instituted. The Judge determined that Caffe Coffee had a potential entitlement to costs in the sum of $12,889[9] but, taking into account the Calderbank offer, he reduced Caffe Coffee's costs to $6,500.[10] He awarded disbursements of $361.86.[11]

Refinement of proposed questions of law

[6] Mr Farrimond's application for leave to appeal identified five points of challenge to the costs judgment and specified both errors of law and errors of mixed law and fact.

[7] Following a telephone conference and in response to minutes of Harrison J a memorandum for the applicant was filed on 16 November 2016 stating certain questions of law:

> (1) Was there an error of law by the Employment Court in failing to take into account the:
>
> (a) steps the applicant took in each of the proceedings after his Calderbank offers were rejected?
>
> (b) the causes of action the applicant succeeded in defending in each of the proceedings?

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8 At [230] and [233].

9 $10,659 (being 20 per cent of the deemed costs as fixed by the scale assessment) plus $2,230 for interlocutory applications.

10 Employment Court costs judgment, above n 1, at [52].

11 20 per cent of the filing fees ($306.66) and hearing fees ($1,502.64).

(2) Was there an error of law by the Employment Court in awarding, albeit on a discounted basis, the respondent costs for steps taken after it rejected the applicant's Calderbank offers?

(3) Was there an error of law by the Employment Court in finding that it was necessary for the respondent to bring the proceedings in order to obtain vindication?

[8] In a minute of 22 November 2016 which noted the reference to "includes" in Mr Farrimond's memorandum Harrison J directed that the three questions above would be treated formally as the subject of the application for leave.

Consideration of the Calderbank offers

[9] Under the heading "Effect of subsequent Calderbank offers to the issue of costs in the Court" the Judge considered the implications of the Calderbank offer made by Mr Farrimond on 14 August 2015 in full and final settlement of the claim which was renewed on 19 August 2015. The Judge referred to the applicable principles stated by this Court in *Blue Star Print Group (NZ) v Mitchell*[12] and, having determined that Mr Farrimond's offer exceeded what the Judge identified as the total figure for comparative purposes ($13,400), the Judge recognised that r 14.11 of the High Court Rules (HCR) applied.[13]

[10] With reference to proposed question (1)(a) set out at [7] above, Mr Patterson's submissions for Mr Farrimond focus upon the Judge's description at [49] of an offeror's entitlement to an allowance for costs after making an offer which exceeds the amount of a judgment. He contends that the Court erred by failing to apply r 14.11(3)(a) of the HCR which states that in those circumstances the offeror is entitled to costs on the steps taken in the proceeding after the offer was made.

[11] Observing that the Court simply reduced the amount it otherwise would have awarded Caffe Coffee by allowing a discount from $12,889 to $6,500, Mr Patterson submits that the Court should have applied the discretion in r 14.11(3) and awarded

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12 *Blue Star Print Group (NZ) Ltd v Mitchell* [2010] NZCA 385, [2010] ERNZ 446.

13 Employment Court costs judgment, above n 1, at [49].

costs to Mr Farrimond for each of the steps that he took after the Calderbank offers were made.

[12] However that submission fails to recognise the earlier parts of the rule, namely:

> **14.11 Effect on costs**
>
> (1) The effect (if any) that the making of an offer under rule 14.10 has on the question of costs is at the discretion of the court.
>
> (2) Subclauses (3) and (4)—
>
> (a) are subject to subclause (1); …

[13] We accept Mr Clark's submission for Caffe Coffee that, while r 14.11 creates a presumption that there is an entitlement to costs under the circumstances described within the rule, that presumption does not translate into an entitlement and it is still subject to the overriding discretion of the Court recorded in r 14.11(1). We do not accept that the exercise of the Judge's discretion conferred by r 14.11(1) involved any error of law.

[14] The suggested second question of law is in effect the flip side of the contention in question (1)(a). In circumstances where, having discounted by 80 per cent the costs according to scale, the Court then provides a discount to reflect the Calderbank offer, is it apt to depict that as an award of costs to Caffe Coffee for steps taken subsequent to the rejection of the Calderbank offer? We do not think so. We consider that the discount was intended to address the costs allocation for the period subsequent to the making of the offer.

[15] In any event, however, our reasoning by reference to r 14.11(1) in the context of question (1)(a) equally applies here. It is not possible to construct an error of law in the application of r 14.11 from the exercise by the Court of the discretion conferred by that rule.

"Proportionality"

[16] Under this heading Mr Patterson advanced the argument in support of proposed question (1)(b) that the Court erred by failing to award him costs associated with successfully defending that part of Caffe Coffee's claim which absorbed 80 per cent of the hearing time and by failing to consider in terms of proportionality that Caffe Coffee achieved a recovery of only 3.5 per cent of its claim.

[17] In response Mr Clark submitted that, where there has been mixed success between parties in the Employment Court, this Court has recognised that when determining the issue of costs the convention is that the plaintiff should be entitled to costs, citing *Health Waikato Ltd v Elmsly.*[14]

[18] The Judge recognised the principles relating to mixed success, citing *Elmsly*, and awarded costs based on an assessment of the proportion of costs reasonably incurred in establishing the issues on which Caffe Coffee succeeded. There is no error of law discernible in the approach which the Judge adopted.

Vindication

[19] Noting that it may have been appropriate to conclude that the claim was an instance of mixed success where neither party should be awarded costs, the Judge accepted the submission for Caffe Coffee that it was necessary for it to bring the proceeding in order to obtain vindication.[15]

[20] While accepting that in certain circumstances, such as where reputational damage has occurred, a plaintiff may have a legitimate interest in seeking vindication via legal proceedings, Mr Patterson submits that Caffe Coffee, being a corporation, cannot suffer hurt feelings, nor can the justification of vindication trump the interest in having judicial resources efficiently used.

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14 *Health Waikato Ltd v Elmsly* [2004] 1 ERNZ 172 (CA) at [19] and [40].
15 Employment Court costs judgment, above n 1, at [27].

[21] We consider that Mr Clark is correct in his submission that the Judge's use of the word vindication was not directed to reputational issues but simply reflected the point made in *Elmsly* that, where a party has to resort to Court proceedings to obtain relief, conventional practice has been to regard a plaintiff in that situation as having an entitlement to costs.

[22] Mr Farrimond did not accept that he had been in breach of his employment agreement in the respects found by the Judge and accordingly the pursuit by Caffe Coffee of its claim in the Employment Court was justified. While the use of the word "vindication" has the potential to confuse, we are satisfied that there was no error of law in the Judge's approach. We do not consider that the case cited by Mr Patterson, *Jameel (Yousef) v Dow Jones & Co Inc*,[16] has application by analogy in the circumstances of the instant case.

Conclusion

[23] For the reasons stated no error of law has been identified which would entitle this Court to grant leave to appeal under s 214 of the Employment Relations Act. The application for leave to appeal is declined. Mr Farrimond must pay Caffe Coffee costs for a standard application on a band A basis and usual disbursements.

Solicitors:
kplegal Limited, Auckland for Applicant
Wilson McKay, Auckland for Respondent

[16] *Jameel (Yousef) v Dow Jones & Co Inc* [2005] EWCA Civ 75, [2005] QB 946.