IN THE EMPLOYMENT COURT
WELLINGTON

[2010] NZEMPC 43
WRC 40/09

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	BRIAN EDEN Plaintiff
AND	RUTHERFORD & BOND TOYOTA LIMITED Defendant

Hearing: By memoranda of submissions filed on 13 and 29 March and 7 April 2010

Judgment: 21 April 2010

JUDGMENT OF CHIEF JUDGE GL COLGAN

---

[1] This judgment deals with a challenge to a determination of the Employment Relations Authority allowing Rutherford & Bond Toyota Limited (Rutherford & Bond) costs on the company's successful resistance of Brian Eden's personal grievance for unjustified dismissal.

[2] The challenge has been disposed of in an unusual way, by written submissions, although by consent and having regard, in particular, to the economies of its prosecution and defence.

[3] The Authority's costs determination (WA 152/09) issued on 9 October 2009 was appropriately succinct. It recorded that Mr Eden had advised the Authority by e-mail on 26 August 2009 that he no longer wished to pursue his grievance against Rutherford & Bond. That e-mail was received by the Authority only on the day before the scheduled investigation meeting. Mr Eden assumed that by discontinuing

his claims he would also extinguish any liability to the company for costs. Despite the company's submissions to the Authority, it was not persuaded that Mr Eden's intention was malevolently to put the company to the unnecessary expense of preparing for a hearing only to withdraw the proceeding at the last possible moment. Only a contribution to its legal costs was ordered to be paid by Mr Eden. The Authority accepted that the company had been put to expense for which it should be reimbursed and directed Mr Eden to pay, as a contribution to its costs, the sum of $4,500.

[4] Mr Eden claims that the Authority made that decision contrary to s 157(2) of the Employment Relations Act 2000 ("the Act") and, in particular, acting contrary to natural justice. In particular, Mr Eden says he was not given "adequate notice that the respondent could still claim costs even though I had withdrawn my application and not proceeded with the investigative hearing …"

[5] 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 Act 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.

[6] In reliance upon the principle underlying some advice that the presiding Authority member gave to him in a telephone conference call in preparation for the investigation meeting, Mr Eden says that he should also have been made aware of possible outcomes if he discontinued. He says that should have been made known to him in the same manner as the Authority member told him that if he was unsuccessful in his claim on its merits, he might be liable to contribute to Rutherford & Bond.

[7] Further, Mr Eden claims that he was not ever advised "that there was a time limit in withdrawing my grievance and that leaving it to the last minute would be seen as creating costs for the respondent."

[8] There is no time limit for withdrawing proceedings that will affect precisely the question of costs. As a matter of commonsense, however, the closer in time that proceedings are withdrawn before a hearing, the greater will probably have been the time put into their preparation by the other party and, therefore, the costs which the other party will have incurred reasonably and which may be the subject of an order.

[9] Next, Mr Eden complains that the company's case comprised false allegations and that when evidence in support of these was sought by him of the company's counsel, none was forthcoming. Mr Eden appears (because it is not entirely clear from his submissions) to contend that one of the reasons for withdrawing his claim before the Authority was that the member scheduled to investigate it had considered false allegations made by the company and would be likely to be biased against him in the course of the investigation.

[10] There is no validity in this submission however. Had Mr Eden not discontinued his proceeding and the case been investigated by the Authority member on the following day, Mr Eden would have had ample opportunity to have corrected any erroneous impression that the member may have gleaned from an advance consideration of the intended evidence of the parties. Indeed, if Mr Eden had been able to establish that the company's intended evidence was false, as he is very confident he could have, this would probably have strengthened his position in the litigation. Because, however, Mr Eden forwent the opportunity by discontinuing his proceeding, this is not an element that should affect the question of costs in the Authority.

[11] In the same connection, Mr Eden complains that what he said was the Authority's refusal to consider a preliminary Independent Police Conduct Authority report contributed to his decision to withdraw his case. The correctness or otherwise of the Authority's decision to do so is not now a matter that can affect costs following a withdrawal of the proceedings. Rights of challenge and judicial review exist to redress errors and it is not correct for Mr Eden to say, as he does, that he should not be required to contribute to the company's costs because the Authority would not consider certain evidence as a result of which he discontinued his proceeding.

[12] Next, Mr Eden criticises what he says was the Authority's failure to take into consideration the company's refusal to attend mediation and, thereby, precluding the ability to settle the process at an earlier and less costly stage. I accept, however, that there was unsuccessful mediation between the parties on these issues.

[13] Penultimately, Mr Eden submits that the Authority's costs decision does not further the objects of the Act and sets a dangerous precedent for other employees who wish to take personal grievances and represent themselves. He says that the Authority allowed itself to be influenced by the company's lawyers "with legal jargon and innuendo." This refers to his allegation that the company's representatives submitted evidence to the Authority knowing that it would not be considered but having as its purpose "purely to intimidate and to exploit the plaintiffs lack of legal knowledge."

[14] Finally, Mr Eden claims costs and disbursements. Whether that is on this challenge or in the Authority is unclear. His claim is for $3,985.73 which he says says is a reasonable cost for the work carried out by him.

[15] The defendant's position may be summarised as follows.

[16] The defendant says that Mr Eden's claims in the Authority were for $100,000 for lost income and $50,000 for humiliation and distress compensation. The claim was filed in mid February 2009 and set down for an investigation meeting in the Authority on 27 August 2009 but withdrawn at 4.36 pm on the previous day.

[17] The defendant relies on the judgments of this Court in *Data Group Ltd v Gillespie*[1] and *Pars Transport Ltd v Lardelli*[2] the combined effect of which is that, in circumstances where a matter is withdrawn before being heard, the proximity of the withdrawal to the scheduled hearing, and all the circumstances in which the withdrawal was made, may be relevant including, in the latter case, supporting an award for full indemnity costs.

---

[1] AC16/04, 22 March 2004.
[2] WC25/06, 13 December 2006.

[18] The defendant says, and I accept that it is logical, that it had prepared fully for the Authority investigation meeting by the time the matter was withdrawn late on the afternoon before the meeting so that, except for the costs of attending at the investigation meeting, all costs of defending a claim of this size and detail had been incurred.

[19] The defendant further points out that the parties in this case attended mediation in late March 2009 but the matter was not resolved there. It denies that it was obliged to return to mediation after Mr Eden had instituted his proceedings in the Employment Relations Authority.

[20] The defendant opposes the plaintiff's belated claim for costs of almost $4,000 submitting, correctly, that these were not claimed by him in the Authority and are not the subject of a determination by it that is challenged. The defendant points out, also, that the plaintiff is not professionally represented although purports to claim amounts equating to those that might have been incurred if he had been professionally represented.

[21] Next, the defendant submits that Mr Eden's conduct added unnecessarily to its costs. It seeks "a significant contribution" towards these. The defendant calculates that the Authority's award amounted to less than 40 per cent of its actual costs incurred and it seeks now to have these increased to the level of 60 per cent of such costs which it says, together with disbursements, amounted to $11,880.70.

[22] In the absence of a cross challenge to the Authority's determination on costs, however, that claim cannot now be considered. It is simply too late to raise it for the first time in final submissions. As I noted in paragraph 3 of my minute of 1 March 2010, not only has there been no cross challenge, but the statement of defence has not put the Court or the plaintiff on notice that an increase in Authority costs may be sought. Mr O'Sullivan submits that there is no requirement to do so, citing, in support of his proposition, the judgment of this Court in *Yong t/a Yong & Co Chartered Accountants v Chin.*[3] Although, at first instance in this Court, the Judge considered that it was open to do what the defendant now seeks, in the Court of

[3] [2007] ERNZ 322.

Appeal[4] at paragraph [16] of the judgment it is noted that the Court ought not to have allowed an increase in the absence of the other party being put on notice that this was in contemplation. I do not consider that Mr Eden has been given fair notice of this very belated application and I decline to increase the award made in the Authority.

[23] The plaintiff has not established error on the part of the Authority in awarding costs in the amount or for the reasons it did. The challenge is dismissed and, because of the effects of s 183(2), I make an order that Mr Eden is to pay the sum of $4,500 to Rutherford & Bond Toyota Limited as a contribution to its costs and disbursements in the Employment Relations Authority.

[24] The defendant is also entitled to a contribution towards its costs on this challenge which, bearing in mind that it has been dealt with by a telephone conference call and on the papers, I fix in the sum of $1,500. Mr Eden must pay this additional sum to the company.

GL Colgan
Chief Judge

Judgment signed at 9 am on Wednesday 21 April 2010

[4] *Yong t/a Yong & Co Chartered Accountants v Chin* [2008] NZCA 181; [2008] ERNZ 339.