IN THE EMPLOYMENT COURT
AUCKLAND

[2010] NZEMPC 81
ARC 44/09

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
AND IN THE MATTER OF	an application for costs
BETWEEN	JIE CHEN Plaintiff
AND	NEW ZEALAND SUGAR COMPANY LIMITED Defendant

Hearing: (by memoranda from Counsel and Plaintiff)
2 June 2010 and 15 June 2010

Judgment: 8 July 2010

COSTS JUDGMENT OF JUDGE M E PERKINS

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[1] Mr Chen commenced a challenge in this Court against a determination of the Employment Relations Authority (the Authority) dated 3 June 2009. In the determination the Authority held that Mr Chen did not have a personal grievance arising from a warning that had been given to him by the defendant employer in March 2008. The personal grievance related solely to that warning. The matter before the Authority and the challenge in this Court therefore proceeded as a disadvantage grievance only.

[2] In the determination of the Authority the issue of costs was reserved. A subsequent determination dated 20 July 2009 contained an order that Mr Chen was to make a contribution of $2,250 towards the costs reasonably incurred by New Zealand Sugar Company Limited (New Zealand Sugar) in the proceedings before the

Authority. There now appears to be a dispute as to whether Mr Chen filed a challenge to this subsequent determination on costs. I can resolve that by finding that no proceedings challenging the subsequent determination on costs have been filed with the Employment Court.

[3] On 14 May 2010, following a hearing of the challenge in April 2010, I delivered a judgment in which I dismissed Mr Chen's challenge to the substantive determination of the Authority. I reserved the issue of costs and I indicated that I was prepared to receive submissions from the parties in respect of costs both in the Court and the Authority. At that stage I was unaware that there had already been a determination on costs in the Authority. I set timetabling for the filing of submissions on costs and memoranda have now been received from counsel for New Zealand Sugar and Mr Chen who is representing himself in the matter.

[4] In submissions from Mr Towner, counsel for New Zealand Sugar, I am referred to the principal authorities dealing with awards of costs in this Court.[1] The starting point generally adopted in this Court is two thirds of the costs actually and reasonably incurred by the successful parties. However, the matter is always one of discretion and in exercising the discretion the Court can take into account the financial circumstances of the unsuccessful party. In this case Mr Chen in his memorandum has given no indication as to his present financial position. In the circumstances, therefore, I infer that he is in a position to meet any costs award against him. I further note that since issuing my judgment Mr Chen has filed an appeal in the Court of Appeal and indeed he mentions that in his memorandum.

[5] In his memorandum, Mr Towner indicates that the defendant has incurred legal costs amounting to $19,550 in relation to the plaintiff's challenge to the Employment Court. He sets out in detail the attendances that are covered by those costs. He further sets out the way in which his firm managed the matter on a cost effective basis by the use of intermediate solicitors within his firm under his general oversight. Attendance at trial by junior counsel was not charged for and in addition

[1] *Victoria University of Wellington v Alton-Lee* [2001] ERNZ 305;
Binnie v Pacific Health Ltd [2002] 1 ERNZ 438;
Health Waikato Ltd v Elmsly [2004] 1 ERNZ 172.

the defendant received a substantial discount on time attendances. In all the circumstances it is clear that the legal costs claimed are fair and reasonable.

[6] Mr Towner refers to the plaintiff's conduct throughout the proceeding. This, he submits, resulted in attendances which in the normal course of events would not have been required. In addition he has referred to three separate Calderbank offers made to the plaintiff, which Mr Chen declined to accept. In addition to that Mr Towner points out that while the defendant wished to endeavour to avoid trial by the convening of a judicial settlement conference Mr Chen would not agree to that course either.

[7] From Mr Chen's memorandum I infer that he is arguing that the costs now claimed are not fair and reasonable. He does not specifically articulate that but that is what I infer. He disputes that the defendant has managed the matter in a cost sensitive way. He submits that advancing the personal grievance to the Authority and the Court would have been avoided had the defendant addressed claims when they were first raised. I must say that I have some difficulty understanding the basis for that submission.

[8] So far as the Calderbank offers are concerned, Mr Chen submits that they need to be considered in the light of circumstances existing at the time the offers were made, the clarity with which the terms of the offers were made, whether the offers were a genuine attempt to settle and whether the offers remained open for acceptance for a reasonable period. He does not elaborate on those submissions except to say that he considers the period for which the offers remained open should have been 14 days rather than the 7 days allowed by the defendant in this case. He submits that the offers should not be considered as being genuine attempts by the defendant to settle the dispute, that there is no prima facie presumption in favour of an award for indemnity costs if a Calderbank offer is not accepted and that in effect the Calderbank offers in this case had no real element of compromise in them. Mr Chen submits that the defendant is unable to show that he was unreasonable to reject the offers.

[9] So far as the rejection of the judicial settlement conference is concerned Mr Chen pointed out that at a call-over conference prior to trial the presiding Judge indicated that nothing would be gained by further mediation or a judicial settlement conference given that the hearing was likely to occupy only one day in any event. That is recorded in a minute of Chief Judge GL Colgan dated 4 March 2010. However, I recall that in the final call-over discussions which I had with Mr Chen, when I raised it again, he indicated that he would not then agree to a judicial settlement conference. I also note that in a minute dated 12 November 2009, Chief Judge Colgan directed that Mr Chen was to respond to the defendant's request for a judicial settlement conference. That minute was followed by an email letter from Mr Chen to the Registry indicating that he did not agree to a judicial settlement conference.

[10] In dealing with the memoranda I do not agree that the actions of Mr Chen and his conduct throughout the proceeding have added to the attendances required from the defendant to such an extent that on that basis alone indemnity costs should be awarded. There were extra attendances necessary on the issue of disclosure of documents. However, Mr Chen was entitled to pursue his rights in that regard. I reject Mr Chen's submissions as to the Calderbank offers made. I regard his rejection of the final Calderbank offer as unreasonable. That offer contained remedies, which Mr Chen could never hope to achieve from the proceedings. He was offered a sum of money including a waiver of the award of costs by the Authority. Against the circumstances giving rise to his claim the offer was more than reasonable.

[11] Mr Chen has represented himself throughout these proceedings. That was his right and of course this Court has a long history of accommodating litigants in person and lay advocates. However, there are consequences which must follow where proceedings are prolonged or unnecessarily continued through obstinate refusal to accept the weaknesses in the cause. That came very much to the fore in *Gates v Air New Zealand*.[2]

[2] [2010] NZEmpC 26.

[12] In this case Mr Chen's refusal to accept the reasonable proposal contained in the final Calderbank offer has forced the defendant to proceed unnecessarily to trial and incur the substantial costs involved in preparation for that as well as attending the hearing itself. As I indicated in my judgment of 14 May 2010, matters ancillary to or collateral to the primary issue were raised in the pleadings and at the hearing itself. In having to answer those matters the defendant has also incurred further costs.

[13] In all of the circumstances I consider that it is appropriate in this case to award full indemnity costs against the plaintiff in the sum of $19,550. As I have indicated there is no record of Mr Chen filing a challenge to the Authority's determination on costs. There is an inference in paragraph 1.1 of his memorandum that he challenges the Authority's cost determination. If that is indeed the case then for the sake of certainty I confirm the determination of the Authority and order that in addition Mr Chen is to pay the costs award of $2,250.

M E Perkins
Judge

Judgment signed at 9 am on Thursday 8 July 2010