

**IN THE EMPLOYMENT COURT
AUCKLAND**

**[2011] NZEmpC 54
ARC 59/10**

IN THE MATTER OF a challenge to a determination of the
Employment Relations Authority

BETWEEN BRENDAN MADDERN
Plaintiff

AND WORLDXCHANGE
COMMUNICATIONS LIMITED
Defendant

Hearing: On the papers
(in response to memoranda dated 29 March, 8 April and 20 May
2011)

Counsel: The Plaintiff self litigating
Ms Claire Mansell, Counsel for the Defendant

Judgment: 27 May 2011

COSTS JUDGMENT OF JUDGE A D FORD

[1] In my substantive judgment¹ dated 14 March 2011, I held that Mr Maddern had succeeded in his challenge to a determination of the Employment Relations Authority (the Authority) which had rejected his disadvantage personal grievance. There were two grounds to his challenge and I upheld one of those grounds which related to a complaint Mr Maddern had made about the actions of Mr Moore, the defendant's operations manager. I awarded Mr Maddern compensation for non-economic loss in the sum of \$3,000. I also specifically recorded that, although he had succeeded on only one limb of his two-part challenge, it was a significant

¹ [2011] NZEmpC 21.

success and had he been represented by counsel he would have been entitled to an award of costs.²

[2] Apart from his disadvantage personal grievance, Mr Maddern had also claimed before the Authority that he had been unjustifiably dismissed by the defendant. In dismissing both of his claims the Authority awarded costs against Mr Maddern in the sum of \$6,300.³ Mr Maddern challenged that costs award but his challenge did not form part of the case before me. The hearing before me was confined to the disadvantage personal grievance challenge. In my judgment I invited the parties to reach an agreement on the issue of costs which would avoid the need for further involvement by the Court. Unfortunately, agreement did not prove possible. There are, therefore, two issues still to be determined, namely, Mr Maddern's challenge to the Authority's award on costs and his claim to costs in this Court.

[3] Ms Mansell filed a helpful memorandum dated 8 April 2011 confirming that, upon receipt of my judgment, she had taken the initiative to try to reach a compromise with Mr Maddern on the basis that "both parties walk away with no issue as to costs". That proposal was not accepted. Counsel therefore submitted, for the reasons expanded upon in her memorandum, that the costs award against the plaintiff in the Authority of \$6,300 should substantially stand and that the plaintiff, as a litigant in person, should not be awarded any costs in relation to the Court hearing.

[4] In rejecting Ms Mansell's settlement proposal, Mr Maddern indicated that he would be seeking costs in relation to the Court hearing of \$6,000 together with disbursements of \$700.

[5] Subsequently Mr Maddern filed a 20 page memorandum (with attachments) setting out his comprehensive submissions on the issue of costs in this Court and in the Authority. I am now in a position, therefore, to deal with both of the outstanding matters relating to costs.

² At [55].

³ AA 212A/10, 15 October 2010.

[6] The thrust of Mr Maddern's submissions in relation to the costs award in the Authority appears to be that no costs should be awarded against him on the grounds that the defendant was "solely responsible for the costs incurred at the Authority level". In this regard, Mr Maddern contended that the defendant "intentionally misled the process at the Authority level in order to obtain a favourable result." Several grounds are put forward in support of that submission but there was no finding to that effect by the Authority and there was certainly no basis for such a submission on the evidence presented by the defendant in this Court. The reality is that Mr Maddern initiated the claim before the Authority and he did not seek to challenge the Authority's finding that he had not been unjustifiably dismissed. He did, however, substantially succeed in his challenge to the Authority's rejection of his disadvantage personal grievance claim.

[7] The investigation meeting before the Authority occupied two days. In all the circumstances, and having regard to the final outcome, I consider that an appropriate award for costs in the Authority would have been \$1,500 in favour of the defendant and in terms of s 183(2) of the Employment Relations Act 2000 the determination of the Authority on this matter is set aside and this decision now stands in its place.

[8] In relation to the issue of costs in this Court, Mr Maddern now claims a total sum of \$17,500 along with receipted disbursements amounting to \$770.88. His claim is said to be based on the allowances provided for in the High Court Rules.

[9] Counsel for the defendant acknowledged that costs are always a matter for the Court's discretion but she submitted that such discretion must be exercised in accordance with settled principles and that any award for costs in favour of the plaintiff, as a lay litigant, should be confined to proven disbursements such as "legal costs, filing fee[s] etc".

[10] In my substantive judgment I noted that the general practice of this Court is that costs are not awarded to a litigant in person. Nevertheless, I opined that having regard to the significant costs award (as it then stood) made against the plaintiff in the Authority compared with the quantum of my non-economic award, this might have been one of those exceptional cases justifying a costs award in order to

properly reflect the overall justice of the case. I am now satisfied however, that any potential injustice has been remedied by my decision on the plaintiff's challenge to the Authority's costs award.

[11] I have fully considered the detailed submissions on the issue filed by Mr Maddern, which I am bound to say show impressive research, but I do not consider that it would be appropriate for this Court to depart from the general practice referred to in the previous paragraph. The Court of Appeal has very recently reaffirmed that lay litigants are not entitled to costs.⁴

[12] The end result of this judgment is that the plaintiff is entitled to his compensatory award of \$3,000 together with proven disbursements totalling \$700 (the additional \$70 claimed was not incurred in connection with the case before me). The costs award in the Authority of \$1,500 can be offset against that figure meaning that the plaintiff is entitled to have judgment entered in the net amount of \$2,200 and I so order.

A D Ford

Judge

Judgment signed at 12.30 pm on 27 May 2011

⁴ *Clifford Lamar Ltd v Gyenge* [2011] NZCA 208 at [12].