

**IN THE EMPLOYMENT COURT  
CHRISTCHURCH**

**CC 14/09  
CRC 31/08**

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

BETWEEN GORRIE FUEL (SI) LTD  
Plaintiff

AND NATHAN SCOTT  
Defendant

Hearing: 7 October 2009  
(Heard at Christchurch)

Appearances: Penny Shaw, counsel for plaintiff  
Defendant in person

Judgment: 7 October 2009

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**ORAL JUDGMENT OF JUDGE A A COUCH**

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[1] This matter comprised a challenge by the plaintiff against a determination of the Authority in favour of the defendant (CA138/08, 18 September 2008).

[2] The Authority determined that Mr Scott had been unjustifiably dismissed and that the plaintiff had failed to pay him wages owing. The Authority awarded Mr Scott remedies in respect of both aspects of the matter. Those remedies were summarised in paragraphs [23] to [25] of the Authority's determination.

[3] The challenge was filed in the Court and duly served on the defendant who did not file a statement of defence within the prescribed time. Subsequently, however, Mr Scott applied for an extension of time for filing a defence to the proceedings.

[4] That application was opposed by the plaintiff who filed a notice of opposition and a detailed affidavit in opposition. As a result, I held a hearing in chambers on 4 May 2009 to deal with the application for extension of time. In the course of that hearing the plaintiff, who was then represented by Mr Gorrie as its agent, withdrew its opposition to the application. In light of that, and on the basis of my assessment of the merits of the matter, I granted the application.

[5] In paragraph [4] of my minute dated 4 May 2009, I made some observations about the manner in which the application had been made and the reasonableness of the opposition to it:

[4] I reserved costs in respect of the application for extension of time but made some observations to be taken into account in the event that costs do need to be fixed. The application was originally filed without any evidence in support. When it was drawn to Mr Scott's attention that he would need to provide evidence, he did so in a manner that was unsatisfactory and the evidence itself was also equivocal in several respects. I note also that it was only at the hearing today that Mr Gorrie and I became aware that Mr Scott had retained counsel. In these circumstances, the plaintiff's opposition was not unreasonable. Mr Gorrie's decision in the course of the hearing to withdraw the plaintiff's opposition was also responsible and ought not to be held against the plaintiff with respect to costs.

[6] I made those observations at the time because I did not want it thought that the withdrawal of opposition in the course of the hearing should necessarily result in indemnity costs being awarded to the defendant.

[7] At that hearing on 4 May 2009, the scope of the issues before the Court was narrowed when Mr Gorrie accepted on behalf of the plaintiff that the claim for arrears of wages was proper and ought to be paid. As a result, the remaining issues were the challenge to the personal grievance and the remedies awarded to Mr Scott in respect of it.

[8] I made the further observation at that time that, as the remedies in issue amounted to only \$2,300 or so, the matter clearly did not warrant the cost of a Court hearing. I also noted that both parties seemed to agree with that proposition. Consistent with it, I directed the parties to further mediation pursuant to s188(2) of the Employment Relations Act 2000.

[9] I am informed that mediation duly took place but did not result in a resolution of the matter. I then conducted a further telephone conference with Mr Gorrie and Mr Scott at which I gave directions for a de novo hearing of the matter and set a timetable for all the events that needed to occur by way of preparation for that hearing. Broadly speaking, those events have occurred and the matter came on for a de novo hearing today. Both parties have prepared fully for that hearing.

[10] A factor which was introduced into the situation very recently is that, apparently some time in the last week, the plaintiff instructed counsel in the person of Ms Shaw. On behalf of the plaintiff, she sought an adjournment of the hearing today. While I did not rule on that application, I made it clear in the course of discussion with counsel that I was unimpressed with the grounds upon which it was made. I then invited the parties to discuss further whether the matter could be resolved without the need for a hearing and took an adjournment to enable them to have that discussion.

[11] After that adjournment, Ms Shaw on behalf of the plaintiff withdrew the challenge. The effect of that was to leave the determination of the Authority undisturbed and the remedies awarded by the Authority still payable to the defendant.

[12] On his own behalf, Mr Scott has sought reimbursement of costs he has incurred in relation to these proceedings. Very helpfully, he set these out in a schedule to which he attached copies of various invoices. The costs sought fall into several categories which I now deal with.

[13] Firstly, although he appeared in person throughout most of the proceedings, Mr Scott did incur some legal fees. These totalled \$1,657.94. The relevant invoices were provided. Legal services for which the fees were charged were partly in relation to the application for an extension for time which I dealt with on 4 May 2009 and partly in relation to general advice regarding the proceedings.

[14] Ms Shaw submits that Mr Scott ought not to be reimbursed at all for the costs incurred in relation to the application for extension of time because that would have

been unnecessary had he complied with the rules of Court. There is obviously some force in that submission. On the other hand, it can properly be said that, had the challenge as a whole not been initiated and had the application for extension of time not been opposed, then it would not have been necessary to incur those costs. Another factor here is that I found that the application for extension of time was justified on the merits and I granted it. A further factor is that the matters dealt with at the hearing on 4 May 2009 were not confined to the application for extension of time.

[15] On balance, and giving some significant weight to Ms Shaw's submission on this point, I find that Mr Scott is justly entitled to a contribution to the costs of representation he incurred in relation to the application for extension of time but only to the extent of 50 percent.

[16] As to the other costs of representation incurred by Mr Scott I see those in a different light. The plaintiff has elected to bring this matter to an end at the very last minute by unilaterally withdrawing its challenge. The overall effect of this is that the plaintiff has put Mr Scott through a lengthy and demanding process for no purpose.

[17] On the material available to me, it seems that the challenge was without merit. The matter was a very straightforward one and the reasons given by the Authority for its determination were compelling. The briefs of evidence provided to the Court did not support a conclusion any different to that reached by the Authority. In particular, the Authority's determination was founded on serious deficiencies in the process which led to Mr Scott's dismissal. In his brief of evidence, Mr Scott confirmed those deficiencies of process and, in his brief of evidence, Mr Gorrie did not deny them. He simply made no reference to them. Because the proceedings were withdrawn I did not have the benefit of hearing the answers to questions that might have been asked in cross-examination but it seems to me that, if the plaintiff did not accept that there were the deficiencies in the dismissal process found by the Authority, that would have been the subject of the evidence-in-chief by Mr Gorrie.

[18] In these circumstances, I think it appropriate and just that Mr Scott should be fully reimbursed for the balance of the legal fees he has incurred. It is not clear from the invoices for those legal fees exactly how much was incurred directly in relation to the application for extension of time and how much was incurred in relation to services and advice on other issues. Overall it seems to me appropriate to award Mr Scott a total of \$1,000 by way of reimbursement of costs.

[19] The next category of the claim made by Mr Scott was for disbursements. He produced receipts for disbursements totalling \$57.60. I accept that this expenditure was properly incurred in relation to these proceedings and I award that sum.

[20] The third category sought was for travel in relation to these proceedings. Mr Scott sought the costs of travelling to and from the Court and the office of his solicitors. The total sought was \$25.20. In my view that was also a cost necessarily incurred and for which Mr Scott ought to be reimbursed.

[21] The fourth and final category for which payment was sought was for the loss of wages incurred as a result of the need for Mr Scott to attend the hearing on 4 May 2009 and to both prepare for and attend the hearing today. On this issue, and on the issue of travelling costs, I had Mr Scott sworn and obtained some evidence from him. What that evidence disclosed in relation to the loss of wages was that the nature of Mr Scott's employment is such that, if he needs to take time off, he can do so only in whole days and that the amount of reimbursement sought on each occasion reflected the daily rate of his base salary.

[22] On this issue, Ms Shaw questioned whether lost wages ought to be considered in relation to the hearing on 4 May 2009 and whether it was necessary for Mr Scott to take a day off in order to prepare for the hearing today. In relation to the hearing of 4 May 2009, I take the same approach as I did to costs, namely, I award Mr Scott half of the sum sought which is \$77.83. I am satisfied that it was entirely reasonable and necessary for Mr Scott to have spent a day in preparation for the hearing today particularly in light of the memorandum of counsel filed last Friday seeking an adjournment. I accept also that Mr Scott necessarily spent a great deal of other time on preparing his responses at each stage of this proceeding. It goes

without saying that Mr Scott needed to be here today. So, I award him a further \$317.76 in relation to lost wages yesterday and today.

[23] In addition to these matters that I have dealt with, Mr Scott did also seek various other sums which I declined to consider. Some of these were in relation to the proceedings before the Authority and, to the extent that they could be raised, they should have been raised in the context of the Authority's consideration of costs. Mr Scott also sought a general sum of \$50 for what he described as "*internet, phone and power*". I regard that as too general to be susceptible of reimbursement.

[24] In summary, the plaintiff is ordered to pay Mr Scott the following sums by way of costs and disbursements:

Costs	\$1,000.00
Clerical disbursements	\$57.60
Travel	\$25.20
Lost wages	\$395.59

A A Couch  
Judge

Oral judgment delivered at 11.45am on 7 October 2009