



Employment Court of New Zealand

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Chen v Banclogix Limited [2012] NZEmpC 28 (22 February 2012)

Last Updated: 28 February 2012

IN THE EMPLOYMENT COURT AUCKLAND

[\[2012\] NZEmpC 28](#)

ARC 37/10

IN THE MATTER OF a challenge to a determination of the

Employment Relations Authority

AND IN THE MATTER OF an application for costs

BETWEEN FRANK CHEN Plaintiff

AND BANCLOGIX LIMITED Defendant

Hearing: by memoranda of submissions received on 21 October 2011 and 14

November 2011 and affidavit dated 23 November 2011

Judgment: 22 February 2012

COSTS JUDGMENT OF JUDGE A D FORD

[1] The plaintiff was unsuccessful in his challenge to the determination^[1] of the Employment Relations Authority which held that his unjustified dismissal claim had not been raised within the 90-day statutory limitation period and that the delay in raising his grievance had not been occasioned by any exceptional circumstances in terms of s 114(4)(a) of the [Employment Relations Act 2000](#) (the Act). In my substantive judgment^[2] dated 3 October 2011, I invited the parties to endeavour to reach agreement on costs but agreement did not prove possible and the Court must now determine that issue.

[2] Ms Joanne Douglas, counsel for the defendant, filed a helpful memorandum

confirming that no steps had been taken by the plaintiff to meet the Authority's costs

award of \$3,000. In this Court, Ms Douglas sought an award of \$11,000 which was

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stated to be approximately two thirds of the defendant's actual costs. Invoices were produced recording limited details of counsel's actual attendances but the most significant invoice is one dated 26 September 2011 for a total figure (including GST) of \$8,382.24 for preparation work and attendances associated with the two-day hearing.

[3] I accept that the costs claimed in the invoice dated 26 September 2011 on account of preparation work and attendances associated with the Court hearing are reasonable. Some of the other invoices for preparation of amended pleadings appear to be excessive and I am not prepared to include the additional claims for expenses. The notations "Parking", "Taxis (x4)", "Expenses", "Admin Fee" and "Courier Expenses" are all too vague to be meaningful.

[4] I am prepared to accept that, based on the information before me, the starting point for assessing the defendant's reasonable costs, after applying the two thirds rule in *Binnie v Pacific Health Ltd*,^[3] would be a figure in the order of \$8,000. In the normal course of events, that starting point would then need to be adjusted taking into account factors claimed to

justify an increase or a decrease. I do not see the need to make any adjustments to the starting figure.

[5] Counsel for the plaintiff, Dr Zhixiong Liao, claims that because of Mr Chen's health and financial situation, he is not in a position to bear the costs claimed by the defendant. I accept that there is significant substance in that submission. An affidavit filed by Mr Chen as to his health and financial situation was accepted by the defendant without comment. I think that that was a responsible reaction from the defendant because there was medical evidence produced at the hearing confirming treatment the plaintiff had undergone at North Shore Hospital, about the time of his dismissal in 2008, on account of his mental health condition.

[6] The plaintiff had been employed as an IT professional but he has been unsuccessful in attempting to obtain another position in the IT industry. Through a Work and Income subsidy, he was able to obtain a labouring job at a New World

Supermarket, "shelving goods" for a short period but, in his own words:

... finally I had to leave there as the owner told me that I was not competent to do the physical job and I had many sick days. Now, I am trying hard to find a job which I could do under my health condition. ... I have to support my family, I am in a financial hardship. I am not able to afford anything other than the essential necessities of daily life.

...

[7] The Court has a broad discretionary power under cl 19 of sch 3 of the Act in awarding costs. That discretion must, however, be exercised in a principled way. The primary principle is that in the normal course costs will follow the event but, as Chief Judge Colgan noted in *Musa v Whanganui District Health Board*,^[4] "this is not

an immutable rule". In *Bay Milk Distributors Ltd v Jopson*^[5] the Chief Judge made

the observation that, "the Court will not make an award of costs, the effect of which is to drive a person into, or further into, penury". In that case, the plaintiff sought a costs award against the defendant who claimed to be impecunious and unable to pay costs. He was unemployed in receipt of a domestic purposes benefit. The Chief Judge was, nevertheless, able to make the following observations:^[6]

... Mr Jopson's work record disclosed by evidence in the case is that he is a capable enthusiastic and committed employee who this Court is confident will be able to work for reasonable remuneration before too long.

...

On that basis, the Court ordered a reduced award of costs to be paid off at the rate of

\$50 per week commencing one month after Mr Jopson gained full-time remunerative employment.

[8] In relation to Mr Chen, I am unable to share the confident outlook the Chief Judge expressed about Mr Jopson's employment prospects. For one thing, Mr Chen has considerable difficulty with spoken English. This was commented upon by Judge Travis in a chambers minute dated 22 September 2010 when the Judge observed, "I had particular difficulties in following what Mr Chen was endeavouring to say to the Court." In the hearing before me, Mr Chen was completely dependent upon a qualified interpreter. Of even more significance,

however, was the medical evidence produced at the hearing relating to Mr Chen's

mental health condition and his associated general health problems. There is no need for me to go into the particulars of that evidence but it must be highly relevant to his employment prospects. Suffice it to say that I cannot be confident that Mr Chen will be able to obtain any form of remunerative employment within the foreseeable future.

[9] I am satisfied that any order of the Court requiring Mr Chen to make payment of an award of costs at this point in time would result in undue hardship. The Court has power, however, under cl 19(2) of sch 3 of the Act to vary or alter a costs award at any time in such manner as it thinks reasonable. Clause 19 reads as follows:

19 Power to award costs

(1) The Court in any proceedings may order any party to pay any other party such costs and expenses (including expenses of witnesses) as the Court thinks reasonable.

(2) The Court may apportion any such costs and expenses between the parties or any of them as it thinks fit, and may at any time vary or alter any such order in such manner as it thinks reasonable.

[10] I was disposed to order that costs lie where they fall subject to reserving leave allowing the defendant to have its application re-opened in the event that the plaintiff obtains remunerative employment. It seems to me, however, that before the Court can exercise its jurisdiction under subclause (2) varying or altering a costs award, it is necessary for there to be an actual award made under subclause (1). On that basis, therefore, I order Mr Chen to pay the defendant's costs in the sum of

\$8,000 but, at the same time, I order an indefinite stay of that award. I reserve leave for the defendant to subsequently apply to have the stay uplifted in the unlikely event

of the plaintiff being able to obtain remunerative employment.

Judgment signed at 1.15 pm on 22 February 2012

A D Ford

Judge

[1] [AA 128/10](#).

[2] [\[2011\] NZEmpC 122](#).

[3] [\[2003\] NZCA 69](#); [\[2002\] 1 ERNZ 438 \(CA\)](#).

[4] [\[2010\] NZEmpC 143](#) at [11].

[5] [\[2010\] NZEmpC 34](#) at [7].

[6] At [7].

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