

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

CA 69A/09
5151631

BETWEEN BYUNG CHUL KIM
 Applicant

AND KENZO LIMITED
 Respondent

Member of Authority: James Crichton

Representatives: No appearance by Applicant
 Susie Tait, Counsel for Respondent

Submissions received: 7 August 2009 from Applicant via interpreter
 10 July 2009 from Respondent

Determination: 24 August 2009

COSTS DETERMINATION OF THE AUTHORITY

Introduction

[1] By determination dated 27 May 2009, the Authority resolved the employment relationship problem between these parties by issuing a number of orders. There was to be a payment of unpaid holiday pay to the applicant (Mr Kim) by the respondent (Kenzo). Mr Kim's claims of unjustified dismissal and breach of the good faith obligation by Kenzo were both dismissed and Kenzo's counterclaim against Mr Kim for payment of unworked notice was successful along with Kenzo's claim that Mr Kim had breached his employment agreement by working for an opposition restaurant while still obligated to Kenzo.

[2] Having made those orders in the original determination, I then directed that counsel for the parties were to engage with each other and reach decisions about how those orders of the Authority were to be implemented, and at the same time deal with the issue of costs.

The discussions between the parties

[3] By email dated 3 June 2009, some six days after the issue of the substantive determination, counsel for the applicant Mr Kim sought leave to withdraw from the matter and indicated that Mr Kim would deal directly with counsel for Kenzo in respect of the implementation of the Authority's orders and the question of costs.

[4] According to the submissions now filed on behalf of Kenzo, those discussions have effectively gone nowhere for whatever reason. Kenzo, in those submissions, now seeks orders from the Authority to implement the original decision together with an order in respect of costs.

[5] In respect of the application for costs from Kenzo, it is claimed that despite the award made in Mr Kim's favour for the unpaid holiday pay, Kenzo was effectively the successful party and is entitled, as a consequence, to an award of costs.

[6] Further, Kenzo contends that by reason of the unnecessarily expensive way in which Mr Kim sought to progress his claim, there ought to be an award of indemnity costs or at least a more than usually significant award of costs.

[7] I note that there is no submission on either the costs issue or the implementation of the Authority's substantive orders from Mr Kim. Given his decision to dispense with his counsel the absence of submissions is not surprising. I am satisfied that Mr Kim's failure to engage with the process of resolving these orders is simply a continuation of his avoidance behaviour which was self-evident at the investigation meeting. I have decided to proceed to determine the issues notwithstanding Mr Kim's failure to engage.

[8] Because Mr Kim had not responded to the costs issue, I directed that Kenzo's costs submission be made available to him and that he be provided with a translation of them. Through that process Mr Kim has now indicated that he will do as the Authority directs, that he is earning \$1000 per fortnight and pays his former counsel at the rate of \$100 per week. He asks whether payment by instalments is possible and notes that he is *not a man with much money*.

The legal principles

[9] The principles that apply to the setting of costs in the Authority are well known and have been set out in a number of recent decisions. Of particular note is the decision of the Full Court in *PBO Ltd v. Da Cruz* AC2A/05 in which Judge Shaw, writing the decision for the Full Bench, identifies the salient principles, comments approvingly about the tariff-based approach often used in the Authority but encourages the continuation of the Authority's practice of adopting a principled basis to the awarding of costs based on the particular circumstances of individual cases.

[10] I have also found it helpful to follow the process suggested by Member Dumbleton in *Graham v. Airways Corporation of New Zealand Ltd* (Employment Relations Authority, Auckland, AA39/04, 28 January 2004). In that decision, the Authority postulates a three step process for evaluating applications for costs. These are, first, the identification of the actual costs and expenses incurred by the successful party; second, a decision about whether those costs are reasonable or not in all the circumstances; and finally, a determination of what proportion of those costs ought to be met by the unsuccessful party.

Discussion

[11] The first issue that the Authority needs to determine in the present case is the question of whether, in truth, the respondent employer can claim to be the successful party. It will be remembered that there was an award made in favour of Mr Kim of unpaid holiday pay but, balanced against that, was a finding of fault against Mr Kim in respect of his breach of his employment obligations to Kenzo, the dismissal of Mr Kim's claims for breaches of good faith and unjustified dismissal and an acceptance of Kenzo's counterclaim against Mr Kim in respect of the absence of notice.

[12] Taken in its totality, it seems clear that Kenzo was more successful than Mr Kim. However, in my considered opinion, such a balance does not quite state the position accurately. Mr Kim was effectively offered full and final settlement of all matters prior to the investigation hearing on the footing that his outstanding holiday pay be paid (which had never been denied by Kenzo, although the amount due and owing was disputed). Mr Kim rejected that settlement proposal and chose to proceed with the investigation meeting.

[13] Of course, by doing that, Mr Kim not only exposed himself to Kenzo's counterclaim and arguments about his bona fides, but also incurred significant increased costs for himself and the risk of having to contribute to the costs of his former employer. That being the position, I am satisfied that Mr Kim made an affirmative decision to proceed with the investigation meeting rather than settle the matter and accordingly it seems to me appropriate to discount completely the award made in Mr Kim's favour as any sort of balance against the other awards, all of which were made in favour of Kenzo. On the basis of this computation then, Kenzo plainly is completely successful in the substantive hearing.

[14] Kenzo incurred total costs of \$7,599 in defending Mr Kim's claim. Of that sum, more than half (\$4,425) is attributed to attendances in respect of the two mediations which preceded the investigation meeting. Kenzo says that, in the unusual circumstances of this case, it ought to be able to claim for a contribution to its costs in mediation because of the unsatisfactory way in which Mr Kim behaved during those mediations. On one occasion, he simply failed to attend and, on the other, he said he would not attend although, in the result, did. In the result, by virtue of the language difficulties which counsel experienced in acting for Kenzo, there were also expenses in translation services throughout the attendances which are reflected in the total cost as well.

[15] I consider the costs charged by counsel for Kenzo as very reasonable in the particular circumstances of this case. I accept the claim that there are additional disbursements by reason of translation and interpreter costs which would not be the case where counsel's client spoke English as a first language. Those costs, I hold, are properly part of the mix.

[16] Furthermore, I accept counsel's argument that the costs of the mediation processes (both of which were abortive) ought also to be brought to account in the unusual circumstances of the present case.

[17] Kenzo also submits that Mr Kim's fundamental claim, that he had been unjustifiably dismissed, was so completely without merit as to justify a higher than usual award. Again, I accept that submission. The substantive determination is very clear about what I thought of Mr Kim's claim that he had been unjustifiably dismissed. In particular, I made it clear that, given Mr Kim's own evidence, given on oath before me, that he had resigned his employment some time before he claimed

that Kenzo unjustifiably dismissed him, it does seem unjust for Kenzo to be effectively forced to fund a defence of a claim that had so little merit.

[18] For all these reasons then I am disposed to make a higher than usual award of costs in the present case. If the Authority was disposed to apply the usual tariff-based approach, an award of perhaps \$3,000 might have been an appropriate starting point. This is a case where I hold that Kenzo has been put to unnecessary and unreasonable expense in defending a claim that was completely without merit. Mr Kim was entitled to be paid his holiday pay; Kenzo acknowledged that was due and owing but there was a legitimate dispute about the quantification of that sum. Kenzo offered a generous formula of calculation for that holiday pay prior to the hearing as a full and final settlement which would have obviated any further cost and Mr Kim turned that proposal down flat. By doing so, Mr Kim exposed himself to Kenzo's counterclaim, the obvious risks to his own entirely unmeritorious claim of unjustified dismissal and the prospect that he would now bear a significant cost impost in respect of Kenzo's costs.

[19] In all the circumstances then, as a starting point I would be minded to make an award of \$6,000 as the sum Mr Kim is to pay to Kenzo to assist Kenzo in the payment of its legal costs. However, I must take into account Mr Kim's reduced circumstances. He is paying off his lawyers bill at \$100 per week and it is important he meets that obligation. If he were directed to pay Kenzo the same amount per week (\$100) it would take over a year to complete payment. In all the circumstances I think it appropriate to reduce Mr Kim's contribution to Kenzo's legal costs to \$5000.

[20] In addition, Mr Kim already owes Kenzo the sum of \$2,264.40 in unworked notice and he is to pay that amount to Kenzo as well. Kenzo may need to accept that Mr Kim will need to make arrangements to meet those costs on a time basis.

[21] Finally, Kenzo owes Mr Kim the sum of \$1,373.54. Dealing with that obligation in a practical way, I direct that amount is to be set off against the amount owed by Mr Kim to Kenzo such that Mr Kim's total indebtedness to Kenzo is reduced to the figure of \$5,890.86.

[22] Mr Kim is to have time to pay. I direct he is to pay Kenzo the money owed at the rate of at least \$100 per week.

[23] A copy of this determination is to be made available to an interpreter who can advise Mr Kim of its contents.

James Crichton
Member of the Employment Relations Authority