

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2014] NZERA Auckland 242
5395990

BETWEEN MICHAEL KINLIM YAN
Applicant

AND COMMISSIONER OF
INLAND REVENUE
Respondent

Member of Authority: R A Monaghan

Representatives: M Scott, counsel for applicant
S Hornsby-Geluk, counsel for respondent

Memoranda received: 24 March 2014 and 27 May 2014 from applicant
17 March, 13 and 29 May 2014 from respondent

Determination: 17 June 2014

DETERMINATION OF THE AUTHORITY ON COSTS

[1] In a determination dated 10 January 2014¹ (the 10 January determination) I found the Commissioner of Inland Revenue's (referred to as the IRD's) action in dismissing Michael Kinlim Yan was justified. Costs were reserved, and the parties were invited to resolve the matter themselves.

[2] The parties duly attempted to do so, in the process addressing costs reserved after a determination of a preliminary matter in January 2013 (the preliminary matter).² To that end there were a number of exchanges between counsel in late January and early February 2014. Agreement was reached on a payment by Mr Yan of \$20,000 plus GST in respect of the 10 January determination, less \$1,750 in respect of the preliminary matter. In a message dated 10 February 2014 counsel for the IRD proposed to issue an invoice to the applicant. On 14 February counsel sent the invoice, seeking payment by 20 March.

¹ *Yan v Commissioner of Inland Revenue* [2014] NZERA Auckland 6

² *Yan v Commissioner of Inland Revenue* [2013] NZERA Auckland 31

[3] On 16 February counsel for Mr Yan notified counsel for the IRD that a challenge to the 10 January determination had been filed in the Employment Court. He advised of his understanding that: *‘as per normal practice the issue of costs of the ERA hearing will remain in abeyance pro temp.’* The IRD did not agree there was such a practice, and sought payment.

[4] No payment was made. The IRD approached the Authority for orders for payment, relying at the time on s 161(1)(r) of the Employment Relations Act 2000. That provision gives the Authority exclusive jurisdiction to make determinations about employment relationship problems generally, including:

‘any other action ... arising from or related to the employment relationship or related to the interpretation of this Act ...

[5] During a teleconference between the Authority and the parties on 25 March 2014, I:

- advised that, in the circumstances, I would hear the parties on costs (and that a grant of leave to proceed with the application for an order could be inferred) even though the matter had been raised outside the timetable contained in the 10 January determination; and
- encouraged the parties to explore the possibility of resolving the matter by methods such as payment of the sum agreed into court or into a solicitors’ trust account pending the outcome of the challenge, or any other mechanism on which the parties could reach agreement.

[6] Payment into the Employment Court may not have been a suitable option. No agreement was reached on payment into a trust account, because Mr Yan’s view of the practice in the Authority meant he considered this was not necessary or appropriate.

[7] When the matter remained unresolved I sought submissions from the parties, and have determined this matter on the papers.

[8] Counsel for the IRD properly acknowledged there was a question – despite Mr Yan not having identified it – of whether the Authority had jurisdiction under s 161(1)(r) to make the orders sought. Reliance on s 161(1)(r) was therefore

abandoned, and the following orders were sought under Schedule 2, clause 15 of the Act:

- that Mr Yan pay to the IRD the sum of \$20,000 plus GST in costs of the 10 January determination;
- that the IRD pay to Mr Yan the sum of \$1,750 (incl GST) of the preliminary matter; and
- that the above amounts be paid within 14 days of the Authority's determination.

[9] Schedule 2, clause 15 sets out the Authority's power to order any party to pay to any other party such costs and expenses as the Authority thinks reasonable. The IRD says the amount of costs has been agreed but because there is no agreement on the timing of payment, costs overall are unresolved.

[10] Mr Yan has continued to argue that there is a practice in the Authority in which costs in the Authority remain in abeyance until after a challenge has been determined. He remains of the view that such an order is unnecessary.

[11] I address these issues:

- a. is there a practice in the Authority under which costs remain in abeyance pending a decision on a challenge; and
- b. does Schedule 2, clause 15 permit the Authority to make the orders sought.

Is there a practice that costs remain in abeyance pending a challenge

[12] Counsel for Mr Yan has relied in support on the following comment of the Authority in *L v M*³:

[23] It is the Authority's usual practice to deal with costs matters even where the substantive determination has gone on challenge, as in this case. No doubt the parties will use their good sense and not seek to enforce this order until the results of the challenge, and any impact that has on costs in the Authority, is known.

³ [2013] NZERA Auckland 566

[13] The first of the sentences just quoted reflects a practice of the Authority, but the second is a supplementary comment by the member. It is not in itself reflective of any further practice of the Authority.

[14] Even so I agree in a general way with the sentiment it expresses. I also recognise that, in the period between the issue of a determination and the resolution of a challenge, a number of matters might arise which are never brought to the attention of the Authority.

[15] Thus there may be reasons why parties seek to enforce an order for costs before the outcome of a challenge is known. There is no rule or practice in the Authority preventing them from doing so.

[16] When an order for costs is made before a challenge has been heard and decided, the responding party has the option of seeking an order for a stay. That happened in the course of the challenge to the determination in *L v M*, and the Employment Court determined the matter in *Booth v Big Kahuna Holdings Ltd.*⁴ Although the Employment Court recorded the passage from the Authority's determination quoted above, it did not otherwise comment on the passage or the issue here. It merely determined the matters before it, and stayed the order for costs. I do not accept the submission that the recording of the passage amounts to support for the position Mr Yan contends.

[17] Counsel for Mr Yan also referred in submissions to Mr Yan's having researched over 100 costs determinations of the Authority, and not found any in which a timeframe for payment was addressed even when a challenge was pending. It seems Mr Yan regards that as significant evidence of the practice he asserts, and says the IRD has not been able to refute the assertion to his satisfaction. However I do not regard the outcome of Mr Yan's research as support for a practice in the Authority that costs remain in abeyance pending the outcome of a challenge. It means that the Authority has not been asked to, and has not, included timeframes for payment in those determinations. It does not go further. If there is any practice, it is that the Authority leaves the matter to the parties – on occasion indicating its view of how they should proceed as it did in *L v M*.

⁴ [2014] NZEmpC 43. The orders prohibiting publication had been lifted.

[18] For these reasons I do not accept there is a practice of the kind Mr Yan relies on.

Does Schedule 2 clause 15 permit the Authority to make the orders sought

[19] The submissions on behalf of Mr Yan noted the ‘citation’ of Schedule 2, clause 15. They went on to assert only that the citation did not deal with the timing issue in question, nor refute the existence of the practice invoked by Mr Yan.

[20] I approach the matter as a request for an order for costs involving:

- payment of amounts which are not disputed; and
- a timeframe for payment, which is disputed.

[21] I therefore can, and do, order that:

- (i) Mr Yan pay to the IRD the sum of \$20,000 plus GST in costs of the 10 January determination; and
- (ii) the IRD pay to Mr Yan the sum of \$1,750 (incl GST) in costs of the preliminary matter.

[22] I resolve the dispute about the timeframe for payment by saying I do not accept Mr Yan’s argument that practice in the Authority makes such an order unnecessary. I find the timeframe sought by the IRD is reasonable, so order further that the above amounts be paid within 14 days of the Authority’s determination.

R A Monaghan

Member of the Employment Relations Authority