

**IN THE EMPLOYMENT COURT  
AUCKLAND**

**AC 37A/07  
ARC 76/06**

IN THE MATTER OF a challenge to a determination of the  
Employment Relations Authority  
AND  
IN THE MATTER OF an application for costs  
BETWEEN ANDREW YONG TRADING AS YONG  
& CO CHARTERED ACCOUNTANTS  
Plaintiff  
AND YUNPEI (SOPHIA) CHIN  
Defendant

Hearing: Memorandum received 25 June 2007

Judgment: 7 September 2007

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**COSTS JUDGMENT OF JUDGE A A COUCH**

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[1] The hearing of this matter was conducted before Judge Perkins who gave a substantive judgment on 20 June 2007. In that judgment, he reserved costs with directions that Mr Nutsford was to file a memorandum within 14 days and Mr Orlov was to file any memorandum in response within a further seven days.

[2] Mr Nutsford filed a memorandum on behalf of the defendant on 25 June 2007, a copy of which was duly served on Mr Orlov. Mr Orlov did not file a memorandum on behalf of the plaintiff within the seven days prescribed by Judge Perkins.

[3] On 3 July 2007, the Registrar sent the following email to Mr Orlov:

*A memorandum in relation to costs is overdue. Please advise the registry whether you wish to file it and if so, please submit a request for an extension of time.*

[4] Mr Orlov did not reply to this email or take any further steps with respect to costs. In a telephone conference I held with the representatives on 29 August 2007, Mr Orlov accepted that it was appropriate that costs now be fixed solely on the basis of Mr Nutsford's memorandum and without input on behalf of the plaintiff. While it is always preferable to have submissions from both parties when making any final orders, it is clear in this case that the plaintiff has had a proper opportunity to be heard but has chosen not to take that opportunity. I note that the plaintiff also declined to be heard on the issue of costs before the Authority.

[5] Judge Perkins ceased to be a member of this Court on 30 June 2007 and it is therefore not open to him to fix costs. That is why the task has now fallen to me.

[6] The Authority fixed costs in relation to its investigation in a supplementary determination given on 9 November 2006 (AA 312A/06). Mr Yong was ordered to pay Ms Chin \$1,615.00 as a contribution to her costs.

[7] In his memorandum, Mr Nutsford urged me to set that determination aside and fix costs not only in relation to the proceedings before the Court but also those before the Authority. That is not appropriate in this case. Where a costs determination is itself challenged or where a challenge to a substantive determination of the Authority has been successful, that would be appropriate. But that is not the nature or the outcome of this case. The costs determination was not challenged and the plaintiff was entirely unsuccessful in his challenge to the Authority's substantive determination. It is therefore appropriate that the Authority's costs determination remain undisturbed.

[8] The Court has a wide discretion to make such orders as to costs as it thinks fit. That discretion must, however, be exercised in a principled way. The essential principles have been established by the Court of Appeal in a series of judgments including that in *Binnie v Pacific Health Limited* [2002] 1 ERNZ 438. The accepted approach is that an appropriate starting point for an award of costs is two thirds of the costs actually and reasonably incurred. That figure may then be adjusted up or down to reflect the manner in which the conduct of the case by either party affected the costs incurred and other factors which ought justly to be brought to account.

[9] Taking that approach, the first step is to ascertain the actual costs incurred by the defendant and then to assess the extent to which those costs were reasonably incurred.

[10] Attached to Mr Nutsford's memorandum were copies of invoices rendered to the defendant for his services in representing her in this matter. The invoices relating to the proceedings before the Court totalled \$7,350.00 plus GST. Mr Nutsford also incurred disbursements totalling \$149.00 inclusive of GST.

[11] Each of the invoices in question contained a detailed list of the work done and the time taken to do that work. The time taken totalled 36.75 hours. In the context of a hearing which extended over two and half days, the time taken by Mr Nutsford seemed to me to be reasonable in every respect. Mr Nutsford appears to have charged for his work at a rate between \$190.00 and \$200.00 plus GST per hour. Taking into account Mr Nutsford's experience and the nature of the proceedings, that is not unreasonable. I therefore find that the total costs of \$7,350.00 plus GST incurred by Ms Chin were reasonably incurred.

[12] Mr Nutsford did not suggest that the plaintiff's case was conducted in a manner which unnecessarily increased the costs of the defendant and, as I was not the trial judge, I have no direct knowledge of such matters. Thus, although Mr Nutsford submitted that the defendant should be totally reimbursed for the costs she incurred, I see no reason to depart from the usual starting point of two thirds of those costs.

[13] The usual practice with respect to disbursements is that, if they are true disbursements in the sense of being money paid to a third party for goods or services necessary to conduct the proceedings, they ought to be reimbursed in full. I have some doubt whether the particular sums claimed in this case are all true disbursements in that sense but, as the sum involved is small, I am prepared to allow them without deduction.

[14] On this basis, the plaintiff is ordered to pay the defendant \$5,512.50 by way of costs and \$149.00 by way of disbursements.

[15] It will be noted that I have dealt with the costs and disbursements incurred by the defendant on a GST inclusive basis. I have done so on the understanding that Ms Chin is not personally registered for GST and therefore has no ability to claim a refund of the GST component of these expenses. It follows that the real cost to Ms Chin of them is the GST inclusive amount. If I am mistaken about Ms Chin's GST status, Mr Nutsford is to inform the Registrar immediately so that the orders made can be amended appropriately.

A A Couch  
Judge

Judgment signed at 4.00 pm on 7 September 2007