

**IN THE EMPLOYMENT COURT  
AUCKLAND**

**[2011] NZEmpC 69  
ARC 46/10**

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

BETWEEN                JIAN ZHANG  
Plaintiff

AND                        SAM'S FUKUYAMA FOOD SERVICE  
LTD  
Defendant

Hearing:                (in response to memoranda filed on 9 and 31 May 2011)

Appearances: Gary Pollak, counsel for the plaintiff  
Tony Kurta, advocate for the defendant

Judgment:              23 June 2011

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**COSTS JUDGMENT OF JUDGE A D FORD**

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[1] In my substantive judgment<sup>1</sup> dated 30 March 2011 I awarded the plaintiff various remedies including reimbursement of his loss of wages pursuant to s 123(1)(b) of the Employment Relations Act 2000 together with an award of costs. In both cases, I invited the parties to endeavour to reach an agreement on the appropriate figure but, failing which, I reserved leave for them to come back to the Court for directions. Unfortunately, agreement did not prove possible.

[2] In relation to the plaintiff's claim for loss of wages, I had stated in my judgment that I was prepared to allow his claim for lost remuneration from the date of the expiry of his two weeks' pay in lieu of notice down to 27 September 2010 in a sum based on his average weekly wage less his earnings from any other source. Both parties accept that the period in question is 47.4 weeks and both accept that

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<sup>1</sup> [2011] NZEmpC 28.

from the resulting figure, the sum of \$4,545.24, which represented payments of the unemployment benefit, needed to be deducted. The dispute relates to the methodology used to ascertain the plaintiff's relevant weekly wages. Mr Pollak contends that the figure is \$898.16 whereas Mr Kurta submits that the figure is \$778.79.

[3] The basis of the plaintiff's calculations of his loss of earnings was fully explained by him and canvassed at the hearing. I noted in my judgment that his claim was based on an average weekly wage prior to dismissal of \$898.16 which figure made appropriate allowance for other income earned apart from the unemployment benefit. The plaintiff was not challenged at the hearing on the \$898.16 figure and I, therefore, allow it. The amount of \$898.16 over the 47.4 weeks in question results in a total figure of \$42,572.78. After deduction of the unemployment benefit figure of \$4,545.24, the claim reduces to \$38,027.54. I allow the plaintiff's claim for lost remuneration in the sum of \$38,027.54.

[4] The methodology and principles relating to awards of costs in this Court are well established and need not be repeated.<sup>2</sup> There are no exceptional circumstances in this case. Mr Pollak correctly noted that the defendant, as it was entitled to do, took an "unyielding position" on virtually every issue but I do not accept any suggestion that it unfairly delayed the progress of the case. The hearing took two full days. The plaintiff seeks a contribution of between 80 per cent and 100 per cent of his actual legal costs which totalled \$14,528.60. Invoices for the legal services in question were filed with the Court.

[5] Mr Kurta accepted that the defendant had to pay costs but he believed a reasonable contribution would be \$8,000.

[6] The invoices submitted by Mr Pollak, in fact, total only \$14,291.41. The figure of \$237.19 appearing on a statement dated 6 May 2011 is not separately invoiced and no details are provided as to what the charge related to. I, therefore, disallow that particular item. The invoices also include disbursements amounting to a total of \$507.22 (including GST) meaning that the plaintiff's actual legal costs

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<sup>2</sup> *Binnie v Pacific Health Ltd* [2002] 1 ERNZ 438.

came to \$13,784.19 (including GST). Counsel should have separated out the claims for costs and disbursements in his memorandum but I accept that the figure of \$13,784.19 is, in all the circumstances, a reasonable sum for actual costs. Taking all relevant factors into account, I am prepared to allow the plaintiff an award of costs based on approximately two-thirds of his actual costs. The figure I allow in this regard is \$9,500 together with disbursements in the sum of \$507.22.

[7] I now direct the Registrar to issue a certificate of judgment confirming the remedies awarded.

A D Ford  
Judge

Judgment signed at 10.30 am on 23 June 2011