

Costs - A Cautionary Tale

The Employment Court has recently confirmed that there can be significant financial consequences for litigants who run a prolonged case or who refuse to accept the weaknesses in their case. In two recent cases, litigants have been ordered to pay substantial costs to the successful respondents after challenging the Authority's determinations, despite obvious weaknesses to their claims and having passed up opportunities to settle their claims.

Gates v Air New Zealand

After Lynda Gates was made redundant by Air New Zealand she took a personal grievance against Air New Zealand for unjustified dismissal but was unsuccessful before the Employment Relations Authority. She then challenged the Authority's determination in the Employment Court, but, again, was unsuccessful.

Generally, when considering costs, the Court will begin with a starting point of two-thirds of the successful party's reasonably incurred costs and then consider any mitigating or aggravating factors which will increase or decrease this amount.

In this case the Court took a dim view of Ms Gates' conduct. Ms Gates represented herself for four out of the five years of Employment Court proceedings during which she made a number of interlocutory (provisional) applications. The Court found that she had conducted her case in an "inefficient manner". Air New Zealand's actual legal costs to defend Ms Gates' claims amounted to \$88,787.50. The Court found that \$87,787.60 of these costs had been reasonably incurred.

The Court also took into account an offer of settlement of \$30,000, made by Air New Zealand to Ms Gates eight months before the substantive hearing took place.

The Court awarded Air New Zealand three-quarters of its costs (\$65,000) after increasing the award from the two-thirds starting point. It did not find any mitigating factors.

Chen v New Zealand Sugar Company

Mr Chen raised a disadvantage grievance against The New Zealand Sugar Company after the company issued him with a warning. He was unsuccessful in the Authority and then challenged its determination in the Employment Court. Unfortunately for Mr Chen, the Court dismissed his challenge.

In determining costs, the Court stated that the matter was always one of discretion and that it could take into account the financial circumstances of the unsuccessful party. The Court found that Mr Chen had not given any indication that he would be unable to meet any costs award against him.

The Court also reviewed Mr Chen's decision not to attend a judicial settlement conference or accept any of the three pre-hearing offers made by the respondent. The last of these offers contained an offer, which the Court described as being "more than reasonable".

The Court (referring to *Gates v Air New Zealand*) concluded by saying that consequences must follow in circumstances where proceedings are prolonged or unnecessarily continued through "obstinate refusal to accept the weaknesses in the cause". It awarded full indemnity costs against Mr Chen, ordering him to pay all of the company's costs, which amounted to \$19,550.

Caution!

These cases serve as a warning to litigants to carefully consider any weaknesses in their claim and to think seriously about whether they should simply call it quits when it becomes apparent that their claim is doomed to failure. Equally, these cases provide an illustration of the importance of well-timed and well-considered offers of settlement, prior to hearing. In both of these cases, the Court placed significant emphasis on the unsuccessful party's decision not to accept these offers when awarding costs against them.

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