Sky high costs?

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Two recent cases, together with the Government's relatively recent call for submissions on possible changes to the personal grievance process, have led us once again to consider the issue of costs in employment proceedings.

As a starting point, the *Employment Relations Act* 2000 contains as some of its objectives: to promote mediation as the primary problem-solving mechanism; and to reduce the need for judicial intervention. There is accordingly a statutory focus on the low-level resolution of employment relationship problems. It is perhaps unsurprising then that the statistics indicate that approximately 80 per cent of employment cases are settled at mediation.

It is also worth considering that the cost of filing a statement of problem in the Employment Relations Authority is $70. This is fairly nominal compared with $1,100, which is the cost of filing a statement of claim in the High Court. Those who practice in the civil jurisdiction will also know the time it takes to have a matter set down in the High Court; it is not unusual for a matter to be set down a year in advance. While there can be delays in the employment jurisdiction, a more common time frame is two to three months and it is possible, where urgency is sought (and granted), for proceedings to be heard within a week.

One complaint that is commonly raised is that while access to justice is important and undoubtedly has its upsides, on the downside, it does nothing to prevent employees or former employees from pursuing cases that are without merit. Many employers consider that low costs awards in the Authority contribute to this, in that employees know that even if they are unsuccessful in their claims, their contribution to the costs of the successful party will not necessarily be significant either (or not sufficiently significant to act as a deterrent). This also contributes to a growing school of thought that it may be more commercially pragmatic to settle a matter at mediation, rather than taking litigation risk and proceeding to the Authority. Also contributing to this school of thought is the potential that a victory could end up being a pyrrhic victory, in that it could cost more to defend the proceedings, even successfully, than it may have cost to have settled at mediation.

However, two recent cases involving Air New Zealand indicate that significant costs awards are at least possible.

The first of these is the Employment Court's costs award in *Gates v Air New Zealand* [2010] NZEMPC 26. *Gates* was an unjustified dismissal claim, heard in the first instance by the Authority. Following an unsuccessful application to the Authority, Ms Gates appealed that decision in the Employment Court. The significance of the case in terms of costs is that she was ordered by the Court to pay $65,000 towards the airline's legal costs (of $88,878 actual costs) following her unsuccessful appeal. In the scheme of costs awards in the Authority and Court, $65,000 truly is "sky high".

In terms of context, costs awards in the Authority are generally based on a notional daily rate. The rate varies between regions, but is generally $1,500 - $3,500 per day for a "standard case". The daily rate is applied to the number of days the Authority Investigation Meeting takes, and arguably takes no account of preparation time.

Under the *Employment Relations Act*, the Court has discretion to award costs "as the Court thinks reasonable". The primary principle is that costs follow the event. Beyond this, costs should be a reasonable contribution to the costs actually and reasonably incurred. In practice, most costs awards are best described as a 'contribution to', as opposed to actual costs.

In the *Gates* case, Judge Couch indicated he would have awarded Air New Zealand two-thirds of its actual costs. However, once it was revealed that Gates had turned down a Calderbank offer of $30,000, he increased the costs award to three-quarters of the actual costs incurred by Air New Zealand.

A 'Calderbank' offer is a special kind of without prejudice offer to settle a dispute. A 'normal' without prejudice offer cannot ever be produced in Court. A Calderbank offer cannot be produced, except when the Court is making its decision on costs. The relevance of the offer at the costs stage is that, if a party has declined an offer to settle the dispute which is more favourable to them than the Court's decision, they 'should' have accepted the earlier offer and ought to pay a greater contribution towards the other party's costs.

Judge Couch gave weight to that offer, together with Gates's "denial" of her responsibility for costs (she said it was Air New Zealand's responsibility to pay its own costs), its finding in relation to what it considered was the inefficient way she conducted her case, and her ability to raise the money to pay the costs ordered (the fact that she owned her house, together with another property was relevant).

More recently, Air New Zealand has been defending a potential personal grievance that has been pursued by Chao Zeng. We say 'defending' a potential personal grievance, carefully, given Air New Zealand actually argued that Ms Zeng was in fact never employed by it. In any event, the Authority determined that a personal grievance was not raised within 90 days and there were no exceptional circumstances sufficient to grant leave to raise the personal grievance outside the 90-day time frame.

The matter has been before the Authority three times and it has recently been reported that Air New Zealand is seeking $24,000 or 40 per cent of the legal fees it has incurred. Air New Zealand's lawyers acknowledged the costs were high, but argued that they were reasonable given the serious allegations made and Zeng's failure to efficiently prosecute her claim. Whether those costs are actually awarded, we will need to wait and see.

In terms of the impact and importance of these decisions, in particular the *Gates* decision, employers and those involved in defending cases are likely to be delighted as it confirms that it is possible to recover a reasonable amount of reasonably incurred costs. Employees and those pursuing cases would be well advised to bear this in mind when weighing up the very literal, and potentially high, cost of proceeding.

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