

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 128A/10
5283713

BETWEEN FUGUAN (FRANK) CHEN
Applicant

AND BANCLOGIX LIMITED
Respondent

Member of Authority: Robin Arthur

Representatives: Applicant in person
Jo Douglas for Respondent

Submissions: 19 April 2010 from Respondent
6 May 2010 from Applicant

Determination: 26 July 2010

COSTS DETERMINATION OF THE AUTHORITY

[1] By determination AA128/10 (19 March 2010) the Authority declined Frank Chen's application for leave to raise a personal grievance against BancLogix Limited.

[2] By further determination AA159/10 (7 April 2010) the Authority also declined to investigate an application to similar effect against KVB Kunlun New Zealand Limited, an associated company of BancLogix.

[3] In the latter determination the Authority noted Mr Chen was still within the 28 day period in which he could lodge a challenge in the Employment Court if he believed determination AA128/10 was wrong.

[4] While Mr Chen has now exercised his statutory right to challenge that determination in the Employment Court (ARC37/10), the usual process is for the Authority to determine costs on its investigation. The costs determination may then

also be the subject of challenge or, if the Employment Court reaches a different conclusion on the substantive issue, the Court may decide to set aside the Authority's award of costs and substitute its own.

[5] Determination AA128/10 reserved costs and encouraged the parties to resolve any issue of costs between themselves. They have been unable to do so and BancLogix has lodged a memorandum seeking an award of \$5000 in costs as a contribution to costs of \$7266 it is said to have incurred.

[6] In reply Mr Chen has reiterated aspects of his substantive claim alleging witness statements and documents provided by BancLogix were not verified in the Authority's investigation and that medical documentation showed BancLogix was responsible for his health problems. He seeks an order that costs lie where they fall.

[7] Costs in this matter may be set according to a notional daily rate after considering any factors in the particular circumstances of the case requiring an adjustment up or down: *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808.

[8] BankLogix successfully defended Mr Chen's applications and costs follow that event. It prepared statements from three witnesses, with two required to attend the hearing. Its counsel also had to prepare legal submissions addressing detailed medical evidence.

[9] While costs awards must be modest and not punitive, I conclude the particular circumstances of this case warrant an award at the usual daily rate of \$3000.

[10] While there is some merit in BancLogix submissions that how Mr Chen conducted his case unnecessarily increased costs, I consider no upward adjustment of that rate is appropriate in light of the evidence, as given during the investigation meeting, of his extended health problems and presently limited financial means. Neither would I adjust the rate upwards in the absence of a detailed breakdown of the legal costs said to have been incurred by BancLogix. None was provided.

[11] Accordingly Mr Chen is ordered to pay BancLogix \$3000 as a contribution to its costs.

[12] An arrangement may need to be made for Mr Chen to pay those costs in instalments over an extended period. Leave is reserved to revert to the Authority for further orders if such arrangements are sought and cannot be agreed.

Robin Arthur
Member of the Employment Relations Authority