

the matter because of the principle of estoppel per rem judicatum and to respond to the application that the Authority should dismiss the claim pursuant to Clause 12A.

[5] Mr Chen has stated that the exceptional circumstances are that the company did not provide a response to his disadvantage grievance within the requisite period, that it did not lodge a Statement in Reply within the proper timeframe and did not seek the leave of the Authority to file a Statement in Reply. He claims that if the proper steps had been taken he would have been able to assess whether he had a separate personal grievance for constructive dismissal.

[6] This argument has no merit. In both the Authority and the Court Mr Chen was clear that he was not pursuing an unjustified dismissal claim.

[7] Mr Chen received an employment warning on 11 March 2008 and later in March tendered his resignation. In January 2009 he filed a Statement of Problem regarding the warning in the Authority. As noted by the Authority¹, the Employment Court² and the Court of Appeal³ Mr Chen did not raise a personal grievance regarding his dismissal.

[8] The Authority found that Mr Chen did not have a personal grievance as did the Employment Court. The Court of Appeal dismissed Mr Chen's application for leave to appeal.

[9] It is abundantly clear that Mr Chen is seeking to relitigate the disadvantage grievance and that he is barred from doing so. As set out in *Shiels v Blakeley* [1986] 2 NZLR 262 at 266 when a final judicial decision has been pronounced by a New Zealand judicial tribunal of competent jurisdiction over the parties and the subject matter of any litigation, any party to that litigation is estopped from questioning or disputing that decision on the merits in any subsequent litigation.

[10] Mr Chen's constructive dismissal claim is predicated on the disadvantage claim. Both the Authority, at para [27], and the Employment Court at para [24] commented on the unlikelihood of Mr Chen being able to successfully bring an

¹ *Jie Chen v New Zealand Company Limited*, ERA Auckland, AA177/09, 3 June 2009.

² *Jie Chen v New Zealand Sugar Company Limited* [2010] NZEmpC 54

³ *Jie Chen v New Zealand Sugar Company Limited* [2010] NZCA 477

unjustified dismissal claim in reliance on the alleged disadvantage, as both the Authority and the Court found that the employer's actions were justifiable.

[11] In my Minute I referred Mr Chen to the Employment Court's judgment at para [24].

[12] There are no exceptional circumstances; and it would not be just to grant leave even if there were. A considerable period had lapsed since the dismissal and there is no likelihood of success.

[13] Mr Chen's unjustified disadvantage claim cannot be relitigated and there are no exceptional circumstances that would permit him to bring his unjustified dismissal claim out of time.

Costs

[14] Given the fact that there have been a number of costs' awards made against Mr Chen, none of which have been paid, it would be fruitless to suggest that the parties attempt to resolve the issue of costs.

[15] The respondent is to file a costs' memorandum within 28 days of the date of this determination. The applicant is to file a memorandum in reply within 14 days of receipt of the respondent's memorandum.

Dzintra King

Member of the Employment Relations Authority