

IN THE COURT OF APPEAL OF NEW ZEALAND

**CA358/2010
[2010] NZCA 477**

BETWEEN JIE CHEN
 Applicant

AND NEW ZEALAND SUGAR COMPANY
 LIMITED
 Respondent

Hearing: 14 September 2010

Court: Glazebrook, Hammond and Ellen France JJ

Counsel: Applicant in person
 R L Towner for Respondent

Judgment: 19 October 2010 at 2.30 pm

JUDGMENT OF THE COURT

- A The application for leave to appeal is declined.**
- B The applicant must pay the respondent costs for a standard application
 for leave on a band A basis and usual disbursements.**
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REASONS OF THE COURT

(Given by Ellen France J)

Introduction

[1] This is an application for leave to appeal against judgments in the Employment Court in which Judge Perkins dismissed the applicant's personal grievance¹ and awarded indemnity costs in favour of the respondent.²

Background

[2] The applicant, Mr Chen, was employed by the respondent, the New Zealand Sugar Co Ltd (NZ Sugar), as a procurement controller from 2 April 2007 until his resignation on 13 March 2008. His resignation was preceded by several months of conflict between Mr Chen and his manager, Kathryn Gilroy, which culminated in Mr Chen receiving a verbal warning on 11 March 2008.

[3] Mr Chen brought a personal grievance based on unjustified disadvantage. Both the Employment Authority and the Employment Court treated the complaint as relating to the issuance of the warning. Both ruled in favour of NZ Sugar, holding that Mr Chen did not have a personal grievance in relation to the warning.

[4] The Authority awarded costs of \$2,250 to NZ Sugar, while the Employment Court awarded NZ Sugar full indemnity costs of \$19,550.

Basis for proposed appeal

[5] In terms of the substantive decision, Mr Chen wants to argue the following:

- (a) The Employment Court's decision was based on unsubstantiated evidence;
- (b) The Employment Court ignored breaches of contractual obligations by NZ Sugar;

¹ *Chen v New Zealand Sugar Co Ltd* [2010] NZEmpC 54.

² *Chen v New Zealand Sugar Co Ltd* [2010] NZEmpC 81.

- (c) The Employment Court ignored the fact that NZ Sugar did not act in good faith; and
- (d) The test of justification in s 103A of the Employment Relations Act should be applied to all of the actions causing the grievance.

[6] As to the costs decision, the applicant points to various matters which he says mean the costs award was unreasonable.

Discussion

[7] Leave to appeal may be granted only if, in this Court's opinion, a question of law involved in the proposed appeal, by reason of its general or public importance or for any other reason, ought to be submitted to this Court.³

[8] The application for leave is opposed on the basis that none of the proposed questions gives rise to any question of law.

[9] We deal first with the proposed question relating to the factual findings.

Factual findings

[10] Mr Chen points to a number of factual findings for which he says that there was no evidential basis. This leads to the submission that unsubstantiated submissions from NZ Sugar were given weight while none of Mr Chen's substantiated submissions were given any weight.

[11] It appears that the focus of the hearing in the Employment Court was on matters leading up to the verbal warning, for example, the meetings between the parties about how to resolve the conflict that had arisen. Judge Perkins had the benefit of evidence from Ms Gilroy and from Mr Chen and, in addition, had a bundle of documents of primary material including correspondence between the parties.

³ Section 214(3) of the Employment Relations Act 2000.

The Judge has then made findings about what happened in the period leading up to the warning.

[12] In terms of the underlying behaviour which led to the warning, it is relevant to note Judge Perkins' observation that while Mr Chen:

[21] ... disputed the need to set ground rules and the verbal warning he has not at any stage denied his actual behaviour towards Ms Gilroy as described in her evidence and contained in contemporary documents.

[13] Against this background, there is nothing before us to support the argument that the Judge's factual findings were clearly unsupportable or untenable on the evidence. The matters Mr Chen points to are questions of fact and not of law.

The focus on the verbal warning

[14] The next three matters raised by Mr Chen can be dealt with together. They come down to an argument that the Employment Court should have evaluated other behaviour of NZ Sugar against the unjustifiable disadvantage standard. The amended statement of claim filed in the Employment Court refers to NZ Sugar having engaged in "a series of unjustified activities/processes ... including a verbal warning". Mr Chen raises complaints such as the failure of NZ Sugar to follow its own grievance process (not undertaking an investigation prior to giving the warning) and restrictions imposed on his ability to take annual leave.

[15] The Authority's determination made it plain that the case before the Authority proceeded on the basis that Mr Chen had confirmed that he had not raised a separate grievance about the termination of his employment. The Authority's determination also records Mr Chen's confirmation that the grievance raised was about the warning only and that the remedies he was seeking through the Authority were an apology and compensation.⁴ The same approach was taken in the Employment Court. The respondent's submissions refer to a minute of Chief Judge Colgan dated 28 August 2009 which is not in the case on appeal but which, it appears, was to the same effect. Certainly, the Employment Court in its decision

⁴ *Chen v New Zealand Sugar Co Ltd* ERA Auckland AA177/09, 3 June 2009 at [5].

recorded that the matter proceeded in the Court as a disadvantage grievance, as it had before the Authority, and related solely to the verbal warning issued on 11 March 2008.⁵

[16] It may be that Mr Chen did not appreciate fully what his concession meant but the end result is that the complaints about these matters do not arise out of the Employment Court's decision.

[17] In any event it is apparent, as Mr Towner for NZ Sugar submitted, that the Employment Court was alive to the background circumstances in existence before the verbal warning was given. The Judge's factual findings on these events largely provide a response to the matters raised by Mr Chen. Judge Perkins considered that, while there may be some "different perceptions" about the matter, Mr Chen had sufficient insight over the course of his employment to perceive that the "way that he reacted to Ms Gilroy on occasion was unacceptable".⁶ Mr Chen chose to apologise on at least two separate occasions for his behaviour although in his pleadings he attempted to resile from one of those. Judge Perkins considered that NZ Sugar's Human Resources Manager was correct in perceiving there was a need for intervention. Judge Perkins continued:

[26] ... At that point standards were set as to how Mr Chen was to behave not only towards Ms Gilroy but also towards his fellow employees who were part of a team where cooperation between them was required.

[18] The next step we note in the Judge's reasoning is the finding that, although Mr Chen had demonstrated some insight, he was not aware of how serious matters had become by March 2008. Indeed, the Judge considered that NZ Sugar could have issued a warning in December 2007. NZ Sugar nonetheless chose to try to mediate between Mr Chen and Ms Gilroy, setting ground rules as to future conduct.

[19] Judge Perkins considered that NZ Sugar's moderate stance in issuing a warning was demonstrated by the fact that it was of a limited duration, namely, six months. Judge Perkins put it this way:

⁵ At [6].

⁶ At [26].

[28] ... This was not a final warning even though Mr Chen's pattern of behaviour had continued over quite a lengthy period of time. Even when Mr Chen made suggestions of resignation the company management discouraged him from taking that step. He refused to accept the fact that the warning was justified in a graceful way and instead reacted in what I regard as a threatening way towards Ms Gilroy. Indeed he quite gratuitously contacted her again on the penultimate day of his employment to confirm that he would be taking a personal grievance and seeking legal advice.

[20] The Judge saw Mr Chen's resignation in the face of the verbal warning as an over-reaction on his part. Judge Perkins also found that the warning was necessary and that it was open to NZ Sugar to consider the entire history of the employment, not just the incident precipitating the decision to issue a warning. The Judge's conclusion was as follows:

[29] ... Judged on an objective basis, it was what a fair and reasonable employer would have done in all the circumstances at the time that the action occurred.

[21] There can be no complaint about the test of justification applied by the Judge. None of these proposed questions gives rise to questions of law in terms of s 214 of the Act.

Costs

[22] Under this heading Mr Chen is critical of the following matters:

- (a) The Judge's reliance on three Calderbank letters;
- (b) The basis for some of the costs sought; and
- (c) The Judge's statement that he had no material about Mr Chen's present financial position.

[23] Judge Perkins' conclusions on costs were that, first, Mr Chen's refusal to accept the reasonable proposal in the final Calderbank letter forced NZ Sugar to proceed "unnecessarily" to trial and incur substantial costs in preparation.⁷ Secondly, the Judge took the view that collateral matters were raised both in the

⁷ At [12].

pleadings and in the hearing leading to further costs. In these circumstances, an award of indemnity costs was seen as appropriate.

[24] There is no error in the approach taken by the Judge. Mr Chen maintains that the Calderbank letters did not represent genuine offers to settle. That was a matter he raised with Judge Perkins and the Judge's rejection of that submission does not give rise to any question of law. The same can be said of the complaint that some of the costs sought were unfounded. We cannot resolve the third matter. We have no information about Mr Chen's financial position but, in any event, his concern does not raise a question of law such that it ought to be submitted to this Court.

Disposition

[25] The application for leave to appeal is declined.

[26] The respondent, having succeeded, is awarded costs on a standard application for leave on a band A basis and usual disbursements.

Solicitors:
Bell Gully, Auckland for Respondent