

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2011] NZERA Auckland 203  
5285242

BETWEEN                      DONG EUI CHOI &  
   SA YOUNG KIM  
   Applicants

AND                              MANHATTAN TRADING  
   LTD  
   Respondent

Member of Authority:      James Wilson

Representatives:            Eska Hartdegen for the applicants  
   Donald Webster for the respondent

Costs submissions  
received:                      23 December 2010 from the applicants  
   2 February 2011 from the respondent

Determination:              13 May 2011

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**COSTS DETERMINATION OF THE AUTHORITY**

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**The substantive determination**

[1]      In a determination issued on 17 November 2010, I found that:

- (i)      *Mr Choi was not unjustifiably dismissed by Manhattan. It follows that he is not entitled to compensation in this regard nor to recover wages lost as a result of the termination of his employment.*
- (ii)     *Mr Choi is not entitled to payment in lieu of notice from Manhattan.*
- (iii)    *Manhattan has paid Mr Choi all of the wages to which he was entitled.*
- (iv)    *Manhattan Trading is to pay Mr Choi \$440, less the appropriate amount of tax, as unpaid holiday pay.*
- (v)     *I have declined Mr Choi's request that I impose a penalty on Manhattan for breach of contract.*
- (vi)    *Mr Choi's request, that I impose a penalty on Manhattan for breaches of its duty of good faith, is also declined*

[2] In that determination I reserved the question of costs and requested that the parties attempt to resolve the question between themselves. Unfortunately they have not been able to do so and Ms Hartdegen has filed a submission seeking a contribution from Manhattan Trading towards her clients' costs.

[3] In my substantive determination I also said:

*I note that while Mr Choi has been largely unsuccessful in his claims, Manhattan's failure to keep adequate records has put Mr Choi to a good deal of unnecessary expense in pursuit of his proper entitlements and this is likely to be reflected in any award made.*

### **The submissions**

[4] In her submissions on behalf of the applicants Ms Hartdegen says that her clients costs were in excess of \$13,000 plus GST and that while the Authority's Investigation Meeting was spread over only two days the preparation time was exacerbated by the need to spend a lot of time with her clients, in the absence of proper wage and time records, trying to reconstruct wage records from her clients personal records. Ms Hartdegen submits that a proper use of the Authority's discretion, and consistent with the principles set out in the Employment Courts decision in *PBO (formerly Rush Security Ltd) v Da Cruz* [2005] 1 ERNZ 808 a reasonable award of costs would be \$8000.00 plus GST plus disbursements and the Authority filing fee of \$70.00.

[5] Mr Webster argues that rather than having to pay the applicants costs his client, in terms of the principals outlined in *Da Cruz* and given the outcome of the case, should be entitled to receive a contribution to its costs from the applicants. He says however that pursuing such costs is likely to be futile as the applicants appear to have left New Zealand. He points out that the respondent made an offer to settle this matter at mediation by paying the applicants \$2000.00 each and in the event the applicants were almost entirely unsuccessful in their claims

## **Discussion**

[6] The principles to be applied by the Authority in determining the appropriate level of costs were set out by the Employment Court in *PBO (formerly Rush Security Ltd) v Da Cruz* [2005] 1 ERNZ 808 and include:

There is a discretion as to whether costs would be awarded and what amount.

The discretion is to be exercised in accordance with principle and not arbitrarily.

The statutory jurisdiction to award costs is consistent with the equity and good conscience jurisdiction of the Authority.

Equity and good conscience is to be considered on a case by case basis.

Costs are not to be used as a punishment or as an expression of disapproval of the unsuccessful party's conduct although conduct which increased costs unnecessarily can be taken into account in inflating or reducing an award.

It is open to the Authority consider whether all or any of the parties costs were unnecessary or unreasonable.

That costs generally follow the event.

That without prejudice offers can be taken into account.

That awards will be modest.

That frequently costs are judged against a notional daily rate.

The nature of the case can also influence costs and this has resulted in the Authority ordering that costs lie where they fall in certain circumstances.

The Court went on to say:

We hold that these principles are appropriate to the Authority and consistent with its functions and powers. They do not limit its discretion and proper application of them should ensure that each case is considered in the light of its own circumstances. While these general principles are applicable also to the Court, the Authority is not bound by the Binnie principles which extend the range of costs which the Court may award beyond what could reasonably be labelled "modest." (My emphasis)

[7] The applicants were almost entirely unsuccessful in their claims against Manhattan and in the normal course of events would be expected to make a contribution towards Manhattan's costs. However as I indicated in my substantive determination, Manhattan's failure to keep adequate records put the applicants to a good deal of unnecessary expense. As the Court pointed out in *Da Cruz* it is within the Authority's discretion whether or not to award costs. In this instance it would not be equitable (or for that matter practical) to order the applicants to contribute to Manhattan's costs

### **Determination**

[8] **Costs will lie where they fall**

James Wilson

Member of the Employment Relations Authority