IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2017] NZERA Auckland 264
5643832

	BETWEEN	LANCOM TECHNOLOGY LIMITED Applicant
	AND	SEAN FORMAN First Respondent
	AND	CHARLIE KANG Second Respondent

Member of Authority:	Robin Arthur
Representatives:	Andrew Schirnack, Counsel for the Applicant Tim Oldfield, Counsel for the Respondents
Submissions:	From the Respondents on 11 August 2017 and from the Applicant on 28 August 2017
Determination:	1 September 2017

COSTS DETERMINATION OF THE AUTHORITY

A. As a reasonable contribution to their reasonably incurred costs of representation Lancom Technology Limited (LTL) must pay $7000 to Sean Forman and $6000 to Charlie Kang.

[1] Lancom Technology Limited (LTL) succeeded in a claim that Sean Forman and Charlie Kang had breached obligations in their employment agreements and Mr Kang had aided Mr Forman's breach of duty. Each man was ordered to pay a penalty of $4000 to LTL.[1]

[2] Ordinarily LTL, as the successful party, could expect a contribution to its reasonably incurred costs in pursuing its claim. However, in this case, the parties were not able to agree on costs and it was Mr Forman and Mr Kang who applied for a determination of costs in their favour. Their application advanced four reasons.

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[1] *Lancom Technology Limited v Forman & Kang* [2017] NZERA Auckland 221 (28 July 2017).

[3] Firstly, 12 weeks before the Authority's investigation meeting they had made an offer, on a 'without prejudice save as to costs' basis, to settle LTL's claim by paying an amount that proved to be more than the Authority's determination eventually awarded LTL.

[4] Secondly, they said LTL had failed to seek mediation before lodging a statement of problem. They said this should result in an increased costs award because LTL had not followed the statutory scheme for resolving employment relationship problems, also referred to in their employment agreements.

[5] Thirdly, in a related reason, they said LTL had pursued "judicial intervention" by refusing reasonable settlement proposals.

[6] Fourthly, they said LTL had made an inflated and unrealistic claim for damages, in which it did not succeed, and responding to its claim had unnecessarily increased their costs.

[7] LTL denied those reasons warranted a costs award to Mr Forman and Mr Kang. Instead LTL sought an order for costs to lie where they fell because LTL succeeded in three of its claims against Mr Forman and Mr Kang, the settlement offer was said to be ineffective, and no material increase in costs resulted from LTL's damages claim or not seeking mediation prior to lodging its statement of problem.

The starting point for assessing costs

[8] The starting point for assessing costs for this two day investigation meeting was $9000, applying the Authority's usual daily tariff of $4500. That starting point may be adjusted up or down to take account of particular factors or circumstances, such as earlier settlement offers and where a party's conduct has unnecessarily increased costs.[2] Mr Forman and Mr Kang said those two factors applied here.

[9] Their joint legal costs, set out in invoices from their counsel's firm, were said to total $22,513. This amount excluded costs incurred before LTL lodged its statement of problem and their costs related to attending mediation. Mr Forman

[2] *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808, 819-820 and *Fagotti v Acme & Co Limited* [2015] NZEmpC 135 at [106]-[108].

sought an order for costs of $11,000. Mr Kang sought $10,000. The uplift sought totalled $11,000 more than the tariff-based starting point of $9000.

Was there an effective offer to settle 'without prejudice save as to costs'?

[10] On 23 February 2017 Mr Forman and Mr Kang offered, without prejudice, to each pay LTL $7500 to settle the proceedings on a full and final basis. The offer was open for 14 days. As is now apparent, this meant their settlement offer expired on 9 March, the same day the Authority held its case management conference to set the May investigation meeting dates for this matter. If accepted, no further preparation for or participation in an Authority investigation would have been needed. By acceptance LTL would have got $3500 more from each respondent than the Authority's eventual determination, some five months later, ordered them to pay.

[11] LTL's costs submissions acknowledged the Authority must take a "steely approach" where a party has failed to accept such an offer.[3] However it submitted the respondents' proposal was not effective because they offered "a bare sum" without indicating whether there were any other terms, including a confidentiality requirement, and did not say if the offer was inclusive of all costs down to the date of the letter in which it was made.

[12] The omission of any reference to whether the offer included costs down to the date it was sent did not make the offer ineffective. Rather, as nothing was said on that point, the authors bore the burden of the implication that the offer was "all in".[4] There was no room for any implication that LTL could, by accepting the offer, have some unexpressed liability for pre-offer costs. The clear words of the offer were that it was made "in full and final settlement of the proceedings and all matters arising out of or related to them". It was a clean, "all-in", everyone-walks-away offer.

[13] Neither, contrary to LTL's submission, did the absence of an express reference to confidentiality make the terms of the offer unclear. It was an offer conveyed by counsel to counsel. Both counsel were experienced employment law specialists, who undoubtedly knew a confidentiality term was a common feature in settlements of matters like this one. Its absence from the offer made reasonably meant no such term

[3] See *Fagotti*, above n 2, at [109] confirming the remarks of the Court of Appeal in *Bluestar Print Group (NZ) Limited v Mitchell* [2010] NZCA 385 at [20] about a "steely approach" to *Calderbank* offers also applied to matters before the Authority.
[4] *Health Waikato v van der Sluis* [1997] ERNZ 236 (CA) at 244-245.

was being sought. If that was an omission in error, it was one LTL could reasonably have used as it saw fit. If accepted, the offer made left LTL free to talk about the outcome. If there was any real doubt on the point at the time, it was one easily resolved by a simple query before responding.

[14] The fact that the settlement offer had no confidentiality requirement also dealt with LTL's other submission that the offer was not reasonable and not effective because it did not adequately address LTL's need for vindication and protection of reputational factors.

[15] Put very bluntly, LTL wanted to make known that it would pursue employees who deliberately broke terms of their employment agreements by using, for their own advantage and without prior permission, software developed for LTL. It was, from its point of view, protecting its property and legal rights. Imposition of a penalty provided that vindication and statement. However, accepting the offered payment in settlement and being able to tell others about it would have provided the same vindication and deterrent value.

[16] But LTL did not do so. It failed to accept a reasonable offer that was for more than ultimately awarded by the Authority. As a result, LTL was no longer entitled to an award of costs despite its supposed 'success' in the Authority proceedings.

[17] A suggestion in the Authority's substantive determination that costs might reasonably lie where they fell in this case was made without any knowledge of the earlier settlement offer Mr Forman and Mr Kang had made. Having not accepted that better offer, LTL now had to bear the consequences of making a reasonable contribution to the reasonably incurred costs of Mr Forman and Mr Kang.

[18] A "steely approach" to the consequences of not accepting such offers also required an uplift in the tariff on the costs to be awarded. The uplift need not be so high as to amount to an indemnity for all the costs they incurred. The amount of $2000 a day, in addition to having to bear the tariff rate, was a sufficiently "steely" consequence for LTL. With that adjustment to the tariff, the assessment of costs totalled $13,000.

No earlier mediation and LTL's alleged motivation - relevant factors?

[19] Two other reasons advanced for an increase on that amount could be addressed under a single heading, considering whether costs were unnecessarily increased.

[20] Contrary to the submissions of Mr Forman and Mr Kang, LTL was not required to seek and attempt mediation before lodging its statement of problem. The statutory scheme for dispute resolution under the Employment Relations Act 2000 (the Act) promotes mediation as the primary problem-solving mechanism.[5] Trying mediation is sensible and reasonable but not mandatory before commencing proceedings. However, if the parties have not already attempted to resolve their differences in mediation, the Authority will almost always require them to do so before any further steps are taken in those proceedings.[6]

[21] The employment agreements of Mr Forman and Mr Kang referred to the statutory dispute resolution scheme and the availability of mediation services. Their agreements referred to mediation as something that "can" be asked for but did not say it must be used in the first instance to address any disputes about the application of their terms.

[22] This was also relevant to their submission that LTL unreasonably "jumped to litigation". They referred to comments an LTL representative had made in correspondence to Mr Kang's present employer about the prospect of "Employment Court action". Those comments were made soon after LTL had learned of and began investigating the breaches by Mr Kang and Mr Forman. A more realistic, and appropriate, understanding of the prospects was expressed in an email LTL's director Warwick Eade sent Mr Forman a few days later. Mr Eade wrote:

> There is a process to be followed. We are at the investigating phase of the process. … Based on your account and our investigations we will [make] a decision about what further actions we will take. Once we have made a decision then we can discuss possible remedies should they be required. **The employment tribunal requires compulsory mediation before a matter is heard so there will be mediation in the process** …"

[23] His point about mediation being required before a matter was "heard" was

[5] Employment Relations Act 2000, s 3(a)(v).
[6] Section 159.

correct. It was not required before an application was lodged in the Authority but would be before an investigation meeting was held.

[24] And mediation did subsequently occur. The matter was referred to mediation on 2 November 2016, after Mr Forman and Mr Kang had lodged a statement in reply on 28 October. Mediation was held on 9 December. On 24 January 2017, in the absence of any advice meanwhile from LTL, the Authority inquired whether the matter was resolved or LTL wanted to proceed with an investigation.

[25] No uplift in the costs award was warranted for costs incurred as a result of whether and when mediation was sought or occurred or a supposed prematurely and sustained litigious approach by LTL.

Did the damages claim unnecessarily increase costs?

[26] LTL's statement of problem sought damages for what it said was Mr Forman's poor performance of some duties and to cover some of its legal fees said to have increased due to delays in Mr Forman attending meetings over its concerns. The Authority did not award damages. The substantive determination criticised LTL's claim under that heading as inflated and exaggerated.

[27] Mr Forman and Mr Kang submitted "exaggerated and unrealistic claims can unnecessarily increase costs" and "this should result in a further uplift" on the tariff in setting an award of costs. However, while such claims could notionally increase costs, they did not explain how LTL's claim had actually unnecessarily increased their costs in responding to it. LTL submitted, correctly, that it was entitled to claim damages it genuinely believed it suffered. The genuineness of its belief, even if found wanting in its evidence on magnitude or consequence, was not in issue. The evidence adduced in pursuit of damages and in defence against that claim was more or less the same, regardless of the alleged value of the loss. While a little more time was spent in the investigation meeting wrangling over those amounts, some of that evidence was also relevant to LTL's claim for penalties.

[28] Although LTL's damages claim was unsuccessful, no uplift in the tariff was warranted on the basis that it had unnecessarily increased the costs of Mr Forman and Mr Kang.

LTL's submissions

[29] Two other points arose from LTL's submissions. Firstly it suggested the Authority had already made some allowance to Mr Forman and Mr Kang for their legal costs in setting the level of penalties imposed on them. LTL submitted this could be inferred from this observation in the Authority's determination referring to deterrence as a factor in imposing penalties:[7]

> The stress and cost of having been involved in subsequent Authority proceedings would probably deter either man repeating such breaches in other employment in the future, however a penalty was appropriate to deter others from breaching such obligations.

[30] That observation was made without knowledge of the earlier without prejudice offer. Knowing about it now changed the relative burden of costs. But because this change did not go so far as requiring a total indemnity, Mr Forman and Mr Kang were still left with some of their own costs to bear as well as a penalty to pay, so a deterrent factor remained in effect.

[31] Secondly, LTL submitted an order should be made for costs to lie where they fell because LTL was successful in three of its claims against Mr Forman and Mr Kang. Its description of the success was correct but, again, the without prejudice offer (only revealed to the Authority at this stage of the proceeding) showed LTL was not really successful at all. It could have got a better result at a lower cost for itself, and Mr Forman and Mr Kang, by taking the better deal they had offered earlier. LTL must now pay the price for the risk it took.

Order

[32] The costs claimed by Mr Forman and Mr Kang were reasonably incurred for this two-day investigation meeting. For the reasons given $13,000 was a reasonable contribution to those costs. Of that amount LTL must pay $7,000 to Mr Forman and $6,000 to Mr Kang.[8]

Robin Arthur
Member of the Employment Relations Authority

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[7] *Lancom,* above n 1, at [99].
[8] Employment Relations Act 2000, Schedule 2 clause 15(2).