

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2016] NZERA Auckland 278
5597351

BETWEEN SUPERCITY RENTAL
MANAGEMENT LIMITED
Applicant

A N D KYLIE TSE
Respondent

Member of Authority: Nicola Craig

Representatives: Michael Kyriak, Counsel for Applicant
Jennifer Wickes, Counsel for Respondent

Submissions received: 27 July 2016 from Applicant
13 July 2016 from Respondent

Date of Minute: 15 August 2016

**COSTS DETERMINATION OF THE
EMPLOYMENT RELATIONS AUTHORITY**

A. I decline to make any award of costs. Costs will lie where they fall.

Employment Relationship Problem

[1] In the Authority's substantive determination of 17 June 2016¹ I found that both parties had breached the mediated settlement agreement between them.

[2] Kylie Tse (Ms Tse) was ordered to comply with a clause of her former employment agreement regarding non-solicitation, as required by the settlement agreement. She was also ordered to pay a penalty of \$3,000 for breach of the

¹ *Supercity Rental Management Ltd v Kylie Tse* [2016] NZERA 200

settlement agreement that sum to be paid to Supercity Rental Management Limited (Supercity).

[3] Supercity was ordered to pay a penalty of \$2,000 regarding its breaches of the settlement agreement and that sum was ordered to be paid to Ms Tse.

[4] Costs were reserved and the parties were invited to resolve the matter. The determination noted that both sides have had some degree of success and I anticipated that being reflected in the costs outcome of the case, in the event that I needed to make decision on it.

[5] No agreement was reached and there was an exchange of submissions, the first being filed on behalf of Ms Tse.

Submissions

[6] I shall deal with the submissions in the order in which they were filed.

[7] An award of costs was sought for Ms Tse. Ms Tse's legal costs up to 16 March 2016 were \$12,389 according to invoices filed. It was acknowledged that both sides were only partially successful in their respective claims. However, the manner in which Supercity had dealt with the issues arising from the settlement and the conducted its claim in the Authority, were said to make it equitable for Supercity to meet Ms Tse's costs in part.

[8] In summary, Ms Wickes submitted that Ms Tse had been put to additional costs due to the chopping and changing of Supercity's case.

[9] Supercity's position was that no award of costs should be made and costs should lie where they fall. In the alternative, if there was to be a costs order, that this should be made in favour of Supercity based on without prejudice offers exchanged by the parties in March 2016.

[10] Supercity considered that that the 50% difference in the award of \$3,000 penalty against Ms Tse, compared to \$2,000 penalty against Supercity, reflected the more serious nature of Ms Tse's breach.

[11] Mr Kyriak submitted that there was no evidence that Ms Tse's costs were increased directly, or indirectly, as a result of any allegedly unnecessary conduct by Supercity.

[12] There were two *Calderbank* offers made but not accepted. An oral offer was made on behalf of Supercity that both parties withdraw their respective claims and costs lie where they fall. This offer was made immediately following the conclusion of the investigation meeting on 18 February 2016.

[13] In addition, there was a subsequent offer on Ms Tse's behalf seeking, amongst other things, that Supercity pay her costs on a full indemnity basis.

Determination on costs

[14] The Authority's power to award costs arises from clause 15 of Schedule 2 of the Employment Relations Act 2000 (the Act). This confers a wide discretion on the Authority to award costs on a principled basis.

[15] The principles guiding the Authority's approach to costs are set out by the Full Bench of the Employment Court in *BPO Ltd (formerly Rush Security Ltd) v Da Cruz*². The principles include:

- the discretion regarding costs 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 are to be considered on a case by case basis.
- costs are not to be used as punishment or as an expression of disapproval for an unsuccessful party's conduct, although conduct which increased costs unnecessarily can be taken into account in inflating or reducing an award.
- costs generally follow the event.

² [2005] 1 ERNZ 808

- without prejudice offers can be taken into account.
- awards will be modest.
- frequently costs are judged against a notional daily tariff.
- the nature of the case can influence costs and this has resulted in the Authority ordering that costs lie where they fall in certain circumstances.

[16] In *Health Waikato Ltd v Elmsly*³ the Court of Appeal stated that although it was mostly clear who had been successful in litigation, cases where the parties had mixed success were by no means rare. It will not necessarily be easy to determine who “won” the case so as to be entitled, presumptively, to costs.

[17] Those comments are particularly relevant to the present case where both parties had causes of action regarding breaches of the settlement agreement and both parties claimed remedies as a result.

[18] Both parties succeeded in establishing some parts of their cases but were unsuccessful regarding other parts. Both had penalties awarded against them. I am not satisfied that either of them could be regarded as the sole winner of the litigation.

[19] I have taken into account the extent of success and failure by both parties, and the submissions made by both parties. There are a number of factors which could support a cost award to either party and these factors are finely balanced.

[20] I do not give significant weight to either of the *Calderbank* offers. Both were made after the investigation meeting and what must have been the bulk of costs had been incurred.

[21] In conclusion, I decline to make an award of costs. I find that in all the circumstances costs should lie where they fall.

Nicola Craig
Member of the Employment Relations Authority

³ [2004] 1 ERNZ 172