

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**[2016] NZERA Auckland 187
5558544**

BETWEEN LICHEN WANG
 Applicant

AND NEW WORLD MARKET
 LIMITED
 Respondent

Member of Authority: Eleanor Robinson

Representatives: Daniel Zhang, Counsel for Applicant
 Jennifer Wickes, Counsel for Respondent

Costs Submissions 23 May 2016 from Applicant
 7 June 2016 from Respondent

Determination: 13 June 2016

COSTS DETERMINATION OF THE AUTHORITY

[1] In a determination dated 26 April 2016 ([2016] NZERA Auckland 124), I found that the Applicant, Mr Lichen Wang, had been unjustifiably dismissed from his employment by the Respondent, New World Market Limited (NWML).

[2] In that determination costs were reserved in the hope that the parties would be able to settle this issue between themselves. Unfortunately they have been unable to do so, and the parties have filed submissions in respect of costs.

[3] The matter involved 1 days of meeting time. Mr Zhang is seeking costs on an either indemnity costs basis of more than \$9,000.00 (claim not supported by invoices), or alternatively, a contribution to costs in the sum of \$7000.00.

Submissions for the Applicant

[4] The Applicant submits that there are three main points in support of the Authority to consider when determining a contribution to costs: (i) the existence of a Calderbank¹ Offer; (ii) the Respondent's conduct; and (iii) the complete lack of merit in the Respondent's case.

(i) *Calderbank Offer*

[5] In regards to the Calderbank Offer, the Applicant submits that it wrote to the Respondent in a letter dated 19 March 2015 containing an offer from Mr Wang to settle his grievances in the sum of \$14,000.00, which is less than the amount Mr Wang was awarded by the Authority.

(ii) *Conduct of the Respondent*

[6] The Applicant submits that the Respondent refused to provide the Applicant with its correct legal name, which resulted in him incurring unnecessary expense.

[7] The Applicant further submits that the Respondent repeatedly failed to comply with the Authority's timetabling directions in respect of the filing of wage and time records.

[8] The Respondent also failed to comply with the timetabling direction on submissions.

(iii) *The lack of merit in the Respondent's Case*

[9] The Applicant claims that there was clearly no merit in the Respondent's case which lacked a viable defence. This had the effect of increasing the Applicant's costs.

Submissions for the Respondent

[10] The Respondent submits that whilst the Applicant claims actual costs in excess of \$9,000.00 it is unclear what that figure includes or whether mediation costs are included.

[11] The Respondent submits that after the Applicant filed the Statement of Problem, the Respondent filed a Statement in Reply identifying the correct Respondent.

[12] In regard to the Calderbank letter, the Respondent states that in light of the claim made by Mr Wang at that time, its rejection of the Calderbank Offer was not unreasonable.

¹ *Calderbank v Calderbank* [1976] Fam 93 (CA)

[13] The Respondent submits that the notional daily tariff in the Authority is the appropriate level for costs in this case.

Determination

Principles

[14] The power of the Authority to award costs arises from Section 15 of Schedule 2 of the Employment Relations Act 2000 (the Act) which states:

15 Power to award costs

(1) The Authority may order any party to a matter to pay to any other party such costs and expenses (including expenses of witnesses) as the Authority thinks reasonable.

(2) The Authority may apportion any such costs and expenses between the parties or any of them as it thinks fit, and may at any time vary or alter any such order in such manner as it thinks reasonable.

[15] Costs are at the discretion of the Authority, as observed by Chief Judge Colgan in *NZ Automobile Association Inc v McKay*².

[16] The principles and the approach adopted by the Authority on which an award of costs is made are well settled and outlined in *PBO Limited (formerly Rush Security Ltd) v Da Cruz*³.

[17] It is a principle set out in *PBO Limited (formerly Rush Security Ltd) v Da Cruz*⁴ that costs are modest. Costs are also reasonable as observed by the Court of Appeal in *Victoria University of Wellington v Alton-Lee*⁵ at para [48] “As to quantification, the principle is one of reasonable contribution to costs actually and reasonably incurred.”

[18] The principles as set out by the Employment Court in *PBO Limited (formerly Rush Security Ltd) v Da Cruz* include:⁶

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

² [1996] 2 ERNZ 622

³ [2005] 1 ERNZ 808

⁴ [2005] 1 ERNZ 808

⁵ [2001] ERNZ 305

⁶ [2005] 1 ERNZ 808 at para [44]

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

[19] I have carefully considered the submissions of the parties. It is incumbent upon me that I approach the question of costs in a principled manner and not arbitrarily, and I therefore consider each relevant ground for uplift separately as appropriate.

[20] As a starting point I find that as there are no supporting invoices to the Applicant's submissions on costs and no identification of the elements of the claim for costs on an indemnity costs basis, the notional daily tariff in the Authority is the appropriate starting point for the assessment of costs in this case.

[21] It is necessary to consider what impact, if any, the Calderbank Offer should have on costs. Calderbank Offers are made on the basis of 'Without Prejudice Save As To Costs', In this case the letter sent by the Applicant dated 19 March 2015 is not clear that the offer to settle the matter is made on a 'without prejudice' basis, or advises of the impact on costs should the offer be rejected.

[22] I therefore do not accept the offer contained in the letter dated 19 March 2015 as being a valid Calderbank offer.

[23] In respect of the submissions that costs be increased as a result of the lack of merit in the Respondent's case, I note that the purpose of costs is not to punish the unsuccessful party.

[24] I am however minded to give weight to the submission that the Respondent's conduct should be considered as a factor in increasing costs.

[25] I note that the Respondent persistently failed to follow the Authority's directions regarding the filing of wage and time records, notably the direction on 16 October 2015 that the Respondent provide the wage and time records, . This necessitated follow-up directions issued on 9 November 2015, and twice on 25 November 2015.

[26] Whilst wage and time records were supplied on 8 December 2015, these were in Chinese and the Authority had to request a translation be provided, and a further request for that needed to be made on 21 March 2016. The submissions of the Respondent were also filed outside the Authority's timetable.

[27] These failures of the Respondent to follow the directions of the Authority in respect of the wage and time records involved it in additional case management, and resulted in it and the Applicant not having accurate records as to the wages paid and to be claimed.

[28] In all the circumstances, I determine that costs follow the event and as such Mr Wang is entitled to costs. The starting point for a 1 day investigation on the basis of the normal daily tariff in the Authority is \$3,500.00.

[29] I determine that that starting point should be uplifted to take into account the increased costs incurred as a result of the Respondent's failure to provide wage and time records in a timely manner.

[30] NWML is ordered to pay Mr Wang \$4,000.00 costs, pursuant to clause 15 of Schedule 2 of the Act.

Eleanor Robinson
Member of the Employment Relations Authority