

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2016] NZERA Auckland 357
5579242

BETWEEN LIANG ZHANG
 Applicant

A N D JBG TRADING LIMITED
 Respondent

Member of Authority: Nicola Craig

Representatives: Eva Kuo, Counsel for Applicant
 Royal Reed, Counsel for Respondent

Submissions: 3 October 2016 from Applicant
 14 October 2016 from Respondent

Date of Determination: 26 October 2016

**COSTS DETERMINATION OF
THE AUTHORITY**

- A. JBG Trading Limited is ordered to pay within 28 days of the date of this determination, \$3,850.00 to Liang Zhang as a contribution towards his costs, along with \$71.56 for the filing fee.**

The substantive determination

[1] In a determination of the Authority dated 5 September 2016¹ the Authority determined that:

- A. Liang Zhang (Mr Zhang) was not subject to an unjustified action by

¹ [2016] NZERA Auckland 302

JBG Trading Limited (JBG) regarding his holiday pay for the Christmas/New Year 2014-2015 close down period.

- B. JBG did not breach section 69ZD of the Employment Relations Act 2000 (the Act) regarding provision of rest breaks for Mr Zhang.
- C. Mr Zhang was unjustifiably dismissed by JBG. JBG was to pay Mr Zhang:
 - (i) \$2,400.00 gross in lost wages; and
 - (ii) \$4,000.00 as compensation for humiliation, loss of dignity and injury to feelings.

Costs application and submissions

[2] The parties were invited by the Authority to resolve the costs issue between them. They were unable to do so.

[3] Mr Zhang has applied for costs. He seeks the notional daily tariff rate for the two days of the investigation meeting, as well as reimbursement for the filing fee and any hearing fee.

[4] Mr Zhang seeks to have costs follow the event. On his behalf, it is acknowledged that although there was a discount to Mr Zhang's award, based on his contribution or fault, JBG was still found to have unjustifiably dismissed him.

[5] In addition, Mr Zhang says that he had to file in the Authority before his holiday pay was calculated correctly and paid, and that deductions had been made from holiday pay without his consent. Mr Zhang says that these matters could have been remedied much earlier and legal costs were unnecessarily incurred as a result.

[6] Invoices to Mr Zhang for legal fees were filed, totalling \$6155.41 (including GST). An additional \$300.00 (plus GST) is claimed for preparation of the costs submissions.

[7] After the substantive determination was delivered, Mr Zhang made a Calderbank offer to JBG regarding the costs issue. Mr Zhang offered to accept \$3,500 from JBG as costs. This offer was not accepted.

[8] JBG's position is that costs should lie where they fall, because of both parties having partial success in this case. Reference is made to authorities supporting such an approach. JBG notes a number of aspects of Mr Zhang's claim that were unsuccessful, and the remedies being less, for several reasons, than the amounts sought by Mr Zhang. JBG considers that the majority of key factual disputes in the case were decided in its favour.

[9] JBG also relies on the company's financial position. No documentation was filed to support this argument, but I accept that it was clear from the investigation meeting, that JBG was a small operation.

[10] Both parties allege that considerable periods of the investigation meeting had been attributable to the conduct of the other party in running his or its case.

Determination on costs

[11] The Authority's power to award costs comes from clause 15 of Schedule 2 of the Act. This confers a wide discretion on the Authority to award costs on a principled basis.

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

[13] 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 faith 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 for an unsuccessful party's conduct, although conduct

² [2005] 1 ERNZ 808

which increased costs unnecessarily can be taken into account in inflating or reducing an award.

- Costs generally follow the event.
- Awards will be modest.
- Frequently costs are judged against a notional daily tariff.

[14] Although costs generally follow the event, in this case both parties had a degree of success. Mr Zhang established his unjustified dismissal claim. JBG was successful in defending Mr Zhang's claims that he was subject to an unjustified action regarding holiday pay, and that he was not provided with rest breaks.

[15] As referred to in the substantive determination, both parties raised issues at the investigation meeting, which I accepted were important to them but which I did not find formed the basis of a claim as such.

[16] I consider that the Calderbank offer was a reasonable one and JBG acted unreasonably in not accepting it. However, the Calderbank offer only related to the issue of costs, rather than remedies. As would be expected, the legal fees incurred in dealing with the costs issue, were only a small portion of the total costs incurred. I take the Calderbank offer into account in making a slight allowance towards Mr Zhang.

[17] The applicable notional daily tariff for the Authority in place at the time that this case was filed, was \$3,500.00 per day. This matter involved an investigation meeting of two days. Mr Zhang claims a costs award of \$7000.00.

[18] The evidence is that the actual legal costs incurred by Mr Zhang are \$6500.41 (the two invoices and \$300.00 plus GST claimed for the costs submissions). I find these amounts to be reasonable.

[19] Mr Zhang claims that either JBG should be required to pay for any hearing fee or the fee should be waived. No hearing fee has been charged to Mr Zhang by the Authority yet. The need for an interpreter to provide interpretation of substantial amounts of the evidence contributed significantly to the length of the investigation meeting. This factor is not attributable to fault by either party. The hearing fee is hereby waived.

[20] In all of the circumstances, including Mr Zhang only having partial success, I order JBG to pay to Mr Zhang the following within 28 days of the date of this determination:

- a. \$3850.00 as a contribution towards his costs; and
- b. \$71.56 being the filing fee.

Nicola Craig
Member of the Employment Relations Authority