

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2017] NZERA Auckland 121
5636146

BETWEEN LEA ZHAO
 Applicant

A N D MULTIMARKETING LIMITED
 Respondent

Member of Authority: Anna Fitzgibbon

Representatives: Andrea Kelleher, Advocate for Applicant
 Edwin Morrison and Joy Yan, Counsel for Respondent

Date of Determination: 24 April 2017

**COSTS DETERMINATION OF
THE EMPLOYMENT RELATIONS AUTHORITY**

- A. The respondent, Multimarketing Limited (Multimarketing), is ordered to contribute \$10,000 towards the costs of the applicant, Ms Lea Zhao. Payment of costs is to be made within 21 days of the date of this determination.**

The substantive determination

[1] In a substantive determination of the Authority issued on 23 March 2017¹, the Authority determined that:

- (a) Multimarketing unjustifiably dismissed Ms Lea Zhao.
- (b) Multimarketing was to pay Ms Zhao \$17,500 compensation under s.123(1)(c)(i) of the Employment Relations Act 2000 (the Act) for humiliation, loss of dignity and injury to her feelings.

¹ [2017] NZERA Auckland 82

- (c) Multimarketing was to pay Ms Zhao reimbursement of lost salary in the sum of \$10,147.41 gross under s128(2) of the Act.
- (d) The compensation and reimbursement of lost remuneration were to be paid to Ms Zhao by Multimarketing within 21 days of the date of the Authority's determination.
- (e) Costs were reserved. Ms Zhao was given 14 days from the date of the Authority's determination to file a submission as to costs and Multimarketing was given 14 days from receipt in which to reply.

The Authority's power to award costs

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

[3] The Full Employment Court in *PBO Ltd (formerly Rush Security Ltd) v. Da Cruz*² held that the following basic tenets which had been applied by the Authority when considering costs were appropriate, namely:

- There is a discretion as to whether costs should 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 when inflating or reducing an award.
- It is open to the Authority to consider whether all or any of the parties costs were unnecessary or unreasonable.
- That costs generally follow the event.

² [2005] ERNZ 808, para.44

- 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.

[4] The Full Employment Court in *Fagotti v Acme & Co Ltd*³ confirmed the continued applicability of the broad principles of *Da Cruz* when the Authority considers costs claims.

Costs determination

[5] The advocate for Ms Zhao filed a memorandum as to costs on 3 April 2017 and Counsel for Multimarketing responded on 18 April 2017.

[6] This matter involved an investigation meeting of two days. The Authority's daily tariff is \$4500 for the first day of an investigation meeting and \$3500 for each day thereafter.

Ms Zhao's submission as to costs

[7] The advocate for Ms Zhao has provided details of costs incurred to bring Ms Zhao's claims against Multimarketing, supported by an invoice which totals \$14,379.44 including GST. The invoice includes claims for witness expenses, mileage, photocopying and transport.

[8] The advocate for Ms Zhao submits that the case is one in which it is appropriate for the Authority to depart from its usual daily tariff in respect of costs. An uplift in the daily rate is sought to cover Ms Zhao's entire costs of \$14,379.44. In support of her uplift of costs, Ms Zhao's advocate says:

- Multimarketing's defence was unmeritorious.

³ [2015] NZEmp C 135 at [115]

- Multimarketing failed to respond to a *Calderbank*⁴ offer of \$8,000 made on 14 September 2016 and made a counter *Calderbank* offer of \$800 on 19 December 2016.

Multimarketing’s response

[9] Counsel for Multimarketing in their submissions in reply, claim Ms Zhao is entitled to actual costs only of \$1750 plus filing fees and costs of the second day of hearing. This is for the following reasons:

- Ms Zhao’s advocate advertises a “no win - no fee” which, based on the outcome of the Authority’s determination, amounts to \$1,750.
- Witness expenses and fees are not payable as they were witnesses for Ms Zhao.
- The case was a usual case without complex issues. Although there was a *Calderbank* offer, the Authority should take into account Ms Zhao’s actual fees only and not apply its daily notional tariff.

***Calderbank* offers**

[10] In a letter to Counsel for Multimarketing on 14 September 2016, the advocate for Ms Zhao made an offer that Multimarketing pay Ms Zhao \$8,000 under s.123(1)(c)(i) of the Act to settle Ms Zhao’s claims. The letter states:

This offer is made on a without prejudice basis save as to costs and as such should be treated as a *Calderbank* offer. In other words, should Multimarketing Ltd decline this offer of settlement Lea Zhao reserves the right to produce this letter in support of an application for costs.

[11] Multimarketing did not respond to the *Calderbank* offer. In a letter to Ms Zhao’s advocate 3 months later, on 19 December 2016, Counsel for Multimarketing made a *Calderbank* offer including the following:

- ...
- ...
- 2. Despite your client has no prospect of succeeding based on the information before the Authority, to avoid costs of the investigation hearing including the preparation, we are instructed to offer \$800.00 in full and final settlement of all disputes between the parties.

⁴ *Calderbank v Calderbank* [1975] 2 All ER 333

3. This *Calderbank* offer is open until 1pm 21 December 2016. If your client does not accept this offer and in the event your client does not succeed before the Authority, we will be presenting this offer to seek costs to be awarded against your client from today until the investigation hearing is finished.

[12] Ms Zhao filed her statement of problem in the Authority on 26 July 2016, before mediation took place between the parties. The *Calderbank* offer was made on Ms Zhao's behalf on 14 September 2016. Its terms were very clear. No response was received to it. Ms Zhao filed an amended statement of problem on 25 October 2016. The *Calderbank* offer on Ms Zhao's behalf was made before the amended statement of problem was filed and a significant period of time before the two day investigation meeting took place on 28 February and 1 March 2017.

[13] The *Calderbank* offer by Multimarketing was made on 19 December 2016, over 3 months after Ms Zhao's advocate had initially made her *Calderbank* offer and was at 10% of the amount sought by Ms Zhao to settle her claims. It is appropriate, in the circumstances, for the Authority to take the *Calderbank* offer into account in determining costs.

[14] Counsel for Multimarketing has pointed to a contingency fee arrangement as a reason for Ms Zhao's claim for costs to be limited to \$1750. Ms Zhao's advocate has provided an invoice for her time and attendances and costs. I am satisfied that Ms Zhao has incurred costs of \$14,379.44.

[15] As part of her claim for costs, Ms Zhao seeks witness expenses. The sum claimed is in respect of Ms Zhao's partner, Mr Craig Wilderspin and totals \$403.60 based on an hourly rate of \$30.95 for his attendance. This claim is resisted by Multimarketing.

[16] Clause 6, Schedule 2 of the Act provides for payment of witness expenses to any person giving evidence before the Authority. The applicable regulations are the Witnesses and Interpreters Fees Regulations 1974. The sum sought on behalf of Ms Zhao significantly exceeds the rate under those Regulations.

[17] In any event, it is not the usual practice of the Authority to make the awards sought and I am not inclined to do so in this case. The Authority has a notional daily tariff for costs and it is my view that any such order for costs will cover the witness expenses and the photocopying and mileage costs claimed.

Determination

[18] Given the success of Ms Zhao in regard to the outcome of the substantive matter, costs in my view must follow the event. The Authority's current notional daily tariff would mean that costs for the two day investigation meeting would amount to \$8,000.

[19] The reference to "without prejudice save as to costs offers", in *Da Cruz* is recognition by the Employment Court that a *Calderbank* offer is a matter that can reasonably be taken into account by the Authority in exercising its discretion in determining costs. The general principles pertaining to *Calderbank* offers have been considered and are now well established by the Court of Appeal.

[20] In *Bluestar Print Group (NZ) v Mitchell*⁵ the Court of Appeal re-emphasized that a "steely" approach is required where a *Calderbank* offer has been made. At para [20] the Court stated:

It has been repeatedly emphasized that the scarce resources of the Courts should not be burdened by litigants who choose to reject reasonable settlement offers, proceed with litigation and then fail to achieve any more than what was previously offered.

[21] On the weight of the evidence before the Authority regarding the substantive matter, the assessment made by Ms Zhao that she had been unjustifiably dismissed, was, in my view, a reasonable one. It follows that the *Calderbank* offer made on her behalf on 14 September 2016 was reasonable, particularly given that the Authority found that there were substantial deficiencies in the procedure undertaken to dismiss Ms Zhao, and the genuineness of the reasons for her dismissal.

[22] The Authority's decision was clear that Ms Zhao's dismissal was not the action of a fair and reasonable employer in the circumstances. Ms Zhao was awarded \$17,500 compensation for hurt and humiliation suffered as a result of the dismissal. Ms Zhao had offered to settle her claims against Multimarketing before she filed an amended statement of problem and almost six months before the investigation meeting for the sum of \$8,000.

[23] In a costs setting, of course, it has to be accepted that the rejection of the offer was a decision that Multimarketing was entitled to take. But in doing so, it was on

⁵ [2010] ERNZ 446 (CA)

notice from Ms Zhao that she would rely on the existence of the *Calderbank* offer in regard to claiming costs, in the event that she was successful in her claims against Multimarketing.

[24] This is a case where the *Calderbank* offer can appropriately be taken into account. A reasonable *Calderbank* offer was made well in advance of the investigation meeting and in the circumstances it is my view that an uplift in costs is appropriate.

[25] Pursuant to Schedule 2, clause 15 of the Act, Multimarketing is ordered to pay to Ms Zhao the sum of \$10,000 as a contribution to her costs. Payment is to be made within 21 days of the date of this determination.

Anna Fitzgibbon
Member of the Employment Relations Authority