

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKĀURAU ROHE**

[2019] NZERA 542
3039792

BETWEEN QISHAN HUANG
 Applicant

AND INDEPENDENT PROSPERITY
 LIMITED
 Respondent

Member of Authority: Anna Fitzgibbon

Representatives: Ben Hinchcliff, counsel for the Applicant
 Callum McLean and subsequently Jesse Nguy, counsel
 for the Respondent

Submissions Received: 30 July 2019 from the Applicant
 7 August 2019 from the Respondent

Date of Determination: 19 September 2019

COSTS DETERMINATION OF THE AUTHORITY

[1] Independent Prosperity Limited (Independent Prosperity) is ordered to pay Ms Qishan Huang the sum of \$10,750 as a contribution towards her costs within 28 days of date of this determination together with the filing fee of \$71.56.

[2] In a determination dated 22 July 2019,¹ the Authority found that the applicant, Ms Qishan Huang was unjustifiably dismissed from her employment by Independent Prosperity, that Independent Prosperity had breached provisions of the Employment Relations Act 2000 (the Act) in unlawfully requiring Ms Huang to repay her wages and by not paying wages to her, and that Independent Prosperity had breached provisions of the

¹ [2019] NZERA 433.

Holidays Act 2003 in failing to pay Ms Huang annual leave. Remedies were awarded accordingly.

[3] The Authority reserved the question of costs. The parties were invited to exchange memoranda as to costs.

Submissions as to costs

[4] A memorandum as to costs was filed on behalf of Ms Huang. The actual legal costs incurred by Ms Huang amounted to \$15,837.07 including GST. Counsel for Ms Huang seeks costs of \$15,500.00 including GST. In support of costs at that level, counsel for Ms Huang relies on *Calderbank*² offers made on Ms Huang's behalf which he says were reasonable, made at an early stage and which were rejected by Independent Prosperity.

[5] In his memorandum in reply, counsel for Independent Prosperity, Mr Nguy submits that "costs should be shared with the total daily tariff of \$9,750.00 setting the upper limit of costs". Mr Nguy further submits that any costs awarded to Ms Huang should be adjusted to take in to consideration the sum of \$2,875.00 being the cost Independent Prosperity was required to pay in order to have Ms Huang's transcripts of conversations translated.

Costs determination

[6] The discretion to award costs, while broad, is to be exercised in a principled manner. The primary principle is that costs follow the event. The Authority has the power to order any party to pay to any other party such costs and expenses as the Authority thinks reasonable.³ The principles applying to costs are well settled and do not require repeating.⁴

[7] The investigation meeting took just over 2.5 days in the Authority. As stated in the substantive determination⁵, the investigation meeting was adjourned after almost one full day on 12 February 2019, because Independent Prosperity disputed the accuracy of the translation of an audio recording made by Ms Huang. This was a matter that could have been attended to well in advance of the investigation meeting. The investigation meeting resumed on 19 June 2019 for a full day and just over half a day on 20 June 2019.

² *Calderbank v Calderbank* [1975] 3 All ER 333.

³ Employment Relations Act 2000, Schedule 2, Clause 15.

⁴ *PBO Limited v Da Cruz* [2005] 1 ERNZ808, 819-820 and *Fagotti v Acme & Co Limited* [2015] NZEMPC 135 at [106] - [108].

⁵ fn1, para 9.

[8] An assessment of costs in the Authority will normally start with a notional daily tariff which is \$4,500.00 for the first day of an investigation meeting and \$3,500.00 for each subsequent day.⁶ The starting point therefore based on the Authority's notional daily rate is \$9,750.00.

[9] The Authority may take into account any offers made by the parties to settle matters.⁷

Calderbank offers

[10] On 17 August 2018, prior to filing a statement of problem in the Authority, counsel for Ms Huang wrote to Independent Prosperity setting out a personal grievance claim which included an offer of settlement. The offer was as follows: "Our client is prepared to offer you a full and final settlement in the amount of \$20,000.00. This offer is only valid until 5pm, Friday, 24 August 2018. If the offer is accepted, the agreement will be drawn up with the assistance of MBIE Mediation Services. ..."

[11] Independent Prosperity responded to the letter on 18 August 2019, stating that Ms Huang owed commission to Independent Prosperity and reminding her to pay it.

[12] A second offer to settle Ms Huang's claims was made to Independent Prosperity on 20 September 2018 as follows:

"My client, Qishan Huang, has the following without prejudice offer except as to costs: Independent Prosperity Limited is to:

1. Pay my client \$12,500.00 under s 123(1)(c)(i) within 14 days;
2. Provide a positive reference including a statement that my client resign from her position, within 14 days; and
3. Each party will not make disparaging comments about the other party. This will be a full and final settlement between the parties related to the employment agreement. This offer is valid for seven days from today.

[13] On 2nd of October 2018, Independent Prosperity through its counsel, made a counter offer to pay Ms Huang \$10,010 at \$2,002 per month for 5 months. The other terms of Ms Huang's offer of 20 September 2018, including the provision of a certificate of service,

⁶ Practice note costs in the Employment Relations Authority.

⁷ As cited in *Blue Star Print Group NZ Limited v Mitchell* [2010] NZCA 385 at [18].

not making disparaging comments and being in full and final settlement were all agreed to, (“other terms”).

[14] This offer was not accepted by Ms Huang. Further offers were made by Independent Prosperity on 9th and 16th of November 2018. The offer on 9th of November was to settle matters by paying Ms Huang the sum of \$12,000.00 at \$2,400.00 per week for 5 weeks with other terms agreed. The offer of 16th of November 2018 was to settle matters by paying Ms Huang the sum of \$21,000.00 at \$2,000.00 per month for 10.5 months with other terms agreed. A further offer was made on 7 June 2019, following the first day of the investigation meeting on 12 February 2019, and before its resumption on 19 June 2019. This offer was that Independent Prosperity increase its offer to \$20,000 payable over 15 months.

[15] It is clear that the parties were attempting energetically to resolve the matters but were unable to do so. It is my view that Ms Huang’s rejection of the offers by Independent Prosperity were reasonable. Ms Huang had attempted at a very early stage following her dismissal to try and resolve the matter without it proceeding to the Authority.

[16] The first offer on 17 August 2018, was contained in a letter made on Ms Huang’s behalf, notifying Independent Prosperity of her employment relationship problem. The letter set out in detail the basis of Ms Huang’s claims and the reasons why she felt that her offer to resolve her claims was reasonable. Independent Prosperity responded by asking Ms Huang to repay commission. Although the offer was not expressed “without prejudice except as to costs”, it was a genuine attempt at an early stage by Ms Huang to settle matters.

[17] The second offer of settlement made by Ms Huang on 20 September 2018 was a matter of weeks after Ms Huang had filed her claim in the Authority. It was expressed “without prejudice except as to costs” and does, in my view, constitute a Calderbank offer. The offer was that Independent Prosperity pay \$12,500.00 to resolve Ms Huang’s grievance.

[18] The settlement offers in response by Independent Prosperity were for amounts to be paid to Ms Huang over a number of months. The amounts were considerably less than the amounts awarded by the Authority in its determination of 22 July 2019.⁸

[19] In all of the circumstances, I consider an uplift in costs to be reasonable. Ms Huang was entirely successful in her claims against Independent Prosperity. The investigation

⁸ fn1.

meeting was adjourned because during the course of the first day of the investigation meeting, Independent Prosperity wished to have its own translation of transcripts provided by Ms Huang. This was a matter which could have been dealt with much earlier but was not. I consider an uplift of \$1000 to be reasonable.

[20] Independent Prosperity is ordered to make a contribution of \$10,750.00 in total in respect of Ms Huang's costs.

[21] Costs of \$10,750.00 together with the filing fee of \$71.56 are to be paid by Independent Prosperity to Ms Huang within 28 days of the date of this determination.

Anna Fitzgibbon
Member of the Employment Relations Authority