

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2018] NZERA Auckland 147
3015031

BETWEEN ZONGLIANG JIANG
 Applicant

A N D ONO
 Respondent

Member of Authority: Eleanor Robinson

Representatives: Nathan Santesso, Advocate for the Applicant
 Mere King, Counsel for the Respondent

Submissions Received: None from Applicant
 10 April 2018 from Respondent

Date of Determination: 7 May 2018

**COSTS DETERMINATION OF THE
EMPLOYMENT RELATIONS AUTHORITY**

[1] In a determination dated 13 March 2018 [2017] NZERA Auckland 82, I found that the Respondent, ONO, was successful in defence of Mr Jiang's substantive claim.

[2] In a determination dated 9 November 2017 [2017] NZERA 348, I determined that ONO was successful in its interlocutory application for non-publication orders in respect of ONO's identity, the identity of its witnesses and of any commercially sensitive information required to be provided as part of the Authority's investigation process.

[3] 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 Miss King on behalf of ONO has filed a submission in respect of costs.

[4] The matter involved two days of hearing for the substantive matter and an interlocutory determination for non-publication orders which was determined 'on the papers' on 9 November 2017 [2017] NZERA 348.

[5] Miss King, citing actual costs of \$51,126.00, is seeking a costs award at a level above the normal daily tariff rate which applies in the Authority, namely a costs award of \$12,000.00 uplifted by 50% above the daily tariff for such an award, and \$21,000.00 being six days preparation for the hearing of the hearing at the notional daily tariff, a total of \$33,000.00.

Respondent Submissions

[6] Miss King on behalf of ONO submits that this is a case where it is appropriate for the Authority to award costs for its preparation of its application and affidavit evidence in support of the successful non-publication order, and also ONO's preparation of submissions in general preparation for the substantive matter.

[7] Ms King, in support of the submission, cites *Tex Onsite Limited v Hill*¹ in which the Authority applied the principles of *Chief Executive of the Department of Corrections v Tawhiwhirangi (No. 2)*² and is seeking that the same principles be applied in this case to award costs and disbursements for hearing time and preparation time.

[8] It is submitted that ONO's legal costs in preparing for the investigation were significantly higher than the award sought and did not include legal costs that were incurred before ONO's Calderbank³ offer made on 20 September 2017, which was an attempt to resolve the matter on a commercial pragmatic basis.

[9] The Calderbank letter was sent before ONO went on to incur the costs of its interlocutory application for non-publication orders and before either party had incurred the costs of preparing evidence for the substantive Authority investigation.

[10] Ms King submits that ONO is seeking a costs award in respect of six days preparation time at the notional daily tariff rate, being \$21,000.00. An amount it considers modest and fair in all the circumstances.

Calderbank offer

[11] ONO attempted to settle the matter with Mr Jiang directly before the substantive hearing. It submits that its efforts to limit costs should also be taken into consideration by the Authority.

[12] On 20 September 2017, ONO through its Counsel sent a letter to Mr Jiang on a Calderbank basis. This Calderbank offer was timely and allowed an adequate opportunity for Mr Jiang to consider, take advice and accept the Calderbank offer.

[13] ONO's position and the problems inherent in Mr Jiang's claim were discussed in detail and the issue of costs was also addressed as being part of the offers made. The letter expressly provided that if Mr Jiang was unsuccessful in the Authority the: "*letter will be*

¹ *Tex v Hill* [2016] NZERA Auckland 67

² *Department of Corrections v Tawhiwhirangi* [2008] ERNZ 73.

³ *Calderbank v Calderbank* [1976] Fam 93 (CA)

relied upon in support of [ONO] obtaining increased costs or solicitor/client costs on a full indemnity basis. “

[14] ONO submits that if Mr Jiang had accepted ONO’s Calderbank offer he would have been at least \$12,400.00 better off (even before accounting for legal fees).

[15] Mr Jiang rejected ONO’s Calderbank offer by email dated 4 October 2017. No counter offer was proposed.

Mr Jiang’s conduct increased costs unnecessarily

[16] ONO submits that Mr Jiang’s conduct increased costs unnecessarily as follows:

- (a) The conduct of Mr Santesso, Mr Jiang’s advocate, prior to the investigation was obstructive and increased ONO’s costs. ONO submits that in particular Mr Santesso refused to include in the common bundle all the documents ONO had provided to him for that purpose.

This was despite a direction from the Authority (Member’s Minute, 25 September 2017) that Mr Santesso was required to prepare a common bundle of documents which was to be referred to each party’s witness statements. It is submitted that Santesso’s refusal appeared to be due to his belief that a number of ONO documents were irrelevant and “fake”. When Counsel for ONO advised Mr Santesso that the documents would be referred to in ONO’s evidence and were required to be before the Authority in the common bundle, Mr Santesso advised ONO to create its own bundle if it wanted to file the documents he considered to be irrelevant.

On 29 November 2017 by way of email, ONO sought leave from the Authority to file an updated common bundle of documents which included all of ONO’s documents and sought leave to raise this conduct when costs were determined.

- (b) ONO incurred additional legal costs as a result of Mr Santesso’s conduct during the investigation meeting. Mr Santesso was formally cautioned by the Authority Member under s 134(A) of the Act for obstructing and delaying the Authority investigation. As a result of Mr Santesso’s conduct, the investigation meeting took longer than necessary. This unnecessarily increased ONO’s costs.

[17] It is submitted that a key policy consideration awarding costs is that conduct unnecessarily increasing costs should be discouraged⁴. ONO submits Mr Jiang's behaviour should be discouraged by taking this behaviour into account as a factor increasing the Authority's costs award.

Ability to pay

[18] ONO has not been provided with any evidence to suggest Mr Jiang is impecunious. For the above reasons ONO considers that costs should be awarded beyond the normal daily tariff. Specifically ONO seeks costs as follows being:

- (a) \$12,000.00 being the notional daily tariff (of \$8,000) uplifted by 50%, and
- (b) \$21,000.00 being six days preparation for the hearing at the notional daily tariff.

Determination

[19] When approaching the issue of costs I do so in a principled manner. The principles guiding the Authority's approach to costs are well known and are set out by the Full Employment Court in *PBO Ltd (formerly Rush Security Ltd) v. Da Cruz (PBO v Da Cruz)*. Principles identified in *PBO3* include:

- Costs are not to be used as punishment or an expression of disapproval of the unsuccessful party's conduct, although conduct which increased costs unnecessarily can be taken into account in 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 without prejudice offers can be taken into account.
- That awards will be modest.⁵

[20] These principles were recently considered and affirmed by a full Court of the Employment Court in *Fagotti v Acme & Co Limited*⁶.

[21] The general principle is that costs follow the event. ONO was the successful party and should be awarded costs.

[22] Having considered therefore the submission of ONO and I approach each ground for uplift separately as appropriate.

⁴ *Stevens v Hapag-Lloyd* [2015] NZEmpC 28.

⁵ *PBO v Da Cruz* [2005] ERNZ 808 at [44]

⁶ [2015] NZEmpC 135 [2015] NZEmpC 135

Preparation Time

[23] This case did not involve a straightforward issue, but was fairly complex requiring preparation beyond what is normally required in respect of an Authority investigation.

[24] I take into consideration the fact that preparation of the common bundle was frustrated by Mr Santesso's refusal to include some of ONO's documents in the common bundle which had been directed by the Member, and which necessitated ONO seeking leave of the Authority to file an updated common bundle of documents and necessitated additional preparation.

[25] In addition submissions were required in respect of the preliminary application by ONO.

[26] . In *PBO v Da Cruz* the Employment Court observed at para [47]:

... we urge representatives of parties to be conscious of the costs that are accumulating as a matter proceeds. Cases should be approached economically and in a way that is likely to leave a successful party with a satisfactory outcome. There is an overall need to ensure that costs being incurred are reasonable in the light of the amount that is likely to be recovered as remedies and costs from the Authority

[27] It is unusual for the Authority to allow preparation time in respect of an investigation meeting. However in this particular case, I am prepared to accept that there was a necessity for preparation in excess of what is usually required for a case falling within the jurisdiction of the Authority.

Conduct of the Applicant's Advocate

[28] I accept that the examples as submitted by the Respondent of the Applicant Advocate's conduct are largely substantiated in my own experience. Mr Santesso disregarded the Authority's direction regarding the common bundle and during the investigation meeting displayed disrespectful and discourteous behaviour towards the Authority.

[29] This consistent inappropriate behaviour resulted in my having to address Mr Santesso on the standard of behaviour expected of him as a party representative in the process on a number of occasions, and necessitated my cautioning him that I was considering his behaviour as delaying and obstructing my investigation.

[30] Such behaviour distracted from issues requiring to be addressed, was frustrating, and delayed the process.

[31] This is a factor which I take into consideration when determining the appropriate level of costs in this matter.

Calderbank Offer

[32] I am also minded to give weight to the matter of the Calderbank Offer.

[33] Whilst taking note of the comments made by Judge Inglis as regards the ameliorating of the ‘*steely*’ approach noted in the judgment in *Stevens v Hapag-Lloyd (NZ) Ltd*⁷ which referred to ‘*significant costs awards*’, I consider that Calderbank Offers may still be taken into consideration in the matter of costs in the Authority on the basis that the public interest in the fair and expeditious resolution of disputes would be adversely affected if parties were permitted to ignore without prejudice offers without costs being impacted⁸.

[34] The Calderbank Offer was made well in advance of the Investigation Meeting and there was therefore due time for the Applicant to consider it fully prior to taking any part in that proceeding.

[35] It was made in advance of any preparation taking place in respect of either for the preliminary matter or for the substantive hearing.

[36] I find that the Calderbank Offer represented a monetary benefit to Mr Jiang at an early stage in the proceedings and I find: “*amounted to a genuine compromise by the defendant*”.⁹

[37] Accordingly I find that the Calderbank Offer is a factor to be considered in setting the level of costs to be awarded to ONO.

[38] Taking all of these factors into consideration, I consider it appropriate that an order for costs is set at a level which reflects these factors.

[39] Accordingly, I order Mr Jiang is ordered to pay to ONO the sum of \$30,000.00 as a contribution to its costs, pursuant to clause 15 of Schedule 2 of the Act.

E Robinson
Member of the Employment Relations Authority

⁷ [2015] NZEmpC 137 at para [95]

⁸ *Aoraki Corporation Ltd v McGavin*⁸ [2004] 1 ERNZ 172 (CA) at [53]

⁹ *O’Hagan v Waitomo Adventures Limited* [2013] NZEmpC 58 at [27]