

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2021] NZERA 130
3057273

BETWEEN

MINSOOK LEE
Applicant

AND

JNJ MANAGEMENT
LIMITED
Respondent

Member of Authority: Vicki Campbell

Representatives: Adam Mapu, advocate for Applicant
Julia Leenoh, counsel for Respondent

Submissions received: 3 and 10 March 2021 from Applicant
3 and 10 March 2021 from Respondent

Determination: 6 April 2021

COSTS DETERMINATION OF THE AUTHORITY

[1] In a determination dated 24 February 2021 I found Ms Lee had been subjected to unfair bargaining and that one or more conditions of her employment had been affected to her disadvantage.¹ Ms Lee's claim that she had been unjustifiably constructively dismissed was not successful. Ms Lee was awarded compensation for the unfair bargaining under s 69 of the Employment Relations Act 2000 (the Act) and compensation for the disadvantage grievance under s 123(1)(c)(i) of the Act.

[2] Costs were reserved and I invited the parties to resolve this matter between them. They have been unable to do so, and both parties have lodged submissions seeking costs.

¹ *Lee v JNJ* [2020] NZERA 500.

[3] The discretion to award costs, while broad, is to be exercised in a principled way. 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.² The principles applying to costs are well settled and do not require repeating.³

[4] An assessment of costs in the Authority will normally start with the notional daily tariff which is \$4,500 for the first day of an investigation meeting and \$3,500 for each subsequent day.⁴ The investigation meeting took one full day plus one part day which gives a starting point of \$6,250.

Mixed measure of success

[5] There was a mixed measure of success by both parties. Although Ms Lee was successful in her claims of unfair bargaining and for disadvantage she did not succeed in her claim that she had been unjustifiably dismissed. The situation of mixed success has been examined by the Court in *Coomer v JA McCallum and Son Limited*.⁵

[6] Ultimately I must stand back and look at things in the round.⁶ Having done so Ms Lee must be considered the successful party. Ms Lee's claim for constructive dismissal largely relied on the same facts as her successful claim for unjustified disadvantage.

Calderbank offers

[7] The Authority will take into account any offers made by the parties to settle matters.⁷ If the Applicant does not beat the offer, there should be a steely response as that would be in the broader public interest.⁸

[8] That approach was reiterated by the Court of Appeal in *Bluestar Print Group (NZ) Ltd v Mitchell* where the Court said:⁹

² Employment Relations Act 2000, Schedule 2, clause 15.

³ *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808, 819-820 and *Fagotti v Acme & Co Limited* [2015] NZEmpC 135 at [106] – [108].

⁴ Practice Note 2, Costs in the Employment Relations Authority.

⁵ *Coomer v JA McCallum and Son Limited* [2017] NZEmpC 156.

⁶ *Coomer* above n 5 at [43].

⁷ *Bluestar Print Group NZ Ltd v Mitchell* [2010] NZCA 385 at [18].

⁸ *Health Waikato Ltd v Elmsly* [2004] 1 ERNZ 172, (2004) 17 PRNZ 16 (CA) at [53].

⁹ Above n 5 at [18]-[20].

It has been repeatedly emphasised 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 was previously offered. ... The importance of Calderbank offers is emphasised by reg 68(1). It is the only factor relevant to the conduct of the parties specifically identified as having relevance to the issue of costs.

[9] These comments apply with respect to Calderbank offers made before an Authority investigation.¹⁰

[10] There were a number of Calderbank offers exchanged between the parties. The offers were made on:

- a) 18 July 2019 by JNJ Management Limited;
- b) 20 August 2019 by Ms Lee;
- c) 23 April 2020 by Ms Lee;
- d) 28 October 2020 by JNJ Management Limited;

[11] None of the offers were accepted and the matter proceeded to an investigation meeting on 29 and 30 October 2020.

[12] The first offer by JNJ Management Limited purports to be in the sum of \$12,000 but in reality Ms Lee would have received \$5,456.65 as the balance was to be used as a set off against the claims against Ms Lee in the District Court.

[13] The offer by Ms Lee to resolve matters in August 2019 included the payment of compensation in the sum of \$10,000 plus payment of costs to Mr Mapu of \$6,000 (plus GST) and the withdrawal of the District Court proceedings. This was equivalent to an offer of \$16,900.

[14] Ms Lee's offer in April 2020 included \$10,000 compensation plus payment of Mr Mapu's costs of \$9,800 (plus GST), payment of Ms Lee's costs in the District Court amounting to \$8,238.20 and the withdrawal of the District Court proceedings. This is equivalent to an offer of \$29,508.20.

[15] The final offer by JNJ Management made on 20 October 2020 was for the payment of \$20,000 and the withdrawal of the District Court proceedings.

¹⁰ *Fagotti v Acme & Co Ltd* [2015] ERNZ 919 at [109]; *Spillman v Tandam Skydiving* [2018] NZEmpC 32 at [37].

[16] I have reached the following conclusions as to the rejection of all of the Calderbank offers:

- a) Ms Lee's rejection of JNJ Management Limited's July 2019 offer was reasonable. Ms Lee was awarded compensation totalling \$11,000 for the unfair bargaining and her disadvantage personal grievance. This was in excess of the offer made by JNJ Management Limited.
- b) JNJ Management's rejection of Ms Lee's August 2019 offer was not reasonable given the awards made to Ms Lee as a result of her success at the Authority. The offer was made before any timetabling orders had been set, and well before any witness statements and other documents were required to be lodged with the Authority for its investigation.
- c) JNJ Management's rejection of Ms Lee's April 2020 offer was not unreasonable. The offer was well in excess of the success Ms Lee achieved at the Authority.
- d) Ms Lee's rejection of JNJ Management Limited's October 2020 offer was unreasonable. The sum offered was in excess of the awards made to her and would have covered a significant proportion of her costs.

[17] Given my findings regarding the rejection of the Calderbank offers there will be an uplift in costs. If JNJ Management Limited had accepted Ms Lee's offer in August 2019 the matter would have been resolved and no further costs would have been incurred by either party. I have balanced that uplift to take into account JNJ Management's success in defending Ms Lee's claim for unjustified dismissal.

Conclusion

[18] JNJ Management Limited is ordered to pay to Ms Lee the sum of \$6,700 as a contribution toward costs within 28 days of the date of this determination.

District Court proceedings

Ms Lee seeks a contribution to the costs she has incurred in defending the District Court proceedings. The Authority has no jurisdiction to order costs in respect of proceedings in the District Court.

Vicki Campbell
Member of the Employment Relations Authority