

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2022] NZERA 262
3134900
3135723

BETWEEN KELLY LEOTA LU
Applicant and Respondent

AND CHOICEKIDS CHILDCARE
LIMITED
Respondent and Applicant

Member of Authority: Eleanor Robinson

Representatives: Dave Cain, advocate for Ms Leota Lu
Daniel Church, counsel for ChoiceKids Childcare Limited

Submissions Received: 8 June 2022 from Ms Leota Lu
3 June 2022 from ChoiceKids Childcare Limited

Date of Determination: 22 June 2022

COSTS DETERMINATION OF THE AUTHORITY

[1] In a determination dated 26 May 2022 [2017] NZERA 216 I determined that Ms Leota Lu was not unjustifiably dismissed by ChoiceKids Childcare Limited (ChoiceKids), but that she had been unjustifiably disadvantaged in her employment. A small penalty was also awarded to ChoiceKids.

[2] In that determination I encouraged the parties to resolve the issue of costs between themselves. They have been unable to do so and both parties have filed submissions and supporting invoices details in respect of costs.

[3] The matter involved two days of an investigation meeting on 19 and 20 April 2022.

[4] Ms Leota Lu is seeking costs in the sum of \$4500.00. ChoiceKids is seeking costs in the sum of \$15,000.00 which sum represents costs sought at the notional daily tariff rate in the Authority for a

two day hearing of \$8,000.00 plus an uplift to reflect Ms Leota Lu's rejection of a reasonable *Calderbank* offer repeated twice and time spent drafting its costs submissions.¹

ChoiceKids submissions

[5] Whilst acknowledging that Ms Leota Lu was successful in her unjustifiable disadvantage claim, ChoiceKids submits that much of its time spent, and costs incurred, were necessary to defend her more substantial claim for unjustifiable dismissal which was unsuccessful.

[6] ChoiceKids submits that Ms Leota Lu should not have pursued the unjustifiable dismissal claim which had little or no chance of success, and as a result ChoiceKids spent a considerable sum of money defending her claims against it, noting this had resulted in only a minor success for her. Accordingly it is entitled to a costs award.

Calderbank Offers

[7] It is submitted on behalf of ChoiceKids that it made a *Calderbank* Offer in a letter dated 23 October 2020 and headed 'Without prejudice save as to costs' to Ms Leota Lu. The *Calderbank* Offer was an offer to settle the matter by way of the payment of \$6,000.00 pursuant to s 123(1)(c)(i) of the Employment Relations Act 2000 (the Act) in full and final settlement.

[8] The amount offered was double what Ms Leota Lu was ultimately awarded by the Authority. It was made after the parties attended mediation but before pleadings were filed by either party. The offer remained open for acceptance by Ms Leota Lu until 30 October 2020.

[9] After the pleadings were filed (both Ms Leota Lu's claims and ChoiceKids counter-claims), and the matters allocated to a Member, the offer was repeated in a second *Calderbank* letter dated 27 September 2021, and remained open for acceptance until 1 October 2021.

[10] The repeated offer was made well in advance of the investigation meeting and it is submitted, ahead of counsel undertaking significant preparation work for the investigation meeting.

[11] It is submitted that Ms Leota Lu was put on notice in the repeated offer that if she were not to be awarded a monetary amount, or an amount less than, or equal to, the amount contained in the offer, ChoiceKids would provide both letters to the Authority in support of an application for increased costs and/or indemnity costs.

¹ *Calderbank v Calderbank* [1976] Fam 93 (CA).

[12] Given Ms Leota Lu's rejection of the Calderbank offer repeated twice, ChoiceKids submits that a significant uplift in the costs, which should be awarded to it, is merited.

[13] ChoiceKids submits it should also be entitled to costs in respect of its costs submissions which were required after it had tried to reach agreement on costs with Ms Leota Lu but she did not respond to its offer.

Ms Leota Lu's submissions

[14] It is submitted on behalf of Ms Leota Lu that she whilst she was only partially successful in her claim, she was nonetheless successful and as such, is entitled to costs.

[15] Although ChoiceKids was successful in its penalty claim, it is submitted that the amount of time spent on this aspect was limited to only a partial element of closing submissions.

[16] It is submitted that this case strongly resembles the case of *Coomer v JA McCallum and Son Ltd* in that a disadvantage claim was successful and a dismissal claim was not, and, as in *Coomer*, Ms Leota Lu is entitled to a costs award.²

[17] In regard to the *Calderbank* offer, it is submitted that Ms Leota Lu is entitled to costs and this amount combined with the hurt and humiliation amount she was awarded by the Authority will exceed the *Calderbank* offer made. On that basis she was justified in not accepting it.

[18] In regard to the submission by ChoiceKids that it be awarded costs in respect of its costs submissions, it is submitted that the Authority does not generally consider costs on costs applications. Ms Leota Lu is not seeking costs in respect of her costs submission, and nor, it is submitted, should any be awarded to ChoiceKids.

Principles

[19] The power of the Authority to award costs arises from Section 15 of Schedule 2 of the Employment Relations Act 2000 which states:

15 Power to award costs

² *Coomer v JA McCallum and Son Ltd* [2017] NZEmpC 156.

- (1) The Authority may order any party to a matter to pay to any other party such costs and expenses (including expenses of witnesses) as the Authority thinks reasonable.
- (2) The Authority may apportion any such costs and expenses between the parties or any of them as it thinks fit, and may at any time vary or alter any such order in such manner as it thinks reasonable.

[20] Costs are at the discretion of the Authority³.

[21] The principles and the approach adopted by the Authority on which an award of costs are made are well settled and outlined in *PBO Limited (formerly Rush Security Ltd) v Da Cruz (Da Cruz)*⁴.

[22] It is a principle set out in *Da Cruz* that costs will be modest. It is also a principle that costs are discretionary and awards made are consistent with the Authority's equity and good conscience jurisdiction.

Costs Award

[23] Ms Leota Lu was the successful party in her case before the Authority, and following the principles deriving from *Da Cruz*, she is entitled to costs.

[24] This was a two day matter in which both parties had some degree of success. In *Coomer* the Employment Court observed that in these cases of mixed success, the Authority must: "stand back and look at things in the round".⁵ As also observed in *Coomer*, I note that Ms Leota Lu could not have achieved her limited success without lodging in the Authority.⁶

[25] It is correct that the Authority does not generally award costs on costs submissions, and I am not minded to make an exception in this case. However I do consider the *Calderbank* offer to be relevant to the assessment of costs is the *Calderbank* offer. The offer was repeated and on each occasion made well in advance of the Authority's investigation. I am minded to give significant consideration to this offer.

[26] Ms Leota Lu was successful in her disadvantage claim but only to half the extent in monetary terms to what was offered to her in the *Calderbank* letters. I am not persuaded that a rejection of the

³ *NZ Automobile Association Inc v McKay* [1996] 2 ERNZ 622.

⁴ *PBO Limited (formerly Rush Security Ltd) v Da Cruz* [2005] 1 ERNZ 808.

⁵ Above N 2 at [43].

⁶ Above n 2 at [43].

offer by Ms Leota Lu based upon an assessment of the amount of a future costs award was a reasonable basis for rejection, given the speculative nature of success in her claims at that stage.

[27] As observed in the Employment Court, 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 impacted:

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.⁷

[28] Standing back and considering the matter in the round, and having had regard to the principles set out in *Da Cruz*, the time taken for the Investigation Meeting, the fact that Ms Leota Lu was the successful party, the partial nature of her success, and the repeated *Calderbank* offer, I consider that whilst Ms Leota Lu should receive a costs contribution, this should be reduced.

[29] Adopting the notional daily tariff rate of the Authority as \$8,000.00 for a two day, I take that as the appropriate starting point for costs.

[30] **Accordingly, I order ChoiceKids to contribute \$3,000.00 towards the Ms Leota Lu's actual costs pursuant to clause 15 of Schedule 2 of the Employment Relations Act 2000.**

Eleanor Robinson
Member of the Employment Relations Authority

⁷ *Lancom Technology Limited v Forman* [2018] NZEmpC 30 at [38].