

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2019] NZERA 207
3041613/3044952

BETWEEN HUILIANG (OCEAN) SHAO
Applicant

AND SHEEPERS COUNTRY
GROUP LIMITED
Respondent

Member of Authority: Jenni-Maree Trotman

Representatives: J Roberts/E Callister-Baker, for the Applicant
R Parmenter, for the Respondent

Submissions received: 18 February 2019 from Applicant
05 February 2019 from Respondent

Determination: 09 April 2019

COSTS DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] On 23 January 2019 I issued a determination in which I found Huiliang Shao had not suffered an unjustified disadvantage to one or more of his conditions of employment with Sheepers Country Group Limited (Sheepers Country). The determination also found that he was not owed any wage arrears and was not unjustifiably dismissed.

[2] Costs were reserved, with the parties encouraged to resolve that issue themselves. In the event that they could not, I set a timetable for submissions.

Application for costs

[3] Mr Parmenter, on behalf of Sheepers Country, applies for a contribution towards the Company's legal costs in the amount of \$13,500 representing three times the daily tariff. In doing so, he relies on Calderbank offers made by the Company. This is opposed by Mr Roberts, Mr Shao's representative. He takes the position that costs should lie where they fall or alternatively costs should be reduced below the daily scale.

Legal Principles

[4] The power of the Authority to award costs is set out in clause 15 of Schedule 2 of the Employment Relations Act 2000 (the Act). The principles and approach adopted by the Authority in respect of this power are well settled and were outlined by a full Court in *PBO Ltd v Da Cruz*.¹

[5] These principles were confirmed as remaining appropriate in *Fagotti v Acme & Co Limited*.² The principles include:

- a) There is a discretion as to whether costs will be awarded and in what amount.
- b) The discretion is to be exercised in accordance with principle and not arbitrarily.
- c) The statutory jurisdiction to award costs is consistent with the equity and good conscience jurisdiction of the Authority.
- d) Equity and good conscience is to be considered on a case by case basis.
- e) Costs are not to be used as a punishment or as an expression of disapproval of the unsuccessful party's conduct although conduct which increases costs unnecessarily can be taken into account in inflating or reducing an award.
- f) It is open to the Authority to consider whether all or any of the parties' costs were unnecessary or unreasonable.
- g) Costs generally follow the event.

¹ *PBO Ltd (Formerly Rush Security Ltd) v Da Cruz* [2005] ERNZ 808 (EmpC) at [44].

² *Fagotti v Acme & Co Ltd* [2015] ERNZ 919 at [114].

- h) Without prejudice offers can be taken into account.
- i) Awards will be modest.
- j) Frequently costs are judged against notional daily rates.
- k) 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.

[6] In considering costs, the starting point is that the losing party should pay the costs of the successful party, absent exceptional circumstances.³ However, if a Calderbank offer is made, and the opposing party does not beat the offer, there should be a steely response by the Courts, as that would be in the broader public interest.⁴

[7] That approach was reiterated by the Court of Appeal in *Bluestar Print Group (NZ) Ltd v Mitchell* where the Court said:⁵

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.

[8] These comments also apply with respect to Calderbank offers made before an Authority investigation.⁶

[9] In *Xtreme Dining Ltd t/a Think Steel v Dewar* the full Court noted that the correct question in circumstances where a Calderbank offer has been made was whether the party to whom the offer was made had acted unreasonably in rejecting the offer, at the time that it did so.⁷

Analysis

[10] An assessment of costs will normally start with the notional daily tariff. The Authority's normal daily tariff for a one day investigation meeting is \$4,500.00.⁸ The

³ *Weaver v Auckland Council* [2017] NZCA 330 at [20].

⁴ *Health Waikato Ltd v Elmsly* (2004) 17 PRNZ 16 (CA) at [53].

⁵ *Bluestar Print Group (NZ) Ltd v Mitchell* [2010] ERNZ 446 at [18]-[20].

⁶ *Fagotti v Acme & Co Ltd* [2015] NZEmpC 135 at [109].

⁷ *Xtreme Dining Ltd t/a Think Steel v Dewar* [2017] NZEmpC 10 at [28].

⁸ *Hines v Eastlight Port Limited* [2018] NZEmpC 111 at [25]; *Gini v Literacy Training Ltd* [2013] NZEmpC 25 at [35].

tariff is then adjusted upwards or downwards depending on the particular circumstances of the case.

[11] The investigation meeting took place over 1 day. Using the normal daily tariff the starting point for an award of costs is \$4,500.

Should the daily tariff be adjusted upwards?

The Calderbank offer

[12] Prior to the Investigation meeting Sheepers Country made a number of offers to settle. On 18 July 2018 and 19 October 2018 it offered to make payment of a sum of \$45,000 to Mr Shao subject to various conditions.

[13] The 18 July 2018 offer included as a condition of settlement that Mr Shao:

... shall have no further claims against [Sheepers Country] in respect of any aspect of the employment, specifically including (but not limited to):

- i. Dismissal;
- ii. Working conditions;
- iii. Wages payments;
- iv. Time and wage records or holiday and leave records;
- v. Any of the other matters raised in your prior correspondences;
- vi. Matters relating to [Sheepers Country's] trademarks; and
- vii. Any matters relating to Immigration New Zealand or IRD.

[14] The 19 October 2018 offer was proposed to be recorded "in a deed on a contractual basis (rather than a Record of Settlement which would relate only to employment matters)". It was to be signed in full and final settlement of "all employment, tax and immigration matters currently in dispute".

[15] On 10 December 2018 Sheepers Country offered to make payment of a sum of \$25,000 to Mr Shao "in recognition of the costs he has incurred in this matter". This offer formed part of a number of other conditions, namely:

- a) Ms Yu would relinquish her shares in the Beijing Company to Mr Shao and would hand over the Company seal.

- b) Sheepers Country/Ms Yu would withdraw their objection to Mr Shao's trademark application.
- c) Ms Yu would change the name of Sheepers Country to "something which is not confusingly similar, to enable your client [Mr Shao] to use the present company name (Sheepers Country) and she would abandon use of the current logo. Our client would retain the rest of the business and premises, as it has been developed by her".
- d) A requirement that Mr Shao not do anything that would "negatively impact our client's immigration status or prevent her obtaining permanent residency in due course".
- e) A full and final settlement of all claims Mr Shao may have in respect of his employment relationship and "any other claims he may have against her or associates or entities associated with her here and in China".
- f) The terms of the agreement would remain confidential.
- g) Neither party would make any disparaging remarks or do anything to undermine the other's reputation.

[16] Mr Parmenter relies on the offers made to justify an increase in the daily tariff. He submits:

... the offer made was more than substantial and, in the scheme of the applicant's case, it is my submission that he could not have been awarded that much, even if he had won. The peremptory rejection of such a generous offer, combined with the refusal to make a counteroffer have to be aggravating features, in my submission.

[17] Mr Roberts submits that the settlement offers should not be taken into account when the Authority considers adjustments to the daily tariff. This is because each of the offers failed to identify a particular sum that relates to the settlement of Mr Shao's employment dispute. Rather, the sums offered incorporate settlement of a number of non-employment related matters such as an intellectual property dispute, the ownership of the Beijing Company, tax matters and Ms Yu's immigration status. He goes on to submit:

It is not the role of the Authority to speculate on what part of the offer may have related to the part of the employment claim that was ultimately before the Authority, and the Authority cannot speculate as to the proportionate

value of the intellectual property claim, IRD issue, or intellectual property claim wrongly pleaded within the employment matter, as they are all outside of the jurisdiction of the Authority.

[18] I agree with Mr Roberts. It is impossible, based on the information before me, to undertake an assessment of what part of the offers made relate to Mr Shao's employment claim, as opposed to other matters in dispute between the parties, so as to assess the reasonableness of the offer and Mr Shao's rejection of that offer.

[19] It appears more likely than not that any offer made was in consideration of all matters in dispute between the parties and not just the Authority's investigation. I am fortified in this finding by correspondence from Mr Shao's representative at the time, Ms Moss, dated 11 December 2018. This email referred not only to Mr Shao's claim before the Authority but also to court proceedings that were underway in China relating to the Beijing Company. It also referred to proceedings in New Zealand involving the ownership of intellectual property. Ms Moss indicated that any "deal" reached with Sheepers Country would have to involve an "offer more than my client is already expecting to receive through his current actions".

[20] In these circumstances I do not consider that any uplift to the daily tariff is warranted.

Should the daily tariff be adjusted downwards?

Ms Yu's evasiveness

[21] In the Authority's substantive determination, I found Ms Yu lacked credibility because of her evasive behaviour.⁹ I found:

She consistently failed to answer questions. This was despite being provided with multiple opportunities to do so and a Chinese interpreter translating each of the questions asked of Ms Yu and her answers.

[22] Mr Roberts submits that this evasive and uncooperative behaviour should result in a downwards adjustment to costs.

[23] I accept that there were aspects of Ms Yu's conduct that unnecessarily increased the time required for hearing. However, this was to a similar extent to that of Mr Shao and his witness Ms Chang. Although Mr Shao did not evade questions, his answers were inconsistent with documentary evidence and the evidence of his

⁹ *Shao v Sheepers Country Group Limited* [2019] NZERA 32 at [9].

business partner, Ms Chang. This resulted in time being taken to address these inconsistencies by both the Authority and Mr Parmenter in cross examination. For this reason a downwards adjustment to the daily tariff is not warranted.

The effect of the Respondent's discontinued cross claim on costs

[24] On 30 October 2018 Sheepers Country filed a "Statement in Reply and cross-statement of problem" that included various allegations that Mr Shao had breached the terms of his employment agreement and his duty of good faith. Penalties and damages were sought. Subsequently Sheepers Country filed a separate Statement of Problem (the Cross Claim) repeating these allegations. Mr Shao filed a Statement in Reply to the Cross Claim on 26 November 2018.

[25] On 30 November 2018 Sheepers Country advised by email that it was withdrawing its Cross Claim because "the complexity of Sheepers' statement of problem is not worth the hassle and expense".

[26] In response to queries from the Authority as to whether the issue of costs was resolved, Ms Moss responded advising there was no agreement as to costs and she considered that it was appropriate for the Authority to make a determination on costs. She submitted:

I would suggest that given the proximity to the investigation meeting date, the fact that my client has incurred costs in submitting a statement in reply, with accompanying evidence and that the cross-examination preparation had been completed that the Authority take into account the daily tariff rate and make an award of \$3,000 + GST.

[27] The Authority advised the parties that I would determine costs arising out of the discontinued Cross Claim at the same time as I determined costs in the remaining claim.

[28] No additional submissions were made by Mr Roberts in relation to a claim by Mr Shao for legal costs other than to submit that "if any costs award is made in favour of the respondent, it should also be adjusted downwards to take into account the intellectual property claim".

[29] Mr Parmenter did not address this issue either, other than to submit he had allowed a deduction for the time he spent preparing the Statement in reply and the Cross claim in his claim for recovery of legal fees.

[30] Costs are able to be awarded when proceedings are withdrawn prior to an investigation meeting pursuant to the Authority's powers under clause 15 of Schedule 2 to the Act. This provides generally that the Authority "may order any party to a matter to pay to any other party such costs and expenses ... as the Authority thinks reasonable." A "party" can include a party to discontinued proceedings.

[31] In measuring the amount payable, the most important factor is the proximity of the withdrawal to the scheduled hearing.¹⁰ In *Eden v Rutherford & Bond Toyota Ltd* the Court followed the judgments of the Court in *Data Group Ltd v Gillespie* and *Pars Transport Ltd v Lardelli*.¹¹

the combined effect of which is that, in circumstances where a matter is withdrawn before being heard, the proximity of the withdrawal to the scheduled hearing, and all the circumstances in which the withdrawal was made, may be relevant including, in the latter case, supporting an award for full indemnity costs.

[32] Other ordinary costs factors still apply, such as whether the costs incurred were reasonable.

[33] Sheepers Country withdrew its cross claim on 30 November 2018. This was 18 days prior to the investigation meeting and 12 days prior to the date set for Mr Shao to provide witness statements in response to the Cross Claim. While Mr Shao's representative at the time said she had completed cross-examination, this is unlikely as Sheepers Country's witness statements had not been filed by the time it withdrew its claim. The work that was undertaken therefore appears, based on the limited information before me, to be limited to the review of the Cross Claim and associated documents, preparation of the Statement in Reply and associated attendances relating to the discontinuance of the claim.

[34] In the circumstances, and taking into account awards of costs in similar cases, I am satisfied an appropriate award of costs in Mr Shao's favour is \$600.

Outcome

[35] The overall outcome is:

- a) Mr Shao is ordered to pay Sheepers Country the sum of \$3,900 towards its legal costs representing the daily tariff for a 1 day investigation less a sum

¹⁰ *Eden v Rutherford & Bond Toyota Ltd* [2010] NZEmpC 43.

¹¹ Above, n 10, at [17-19].

of \$600 for the costs Mr Shao incurred on Sheepers Country's discontinuance of its claim against him.

- b) The sum of \$3,900 must be paid within 14 days of the date of this determination.

Jenni-Maree Trotman
Member of the Employment Relations Authority