

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2020] NZERA 207
3040971

BETWEEN XIE PLANS LIMITED
Applicant

AND NI NI
Respondent

Member of Authority: Robin Arthur

Representatives: Edwin Morrison, counsel for the Applicant
Benjamin Hinchcliff, counsel for the Respondent

Submissions: 24 February 2020 from the Applicant
and 3 March 2020 from the Respondent

Determination: 22 May 2020

COSTS DETERMINATION OF THE AUTHORITY

A. By no later than 28 days from the date of this determination Ni Ni must pay \$6,000 as costs and expenses to Xie Plans Limited.

[1] By determination issued on 16 January 2020 Ni Ni was ordered to comply with terms of a settlement agreement she had made with Xie Plans Limited (XPL) in 2018.¹ Any issue of costs was reserved with a timetable set for lodging memoranda if the parties did not resolve that matter themselves.

[2] XPL lodged a memorandum seeking an award of \$57,923.88 in costs and expenses. This included \$11,068.75 XPL paid for accounting advice on the issues raised by the dispute with Ms Ni and for its accountant to attend the investigation meeting as a witness. The remainder, \$46,855.13, was legal fees invoiced to XPL.

¹ *Xie Plans Limited v Ni Ni* [2020] NZERA 19.

[3] XPL recognised the Authority's assessment of costs started from its usual daily tariff of \$4,500 for a one day investigation meeting of the type held in this matter. However XPL sought an increased award in this case to take account of offers made to settle the dispute between the parties about how the terms of the original settlement were to be carried out.

[4] XPL made one of those settlement offers, on a without prejudice basis save as to costs, in December 2018. This was soon after the parties had attended mediation by direction of the Authority.

[5] In August 2019 Ms Ni, through counsel, formally made a settlement offer of her own on the same without prejudice basis. XPL rejected that offer. In October 2019 XPL, on an open basis through counsel, advised Ms Ni it would seek an award for its actual legal costs in the Authority proceedings.

[6] Ms Ni's reply memorandum on costs suggested she should get an award of \$1,125 because she succeeded in defending a claim for damages and the orders made in XPL's favour in the Authority's substantive determination had therefore not gone as far as XPL sought. Alternatively, Ms Ni submitted costs should lie where they fell.

[7] Costs are awarded in the Authority on well-established principles, usually starting from the daily tariff with upward and downward adjustments made if appropriate to the circumstances of the case and under those principles.² The following principles are of particular application here:

- Costs generally follow the event;
- The Authority may consider whether all or any of the parties' costs were unnecessary or unreasonable;
- Costs are not to be used as a punishment or as 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;
- Without prejudice offers can be taken into account;
- Awards will be modest and the discretion to award costs is to be exercised in accordance with principle, not arbitrarily.

² *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808, 819-820.

The event

[8] “The event’ refers to which party was successful. XPL did not succeed in a claim for damages, for reasons explained in the determination, but did succeed in respect of its principal claim for a compliance order. Overall it was the successful party and entitled to have an award of costs assessed.

Unreasonable costs

[9] From early in this proceeding, as part of a direction to mediation, the Authority gave this caution to the parties about incurring a level of legal costs that were not likely to be recovered if the matter went on to an Authority investigation meeting:

Both parties, and their lawyers, should be conscious they do not have much hope of recovering unnecessarily incurred legal costs over technical arguments if the matter is not resolved in mediation and then proceeds to an Authority investigation. Sorting this out now, directly and quickly, is the cost-effective and practical thing to do.

[10] The history of the complex, technical arguments traversed in extensive correspondence between the parties’ legal representatives before and after mediation is set out in the substantive determination. On review of those arguments, and the outcome achieved by the proceedings in the Authority, legal costs of more than \$46,000 were not reasonably incurred. Similarly, an award of more than \$11,000 for associated accounting expenses and to pay the company’s accountant to attend the investigation meeting was not reasonable.

[11] The appropriate starting point for an assessment of costs remained the daily tariff of \$4,500 for the one day investigation meeting required.

Conduct unnecessarily increasing costs

[12] The facts canvassed and conclusions reached in the determination showed that Ms Ni’s accountant, as the result of conversations with Ms Ni, had lodged information with IRD which was incorrect and substantially complicated attempts between the parties to resolve the matter.³

[13] Costs are not to be used to punish or express disapproval of Ms Ni’s conduct, with the assistance of her accountant, in respect of that incorrect information given to

³ *Xie Plans Limited*, above n 1, at [33], [47], [52] and [62].

IRD. However, those actions did require further legal work from XPL's counsel and did extend the scope of material and time taken in the Authority's investigation of the matter. Ms Ni had therefore unnecessarily increased XPL's legal costs. This warranted an uplift of the usual daily tariff by a factor of one third, that is an increase to \$6,000.

Without prejudice offers

[14] The Authority must take a steely approach to awarding costs where a party has proceeded unsuccessfully rather than accepting an earlier reasonable offer of settlement made by the ultimately successful party.⁴

[15] XPL's without prejudice settlement offer, made in a letter on 12 December 2018, did not however meet the necessary standard of being a reasonable offer.⁵ It required her to agree to a variation of the settlement agreement that had been certified by a mediator under s 149 of the Employment Relations Act 2000 (the Act). Certification has the effect, under s 149(3) of the Act, of the agreement's terms being final, binding and not subject to further legal action except for the purposes of enforcement. In later stages of the dispute XPL relied on that very point. There was therefore no reasonable and effective without prejudice offer to take into account.

[16] In later open correspondence during its dispute with Ms Ni XPL had said it would seek indemnity costs. This appears to be the basis of the level of costs sought. The circumstances of this case, and the conclusions reached about it in the Authority's determination, do not meet the rare circumstances indemnity costs could appropriately be considered.

The award of costs and expenses

[17] Weighing those factors and applying the relevant principles, the appropriate award of costs in this matter was \$6,000. This is the amount Ms Ni must pay as a contribution to the costs and expenses XPL incurred in seeking an order that she comply with a settlement agreement she had made.

Robin Arthur
Member of the Employment Relations Authority

⁴ *Bluestar Print Group (NZ) Ltd v Mitchell* [2010] NZCA 385 at [20].

⁵ *Xtreme Dining Ltd t/a Think Steel v Dewar* [2017] NZEmpC 10 at [28].