

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2015] NZERA Auckland 178
5514796

BETWEEN KUN ZHANG
 Applicant

AND GL FUTURES
 DEVELOPMENT LIMITED
 Respondent

Member of Authority: Robin Arthur

Representatives: Zhenzhen Chen for the Applicant
 David Liu for the Respondent

Costs memoranda: From the Applicant on 8 and 17 June 2015 and from the
 Respondent on 16 June 2015

Determination: 22 June 2015

COSTS DETERMINATION OF THE AUTHORITY

A. GL Futures Development Limited must pay costs of \$7000 to Kun Zhang and a further \$71.56 in reimbursement of the fee paid to lodge her personal grievance application in the Authority.

[1] The parties sought a determination of costs in relation to an Authority investigation that found Kun Zhang was unjustifiably dismissed by GL Futures Development Limited (the company).¹

[2] Their memoranda on costs addressed the application of the Authority's usual daily tariff and whether any particular factors or principles, applicable in the circumstances of the case, required an adjustment upwards or downwards of that tariff.²

[3] Costs 'follow the event' that Ms Zhang was successful in her personal grievance application but any award made should be modest and not used to punish or

¹ *Kun Zhang v GL Futures Development Limited* [2015] NZERA Auckland 151.

² *PBO v Da Cruz* [2005] ERNZ 808 at [46].

express disapproval of the company's unjustified dismissal of her. There was an early 'without prejudice' offer made to settle the matter but for an amount that proved to be less than that awarded by the Authority so no further account needed be taken of it. There was no issue raised as to whether the company had the means to meet an award of costs.

[4] Both parties contended that conduct by the other party – in preparing for and participating in the Authority investigation – had increased costs unnecessarily and should be taken into account by raising or reducing the level of any award made.

[5] Ms Zhang was said to have incurred actual legal costs of more than \$16,000 and submitted those costs were unnecessarily increased by the company's request for extensive medical records from her. The request was motivated by the company's understanding that Ms Zhang alleged some causative link between her dismissal (and the prior disciplinary process) and the circumstances in which she experienced a miscarriage and related health problems around that time. Her costs memorandum also suggested the company's counsel unnecessarily extended the length of the investigation meeting by asking questions of her and her midwife about whether a causative link was alleged. She sought a costs award of \$12,000 (based on an uplift of the usual daily tariff to \$6000, applied to the two days of the Authority investigation meeting).

[6] The company opposed any departure from the daily tariff. It contended that several references in Ms Zhang's statement of problem and her witness statement about her health circumstances during the time of the company's inquiries (including her reporting stomach pain and bleeding that subsequently were confirmed as symptoms of miscarriage) warranted exploration of whether she was alleging the heightened stress of having to attend meetings with her managers resulted in her pregnancy miscarrying.

[7] Ms Zhang also lodged a witness statement from her midwife that referred to Ms Zhang having reported "*stress from her employment for the past couple of months*" and stating the midwife's "*professional opinion [that] ...[e]motional distress may be one of the factors that could cause miscarriage*".

[8] The company responded to that witness statement by having an obstetrician review Ms Zhang's medical records and provide an opinion about the circumstances

of her miscarriage. Ms Zhang's subsequent clarification that she was not alleging a causative link was said to have rendered the obstetrician's fee (and related legal costs in arranging his evidence) an unnecessary expense for the company. It submitted the Authority should exercise its discretion to take those costs into account and reduce the notional daily tariff that would otherwise apply in setting an award of costs to Ms Zhang.

[9] From the outset of the Authority investigation I considered there was some ambiguity as to whether or not Ms Zhang was suggesting a causative link but, by the time of the investigation meeting (after having seen the witness statements and other relevant documentary evidence lodged by the parties and having discussed the issue with counsel), I took the firm view there was an insufficient evidential foundation on which such a conclusion could be safely drawn. However the references in Ms Zhang's statement of problem to her circumstances had been sufficient for me to direct, during the case management conference at which arrangements for lodging evidence were made, Ms Zhang to provide her health records from her doctor, her midwife and the hospital.

[10] In that light I did not consider questions put by the company's counsel to Ms Zhang and her midwife during the Authority's investigation meeting unnecessarily lengthened the time taken to a degree that required an uplift of the daily tariff. Counsel had the opportunity to seek answers to clarify the issue but I also ended that line of inquiry when I felt it had become irrelevant or unnecessary.

[11] Neither however was a reduction of the tariff required to offset the company's costs (of around \$1500) in having an obstetrician review Ms Zhang's records and provide an opinion. Rather that was a cost that arose from having to defend an allegation of unjustified actions and, by usefully narrowing the issues for resolution, probably reduced the company's overall costs. It resulted in both Ms Zhang and her midwife confirming or clarifying (depending on one's point of view of what had been suggested up to then) that no causative link was either alleged or established and, consequently, no need for the obstetrician to attend and answer questions about his witness statement.

[12] I have also rejected one other factor suggested by the company as a basis for reducing the daily tariff. Its costs memorandum said Ms Zhang was not completely

successful as the award of lost wages made to her was reduced by ten per cent (to mark her contribution to the circumstances giving rise to her grievance) and the award of \$9000 distress compensation was less than 25 per cent of the amount she had claimed. I have not accepted the setting of the level of remedies required any discount of the costs award that should be made to her. Ms Zhang had achieved the overall success of establishing her claim of unjustified dismissal. The award of costs follow the ‘event’ of that success.

[13] The investigation meeting took just over one-and-a-half days with the parties and counsel returning, after a two-hour break, to hear an oral determination delivered in the late afternoon of the second day. I considered the Authority’s daily tariff of \$3500 should apply to two days. The preparation and complexity was within usual range for an Authority investigation and no increase in the tariff was required on that basis. No invoices and fees narration were provided to support the basis of what were said to be Ms Zhang’s actual costs of \$16,000 but I have accepted that costs at the tariff level, at the least, were reasonably incurred. The higher level of costs that she actually incurred are subject to the cautionary note made by the Employment Court in the *Da Cruz* case:³

... [W]e 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.

[14] The result of the assessment of the relevant factors and principles was that I concluded the company should pay Ms Zhang \$7000 as a reasonable contribution to her costs incurred in bringing her personal grievance application to the Authority for investigation and determination. She was also entitled to reimbursement of the \$71.56 fee paid to lodge her application in the Authority.

Robin Arthur
Member of the Employment Relations Authority

³ *Da Cruz*, above, at [47].