



Employment Court of New Zealand

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Zhang v Telco Asset Management Limited [2020] NZEmpC 9 (20 February 2020)

Last Updated: 26 February 2020

IN THE EMPLOYMENT COURT OF NEW ZEALAND WELLINGTON

I TE KŌTI TAKE MAHI O AOTEAROA TE WHANGANUI-A-TARA

[\[2020\] NZEmpC 9](#)

EMPC 58/2019

IN THE MATTER OF a challenge to a determination of
 the Employment Relations
 Authority
BETWEEN YAN ZHANG
 Plaintiff
AND TELCO ASSET MANAGEMENT
 LIMITED
 Defendant

Hearing: (On the papers)
Appearances: B Scotland, counsel for plaintiff until 18 November 2019;
 plaintiff in person thereafter
 T Cleary, counsel for the defendant
Judgment: 20 February 2020

COSTS JUDGMENT OF JUDGE B A CORKILL

Introduction

[1] This judgment resolves costs issues arising from the Court's substantive judgment of 23 October 2019.¹

[2] In essence, Mr Zhang contends that as he succeeded on two significant matters, costs should follow that event; he seeks scale costs totalling \$26,760, and disbursements of \$2,576.58. His actual costs totalled \$46,904.85 plus GST.

1. *Zhang v Telco Asset Management Ltd* [\[2019\] NZEmpC 151](#) (*Zhang – Substantive judgment*); see also subsequent judgments involving the application of the slip-rule: *Zhang v Telco Asset Management Ltd* [\[2019\] NZEmpC 168](#); and the declinature of an application for recall: *Zhang v Telco Asset Management Ltd* [\[2019\] NZEmpC 175](#).

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[3] Telco Asset Management Limited (Telco) resists the application. It argues Mr Zhang's actual costs should not be used as a starting point because a significant portion of those were incurred in dealing with settlement matters; that Calderbank offers were made which should be taken into account; and that Telco succeeded in most of the case. For all these reasons, Telco's position is that costs and disbursements should lie where they fall.

[4] Mr Zhang filed a submission in reply. Some parts of that submission contain references to factual matters which have already been the subject of findings by the Court, and which cannot be considered further. Mr Zhang also explained why he did not accept the Calderbank offers.

The findings made by the Court

[5] Before addressing the parties' submissions, it is necessary to summarise the findings made by the Court. I was required to consider five issues, all raised by Mr Zhang on a non-de novo basis. My conclusions were:²

- a. The challenge in respect of a claim for lost wages was disallowed. I confirmed that the amount payable for these was \$12,231.25, as found by the Authority, minus PAYE and any other lawful deductions agreed between the parties as reimbursement of lost wages, subject to contribution.
- b. The challenge in respect of compensation for humiliation, loss of dignity and injury to feelings was allowed; the amount payable by Telco to Mr Zhang was increased from \$10,000 to \$22,500, subject to contribution.
- c. The challenge with regard to contribution was allowed; I assessed this at 20 per cent, rather than 50 per cent as had been determined by the Authority.

² *Zhang – Substantive judgment*, above n 1, at [173].

- d. I dismissed the challenge in respect of the claim for a penalty for breaches of good faith by Telco in a redundancy process.
- e. I dismissed the challenge in respect of a claim for a penalty for failure to undertake a remuneration review in 2016.

Relevant principles

[6] Schedule 3, cl 19 of the [Employment Relations Act 2000](#) (the Act) describes the Court's broad jurisdiction as to costs. Additionally, reg 68 of the [Employment Court Regulations 2000](#) provides that in the exercise of that discretion, the Court may have regard to any conduct of the parties intending to increase or contain costs, including any offer made by either party to the other at a reasonable time before the hearing, to settle all or some of the matters at issue between them.

[7] As noted, it is contended for Mr Zhang that the Court's Guideline Scale should be utilised in this case, on a Category 2, Band B basis. I agree, since that will provide a fair basis for assessing the question of any contribution to Mr Zhang's costs. Accordingly, it is unnecessary to consider the amount of Mr Zhang's actual costs.

Discussion

Quantum

[8] I have reviewed the elements of the claim made for Mr Zhang based on the scale. The quantum amount claimed under the scale is not contested. I therefore adopt the cost figure of \$26,760, and disbursements figure of \$2,576.58, as starting points.

Calderbank offers

[9] The judgment of the Court of Appeal in *Bluestar Print Group (NZ) Ltd v Mitchell* provides a helpful description of the applicable principles when considering Calderbank offers.³

³ *Bluestar Print Group (NZ) Ltd v Mitchell* [\[2010\] NZCA 385](#), [\[2010\] ERNZ 446](#).

[10] In short, such an offer should not be unreasonably rejected, and a "steely" approach is required when assessing any such offer.⁴

[11] Prior to the hearing, lawyers for the parties exchanged correspondence on a Calderbank basis. In summary, on 9 May 2019, Telco proposed that Mr Zhang be paid

\$7,500 under s 123(1)(c)(i) of the Act. This sum would be paid by Telco in addition to the sum it had already paid in satisfaction of the awards made by the Employment Relations Authority. The sum offered would include a contribution to scale costs for steps taken in the proceeding to that point. The proceeding would then be discontinued. In a record of settlement, it would be agreed that the parties would not disparage each other, and the terms of settlement would be confidential.

[12] The offer was rejected. Mr Zhang's lawyer stated that a significant factor was his need to obtain a public decision from the Court in respect of the Authority's findings. He also said those findings were "reputationally very damaging" to Mr Zhang, and also mentioned that the financial component of the offer was not sufficient.

[13] A second Calderbank offer was advanced for Telco on 31 May 2019. The financial component of the offer was the same as before. The company now also proposed that a consent judgment be issued incorporating provisions for the setting aside of the Authority's determination. It would also include a statement that Mr Zhang had been unjustifiably dismissed by Telco acknowledging that he had not contributed to the situation giving rise to his unjustified dismissal; that Mr Zhang's communications about Ms Sim were not coupled with threats and were neither malicious nor excusable; and they were not aimed to intimidate her or discredit her reputation.

[14] This offer was also rejected. Mr Zhang's lawyer stated that the financial sum was well below what Mr Zhang expected would be awarded by the Court. Further, the proposed consent judgment would not satisfactorily address his concerns about the reputational impact of the Authority's determination or provide him with the public vindication he was seeking. It was noted that a consent judgment would also be

4 At [20] and quoting *Health Waikato Ltd v Elmsly* [2004] NZCA 35; [2004] 1 ERNZ 172 (CA) at [53].

perceived by third parties as being the result of a negotiated agreement and would differ significantly in form and substance from the content of a judgment of the Court following a hearing.

[15] There are two aspects of these offers which require consideration. First, the financial element. Mr Cleary, counsel for Telco, submitted that the Court's judgment obtained by Mr Zhang was, in monetary terms, marginally better than the offer made in combination with the Authority judgment sum already satisfied.

[16] As already noted, in the Authority, Mr Zhang was awarded compensation for humiliation, loss of dignity and injury to feelings in the sum of \$10,000, reduced to

\$5,000 to reflect contributory conduct.⁵ He was also awarded \$12,231.25, (minus

PAYE and any other lawful deductions agreed between the parties), as reimbursement of lost wages, again subject to contribution; the nett result was an award for loss of wages of \$6,115.26.⁶ The total amount which Telco was directed to pay by the Authority was accordingly \$11,115.26, (less PAYE and the wages figure, and any other agreed lawful deductions).

[17] Also, as noted earlier, the Court increased the award for humiliation, loss of dignity and injury to feelings to \$22,500, and reduced contribution to 20 per cent. The Court did not increase the amount awarded for reimbursement of lost wages, but the revised contribution assessment increased the amount payable under that head to Mr Zhang.

[18] Mr Zhang thereby established in the Court an entitlement to a further

\$16,142.74, (minus PAYE and any other agreed lawful deductions), over and above the sum he had already been paid. It is this sum which must be compared with the Calderbank offer of \$7,500, noting that it was intended to relate not only to Mr Zhang's financial claims in the Court, but steps taken by him up to the date of the offer in this proceeding.

⁵ *Zhang v Telco Asset Management Ltd* [2018] NZERA 84 at [177(b)].

⁶ At [77(a)].

[19] In light of that outcome, I do not agree that Mr Zhang obtained a marginally better result; it was a significantly better result. Thus, it was not unreasonable for the two Calderbank offers to be rejected on financial grounds.

[20] Turning to the vindication issues, the following statement by the Court of Appeal in *Bluestar* is of assistance:⁷

We accept that there may be cases where vindication through seeking a statement of principle in the employment context may be relevant to the exercise of the Court's discretion. Thus the relevance of reputational factors means that cost assessments are not confined solely to economic considerations. But equally, an offer to pay compensation at a level that is reasonable might well be regarded as conveying a distinct element of vindication to the plaintiff.

[21] When assessing the Calderbank offers that were made, it is necessary to consider whether the offer adequately addressed Mr Zhang's concerns – whether by way of the vindication statements contained in the second Calderbank offer, or by way of the amount offered.

[22] Whilst the second offer went a considerable distance towards addressing vindication, the financial component of the offer did not.

[23] Nor did the vindicatory elements of the offer make up for the fact that a relatively modest financial offer had been made. Accordingly, the second offer was not unreasonably declined.

[24] I therefore place these offers to one side.

Mixed success

[25] Mr Cleary submitted that Telco succeeded in most of the case. He said that Mr Zhang had pursued five separate causes

of action but was successful in only two.

[26] Mr Cleary developed the submission by referring to the time taken to hear the case – three days – and the position taken by Mr Zhang on issues that did not succeed, particularly an asserted breach of good faith which failed.

7 *Bluestar*, above n 3, at [19] (citations omitted).

[27] In *Health Waikato Ltd v Elmsly*, the Court of Appeal made observations regarding cases where there had been a mixed measure of success.⁸ It stated that:⁹

It is not usual in New Zealand for costs to be assessed on an issue by issue basis, albeit that it is common enough, where both parties had a measure of success at trial, for no order as to costs to be made. The reluctance to assess costs on an issue by issue basis probably stems from the reality that in most cases of partial success it is not practical to separate out from the total cost incurred by the parties what was incurred in relation to the individual issues before the Court.

[28] But the Court also recognised the broad discretion bestowed on a trial Judge, and the existence of the equity and good conscience provision.¹⁰ It also found that the effect of the first instance decision was to award the employee a contribution to costs on issues on which he failed, which was wrong. However, it did not make no order as to costs; the Court made its own assessment as to costs reasonably incurred on the issues on which the employee succeeded.¹¹ I consider it appropriate to consider a similar approach in this case.¹²

[29] Were one to approach the issue of costs purely on the basis of the number of points of appeal on which each party succeeded, Telco may have been entitled to costs, because it succeeded on more points of appeal than did Mr Zhang. Telco does not, however, go that far.

[30] In any event, I consider that such an approach is unduly simplistic and, in the end, unreasonable, having regard to the nature and outcome of each point of appeal:

- a. *First point: consideration of s 128(3) of the Act.* Telco had submitted that the Authority was correct in stating that certain of Mr Zhang's statements about Ms Sim were potentially a disciplinary matter; that Telco would have been entitled to commence a disciplinary inquiry; and that it was unlikely the employment relationship would have lasted beyond three months after the dismissal in fact occurred. I found that if

8 *Elmsly*, above n 4.

9 At [39].

10 At [45].

11 At [48].

12 See also *Farrimond v Caffè Coffee (NZ) Ltd* [\[2017\] NZCA 34](#), [\[2017\] ERNZ 77](#) at [\[18\]](#).

this issue had been raised for investigation, it would not have resulted in anything other than a warning in the particular circumstances.¹³ I went on to conclude that Mr Zhang would not have resigned if he could possibly have avoided doing so, and that he would have explored alternative employment options with Telco. However, these may have reached the point where redundancy ultimately occurred when his wife, Ms Yu, returned to the workplace.¹⁴ Although Mr Zhang did not succeed on the appeal point, the strong criticisms of Mr Zhang by the Authority were in effect mitigated. I also note that some of the evidence required to consider this point overlapped with evidence considered on other points.

- b. *Second point: compensation.* As already noted, the figure for compensation was increased from \$10,000 to \$22,500. In the circumstances, I regard this as a significant outcome for Mr Zhang for financial and vindication purposes. It required the Court to receive evidence outlining the full background and consequences of the redundancy process.
- c. *Third point: contribution.* As already noted, this figure was decreased from 50 per cent to 20 per cent. It, too, amounted to a significant outcome for Mr Zhang for financial and vindication purposes. Again, a significant portion of the evidence pertained to this issue.
- d. *Fourth point: penalty for breach of good faith.* Ultimately, Mr Zhang did not succeed in establishing this point of appeal, although I was satisfied that the range of breaches of good faith referred to in his case were established.¹⁵ However, it was also necessary to consider whether Mr Zhang had complied with his good faith obligations. I found that he had expressed his concerns in an intemperate way.¹⁶ Balancing the parties' respective obligations, and the fact that significant remedies were

13 *Zhang – Substantive judgment*, above n 1, at [111].

14 At [113].

15 At [154].

being awarded, I declined to award a penalty. In addition, whilst there was some additional evidence that fell for consideration with regard to this particular point of appeal, much of it was relevant to those points of appeal on which Mr Zhang did succeed.

- e. *Fifth point: failure to undertake remuneration review in 2016.* Mr Zhang failed on this particular point, but its scope was narrow, and the extent of evidence required to consider it modest.

[31] I reiterate that any award of costs must reflect the time considered reasonable in respect of the points of appeal on which Mr Zhang succeeded; he cannot receive a contribution to costs on points on which he did not succeed.

[32] Standing back, I am satisfied that Mr Zhang should receive a contribution to his costs at 25 per cent of that to which he would have been entitled if he had been completely successful on his challenge.

Conclusion

[33] Telco is to pay Mr Zhang:

- a. a contribution to costs in the sum of \$6,690; and
- b. a contribution to disbursements of \$644.15.

[34] I make no award for costs in respect of the application for costs.

B A Corkill Judge

Judgment signed at 3.00 pm on 20 February 2020