

*Under the Employment Relations Act 2000*

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND OFFICE**

**BETWEEN** The Callista Group Limited (Applicant)

**AND** John Zhang (Respondent)

**REPRESENTATIVES** Chris Patterson, Counsel for Applicant  
John Zhang, In person for Respondent

**MEMBER OF AUTHORITY** R A Monaghan

**MEMORANDA RECEIVED** 4 August, 7 and 10 October 2005

**DATE OF DETERMINATION** 20 October 2005

**DETERMINATION OF THE AUTHORITY ON COSTS**

[1] Further to determinations of the Authority dated 1 December 2004 and 26 July 2005 between the above parties, costs remain to be determined. In the determinations I found:

- (a) Mr Zhang had breached his employment agreement in a number of respects, but there was no award of damages because in separate proceedings the High Court had awarded damages in respect of the same set of facts;
- (b) Mr Zhang's dismissal was justified and he did not have a personal grievance.

[2] Counsel for Callista seeks costs, although Mr Zhang was adjudicated bankrupt on 3 August 2005. The Official Assignee advised the Authority by letter dated 7 September 2005 that "the claim made in the proceedings for compensation and costs do not vest with the Official Assignee ...". The Official Assignee also advised that its decision on the matter was subject to appeal, and therefore would not be deemed to be final until 28 September 2005. Since I have not been advised of any appeal, I now determine the present application as between Callista and Mr Zhang.

[3] Counsel quantified Callista's costs as \$60,435.32, saying they were incurred in respect of the Authority's investigation. He seeks a contribution to costs in the sum of \$36,261.19 (being 60% of actual costs) plus disbursements. He invoked the factors usually applied in assessing awards of costs, and made particular reference to:

- (a) An offer of settlement made without prejudice save as to costs; and
- (b) Mr Zhang's financial circumstances.

**The settlement offer**

[4] Counsel produced a letter dated 11 November 2003 to Mr Zhang's then-solicitors, which was headed 'without prejudice save as to costs.' The content amounted to an agreement by Mr Zhang to provide certain information by affidavit, agreement that the injunctions Callista sought in its

statement of problem be granted, and that these arrangements, if concluded satisfactorily, would amount to a full and final settlement of all matters between the parties before the Authority and the High Court. There was to be no issue as to costs.

[5] Although Mr Zhang has doggedly refused to accept he has done anything wrong, hindsight reveals just how favourable to him the proposal was. Mr Zhang's apparent rejection of it has led not only to significant and unnecessary legal expense for Callista both in the High Court and in the Authority, but has also left him with a substantial award of damages against him. As far as the proceedings in the Authority are concerned, the making of the offers attracts weight in a consideration of costs.

### **Mr Zhang's financial circumstances**

[6] I have commented on Mr Zhang's financial circumstances in previous determinations, and so did the High Court when it decided Callista's claim against Mr Zhang for damages for breach of copyright. Now, however, the matter has become more complex. Not only did Mr Zhang apply to have himself adjudicated bankrupt, but his financial position has been the subject of a further decision of the High Court in **The Callista Group Limited & Anor v John Zhang & Ors** 11 August 2005, Laurenson J, CIV 2005-404-4431.

[7] According to the facts recorded in that decision, on the day after the employment relationship problem was filed in the Authority, Mr Zhang and his wife signed an agreement for sale and purchase of their home. The circumstances of transactions involving that property led the High Court to say the sale was probably voidable against the Official Assignee and conceivably amounted to a covert trust of some kind. The Court also recorded other, less substantial, transactions in which Mr Zhang transferred assets to his wife. It granted an interim order freezing the proceeds of the sale of the property to allow the Official Assignee to investigate the matter further.

[8] Mr Zhang said in his memorandum to the Authority on costs that he has no money, but the foregoing information leads me to take a different view of the ability to pay issue than I would otherwise have done. I will assess costs without reference to that issue.

### **Conclusions as to costs**

[9] Callista is entitled to recognition of Mr Zhang's lack of success in his personal grievance, but I continue to have reservations about its claim for damages for Mr Zhang's breaches of the parties' employment agreement. While I accept Callista incurred costs in pursuing its claim for damages in the Authority, I have serious reservations about the necessity for that, since the same factual matrix and the same quantification of damages was being pursued in the High Court.

[10] I am also aware that the High Court has made an award of costs against Mr Zhang in respect of the substantive claim for damages before it, in the sum of \$28,420 plus disbursements of \$10,980. It was abundantly clear to me that the material being presented in the Authority was closely allied with and probably an early version of the material being prepared for the proceedings in the High Court, and I have already commented on the extent of the similarity in the evidence relating to the quantification of damages. Even the documents produced were the documents obtained under discovery pursuant to the High Court matter. I am not prepared to find that the entirety of the costs identified to me, taking into account the deductions made by counsel, are so divorced from any of the costs of representation contemplated and covered by the award of the High Court that I should treat them as a separate matter.

[11] Some things were obviously not encompassed by the High Court's award. They include the 3 ½ days of the investigation meeting, aspects of the submissions and various attendances on the Authority. Much of the investigation meeting was spent on matters directly relating to the personal grievance although even then the orientation of the evidence was strongly towards the damages claim. For example, in the determination of the substantive matter I pointed out that Callista had not properly distinguished between matters relevant to the damages claim and identified after Mr Zhang's dismissal, and matters identified and put to Mr Zhang as part of the dismissal process.

[12] Beyond saying Callista is entitled to a contribution to its costs in its capacity as the successful party, and taking into account the settlement offer, it is difficult to assess costs with reference to the usual principles. Instead I will borrow the daily rate identified by the High Court, being \$1,450, apply it to the time taken for the investigation meeting, and to an equivalent amount of time for preparation and attendances directly related to the Authority.

[13] The result is 7 days x \$1,450 = \$10,150.

[14] Mr Zhang is ordered to pay that amount to Callista.

**R A Monaghan**  
**Member, Employment Relations Authority**