IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2013] NZERA Auckland 528
5375852

BETWEEN	NISHA ALIM also known as SHABEENA SHAREEN NISHA Applicant
A N D	LSG SKY CHEFS NEW ZEALAND LIMITED Respondent

Member of Authority:	Alastair Dumbleton
Submissions Received:	25 October and 11 November 2013
Date of Determination:	17 November 2013

COSTS DETERMINATION OF THE AUTHORITY

A. The applicant, Ms Nisha Alim, is to pay to the respondent, LSG Sky Chefs New Zealand Ltd, costs of $21,000.

[1] At the conclusion of its investigation into the employment relationship problem raised by the applicant, Ms Nisha Alim, against the respondent, LSG Sky Chefs New Zealand Ltd (LSG), the Authority issued a determination on 15 October 2013 (recorded at [2013] NZERA Auckland 472).

[2] The Authority held that Ms Alim had been entirely unsuccessful with her multiple claims against LSG. Consequently the company was held entitled to costs against Ms Alim.

[3] In accordance with the timetable given by the Authority, through counsel LSG has applied for an order of costs. Ms Alim through counsel has replied to the application.

[4] Ms Douglas for LSG has advised that its actual costs including GST and disbursements were $40,425. Of this $37,047 is sought, being the costs incurred after a 'Calderbank' offer twice made by LSG was rejected by Ms Alim. An offer she later made to settle her claims was rejected by LSG.

[5] As pointed out by Mr Drake counsel for Ms Alim, the level of costs sought for LSG represents about 92% of its actual costs. As such the amount is close to solicitor-client costs, a level at which the Authority rarely makes awards.

[6] Mr Drake accepts that in principle costs should follow the event and submits that there are three alternative bases for awarding them in this case. In descending order of preference they are;

- Costs should lie where they fall; or
- The daily tariff (currently $3,500) should be applied to investigation meeting time (3.1 days); or
- A modest increase in the daily tariff.

[7] In their submissions Ms Douglas and Mr Drake have referred to the principles set out in the leading case from the Employment Court on costs in the Authority; *PBO Ltd v Da Cruz* [2005] ERNZ 808.

[8] The determination in the present case has been reached after consideration of those principles and of three matters in particular;

- the parties' offers to settle;
- funding of Ms Alim's case by a third party;
- applications made along the way during the investigation.

The parties' offers to settle

[9] The investigation of this case was protracted. Time was taken up waiting for related proceedings in the High Court and Employment Court to be concluded, as there was no point in the Authority going over the same legal and factual ground if those higher courts were likely to give decisions of relevance. The various cases are referred to at para [11] of the substantive determination. Considerable reliance was

placed by the Authority on the judgment of Woolford J in the High Court issued on 25 October 2012. The *Matsuoka* case in the Employment Court, referred to at para [23] also provided valuable guidance to the Authority, as did the judgment of Perkins J dated 7 June 2013 from a challenge against the Authority's determination; *Pacific Flight Catering Ltd and PRI Flight Catering Ltd v The Service and Food Workers Union Nga Ringa Tota (and four workers)* [2013] NZEmpC 106.

[10] The present case was brought to the Authority by Ms Alim in March 2012. LSG's offer to settle it was first made a few weeks later on 16 May 2012. It was for a payment to Ms Alim of $6,000, to cover lost wages and compensation for distress. The offer was not responded to but in March 2013 it was repeated, the investigation meeting by then having taken place over three days in September 2012 and February 2013.

[11] Ms Alim's counter-offer of settlement made on 21 March 2013 was for payment to her of $26,500, to cover wages, distress compensation and legal costs. It also required LSG to provide an 'admission apology' which I take to mean an express acknowledgment of liability and harm suffered by Ms Alim as a consequence of the breaches she had alleged against LSG.

[12] Although there is not a true 'Calderbank' situation present, because LSG was fully successful in defending the various claims, in principle without prejudice offers to settle may be taken into account by the Authority when awarding costs.

[13] I consider that LSG's offer was unreasonably rejected by Ms Alim. Her claim to recover distress compensation of $10,000 was not a personal grievance likely to have succeeded. Undoubtedly Ms Alim suffered real distress given the events that followed her transfer from Pacific (PRI Flight Catering Ltd and Pacific Flight Catering Ltd) to LSG but, as the Authority found, the root cause of that was the actions of Pacific, her former employer, and legal blame could not reasonably be placed at LSG's door in all the circumstances.

[14] Ms Alim was not actually dismissed by LSG whose actions were fair and reasonable in the very trying circumstances it faced upon becoming the new employer by operation of statute. The claim of unjustified dismissal appears a tactical make-weight in those circumstances, and the unjustified disadvantage claims in substance were recovery claims which in turn were dependent on establishing the terms and

conditions under which Ms Alim had been employed by Pacific at the time of transfer. The request by Ms Alim for an admission by LSG of guilt or liability in the circumstances was unrealistic and likely to have ruined any chance that LSG might negotiate above its $6,000 offer to settle.

[15] Any risk LSG had in this case lay in relation to underpayment of wages and other entitlements, because regardless of the difficulties establishing what they had been with Pacific, LSG was by statute required to employ Ms Alim on those same terms and conditions. For that reason I consider the offer of $6,000, structured tax effectively, was a reasonable one and if it had been accepted in mid-2012 when first made a great deal of the cost subsequently incurred by LSG would have been avoided.

[16] If daily tariff is to be the basis for awarding costs, I consider the current rate of $3,500 should be substantially uplifted to take account of Ms Alim's rejection of a reasonable settlement offer.

Funding of Ms Alim's claims by a third party

[17] In this regard Ms Douglas relied on the recent Supreme Court decision in *Waterhouse v Contractors Bonding Ltd* [2013] NZSC 89.

[18] In its substantive determination the Authority referred to financial backing Ms Alim has apparently been receiving from Pacific in taking this case. But the relevance of this was solely the accessibility she had to evidence which could have proven or established the terms and conditions of her employment, a core issue in this case. With the level of legal assistance she had, and her association with Pacific, the Authority was critical of her failure to present Pacific or any witnesses for Pacific to confirm the terms and conditions on which she had been employed by Pacific at the time of transfer.

[19] The Supreme Court expressly held, at para [24], that its judgment did not address the position of "relatives or associated bodies who might fund litigation." Pacific would seem to have been only within the latter category. There is no evidence, and it seems unlikely in any event, that Pacific acquired a financial interest in the outcome of this case (apart from recovering from Ms Alim some of its funding if she was awarded costs).

[20] Whatever arrangements there may be between Pacific and Ms Alim, they are not before the Authority in any detail sufficient to allow it to determine whether the *Waterhouse* decision applies.

[21] I take the approach that Ms Alim was in both name and substance the applicant in this case and therefore put herself at risk of an award of costs being made against her in the event that she was not successful. I may assume that her case was presented according to her instructions given to counsel rather than those of a third party such as Pacific, although the course taken by the applicant was no doubt influenced by the fact that she was the beneficiary of Pacific's financial generosity.

[22] I therefore can take no account of the funding situation. There is on the other hand no claim made that Ms Alim is impecunious and that ability to pay ought to be taken into account, although that might become an issue if in the future the Authority's costs award requires enforcement by compliance.

Applications made along the way during the investigation

[23] I consider that the application made to remove this case to the Court unnecessarily added to LSG's costs and should be taken into account in fixing costs. A stretched and strained presentation was made for Ms Alim of the questions of law contended to exist as a basis for removal. These appeared to have been invented to superficially meet the test of removal and not because of any genuine need for a higher court to authoritatively determine any legal issues.

[24] It is also telling that when special leave from the Court was sought for removal, unsurprisingly the Court ruled it had no jurisdiction as the Authority had then not even determined the removal application. When subsequently it did so, Ms Alim withdrew her application for special leave and did not challenge the determination declining removal. I find that the removal application was a spurious one to begin with, brought as 'litigation strategy' or for other tactical reason, rather than as contemplated by the statutory removal provisions and their objectives.

[25] Tactics again seemed to be to the fore when Ms Alim applied to have Ms Marie Park joined as a party to the claim, so that penalties could be sought from her. This application was not only entirely without merit on the facts as had by then been established, but also lacked jurisdiction in the sense that it was made out of time. The motives in bringing it must be questioned when Ms Alim's legal advisors should have

known it could not succeed. It was obvious from the investigation including the evidence given by Ms Park that she had always acted as the agent of her employer LSG in all that she had done. There could be no suggestion that she had independently on her own behalf done or omitted to do anything that was actionable against her personally, so that she could be regarded as a party to LSG's unlawful conduct. As HR Manager of LSG, she was simply the human agency though or by which an incorporated company must carry out its acts to achieve its business purposes including those in matters related to employment.

[26] Just as telling was the fundamental problem apparently overlooked by Ms Alim's legal advisors that a claim for penalties against Ms Park needed to have been brought within 12 months of LSG's alleged breaches which it was claimed she had aided, abetted, instigated or incited.

[27] The attempt to join Ms Park did not add significantly to the time taken in this case but did raise for the Authority a question as to the motives of Ms Alim and whether the application was simply intended to vex or annoy Ms Park and her employer LSG.

[28] There was some echo of this in the recusal application. There is nothing wrong in principle with such an application being made where grounds appear to exist. In this case the Authority was asked to deal with it and Mr Drake confirmed that it was appropriate that I should be the judge of it rather than another Authority member. The application was declined for reasons that were set out in my determination of that matter. Ms Alim then challenged that determination, and in principle was entitled to do so if dissatisfied with it. But having done that, and while awaiting the matter to be determined by the Court, she should not have tried to re-litigate it in final submissions. They should have been confined to the legal and factual merits of Ms Alim's claim.

[29] Similarly, the submissions made about my complained of 'discourtesy' shown towards counsel Mr Drake had no place in final submissions, which should have been confined to the merits. The same is true about the complaints made of the way the investigation meeting was run. How that was relevant to the factual and legal merits of Ms Alim's claims, particularly when both parties had been given an opportunity to call further evidence if they wished, was not explained.

Determination

[30] I conclude that this is not at all a case where costs should lie where they fall. The applicant Ms Alim approached her claims with a theory that took little or no account of Pacific's actions in deliberately inflating vital payroll information, or in hijacking that data as Pacific's own counsel described its actions in the High Court.

[31] I accept that Ms Alim had no knowledge of what Pacific had done at the time shortly before transfer, but once the true picture emerged from the High Court evidence in August 2012 she should have revised her whole approach to this case instead of hoping the Authority would ignore circumstances which explained why LSG needed to take the steps it did in trying to uncover the true and accurate payroll information required by it. By trying to make LSG responsible for Pacific's conduct in misrepresenting vital payroll information, Ms Alim added unnecessarily and unreasonably to LSG's legal costs.

[32] I therefore consider this to be a case where costs should be determined on the basis that the successful party, LSG, is entitled to a reasonable contribution to actual costs. They were reasonable and moderate even, by comparison with many the Authority has seen. The daily tariff may be suitably applied to that end, but with an uplift to recognise the unnecessary and unmeritorious 'interlocutory' applications, and also the failure to engage more reasonably in the settlement proposals at a level much closer to LSG's offer.

[33] The daily tariff of $3,500 should in this case be doubled to $7000 and applied to 3 days, giving an award of $21,000. This is about 2/3rds of actual costs, which I consider to be reasonable compensation. The uplift is well within the range of such adjustments made in other Authority cases referred to by Ms Douglas.

[34] Accordingly, pursuant to clause 15 of schedule 2 of the Employment Relations Act 2000, the applicant Ms Alim is ordered to pay costs of $21,000 to the respondent LSG.

A Dumbleton
Member of the Employment Relations Authority