



Mr Li's application for payment of holiday pay.<sup>1</sup> Penalties were imposed on ICOM Corporation (NZ) Limited for its failure to provide Mr Li with a written employment agreement and for its breach of the Holidays Act 2003 with 50 per cent of the penalty being payable to Mr Li.

[2] ICOM's application for damages and penalties against Mr Li were declined.

[3] I reserved costs and invited the parties to resolve the issue between them. The parties have been unable to resolve the matter and they have both lodged costs memoranda seeking a determination of the issue of costs. Both parties claim success and ask that costs be applied in their favour.

[4] The discretion to award costs, while broad, is to be exercised in a principled way. The primary principle is that costs follow the event. The Authority has the power to order any party to pay to any other party such costs and expenses as the Authority thinks' reasonable.<sup>2</sup> The principles applying to costs are well settled and do not require repeating.<sup>3</sup>

[5] An assessment of costs in the Authority will normally start with the notional daily tariff which is \$4,500 for the first day of an investigation meeting and \$3,500 for each subsequent day.<sup>4</sup> The investigation meeting took one day so the starting point is \$4,500.

[6] The Authority will take into account any offers made by the parties to settle matters.<sup>5</sup> If the Applicant does not beat the offer, there should be a steely response, as that would be in the broader public interest.<sup>6</sup>

[7] That approach was reiterated by the Court of Appeal in *Bluestar Print Group (NZ) Ltd v Mitchell* where the Court said:<sup>7</sup>

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<sup>1</sup> *Li v ICOM Corporation (NZ) Ltd* [2019] NZERA 630.

<sup>2</sup> Employment Relations Act 2000, Schedule 2, clause 15.

<sup>3</sup> *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808, 819-820 and *Fagotti v Acme & Co Limited* [2015] NZEmpC 135 at [106] – [108].

<sup>4</sup> Practice Note 2, Costs in the Employment Relations Authority.

<sup>5</sup> *Bluestar Print Group NZ Ltd v Mitchell* [2010] NZCA 385 at [18].

<sup>6</sup> *Health Waikato Ltd v Elmsly* [2004] 1 ERNZ 172, (2004) 17 PRNZ 16 (CA) at [53]

<sup>7</sup> Above n 5 at [18]-[20].

It has been repeatedly emphasised that the scarce resources of the Courts should not be burdened by litigants who choose to reject reasonable settlement offers, proceed with litigation and then fail to achieve any more than was previously offered. ... The importance of Calderbank offers is emphasised by reg 68(1). It is the only factor relevant to the conduct of the parties specifically identified as having relevance to the issue of costs.

[8] These comments also apply with respect to Calderbank offers made before an Authority investigation.<sup>8</sup>

[9] On 7 May 2019 ICOM made a Calderbank offer to resolve all employment relationship problems between the parties, including its counter-claim against Mr Li. The offer was open for acceptance for a period of 10 days. Mr Li rejected the offer because it did not address his arrears of wages claims.

[10] I have concluded Mr Li's rejection of the Calderbank offer was unreasonable. The offer was more than Mr Li achieved at the Authority. Both parties would have been better off if the Calderbank offer had been accepted as they would not have incurred the costs associated with the investigation meeting.

[11] There was a mixed measure of success by both parties. Although Mr Li was partially successful in his claim for arrears of wages and was successful in his application for the imposition of penalties, other aspects of his claim were not successful. Mr Li was however wholly successful in defending the counter-claim against him.

[12] ICOM was successful in defending Mr Li's claim that he had been unjustifiably dismissed and a claim for holiday pay. However ICOM were unsuccessful in defending the application for payment for a public holiday, the claim for penalties and failed in its counter-claims against Mr Li.

[13] Both parties had a measure of mixed success. This is a situation that has been examined by the Court in *Coomer v JA McCallum and Son Limited*.<sup>9</sup>

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<sup>8</sup> *Fagotti v Acme & Co Ltd* [2015] ERNZ 919 at [109]; *Spillman v Tandem Skydiving* [2018] NZEmpC 32 at [37].

<sup>9</sup> *Coomer v JA McCallum and Son Limited* [2017] NZEmpC 156.

[14] Ultimately I must stand back and look at things in the round.<sup>10</sup> Having done so Mr Li must be considered the successful party. While he was unsuccessful in his key claim he successfully defended ICOM's claims against him and was successful in having penalties imposed on ICOM.

[15] ICOM is ordered to contribute to the costs incurred by Mr Li on the basis of the daily tariff. I have allowed a reduction for the unreasonable rejection of the Calderbank offer and in setting costs have taken into account that Mr Li was only partially successful in his claims but wholly successful in defending ICOM's claims against him.

[16] ICOM Corporation (NZ) Limited is ordered to pay to Mr Li the sum of \$3,000 as a contribution toward costs within 28 days of the date of this determination.

Vicki Campbell  
Member of the Employment Relations Authority

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<sup>10</sup> Ibid at [43].