

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2019] NZERA 248
3030945

BETWEEN QWU
 Applicant

AND LSG SKY CHEFS NEW ZEALAND
 LIMITED
 Respondent

Member of Authority: Christine Hickey

Representatives: Applicant in person
 Daniel Erickson, counsel for the Respondent

Submissions Received: 1 and 8 April 2019 from the Applicant
 19 March 2019 from the Respondent

Date of Determination: 29 April 2019

COSTS DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] On 19 February 2019, I issued a determination finding that QWU had not been unjustifiably disadvantaged or unjustifiably dismissed by LSG Sky Chefs New Zealand Limited (LSG). He was wholly unsuccessful in his claims.

[2] The non-publication order issued by the Authority on 19 February remains in force and is extended to cover the current issue before the Authority.

[3] In that determination I reserved costs and set a timetable for submissions. I received submissions from LSG seeking \$8,250 from QWU towards its actual legal costs of \$21,830 plus GST.

[4] QWU's response has been that he and his wife have returned to China to care for his mother who has had one round of surgery on her spine and is due to have another surgery, also on her spine. QWU says that he is taking responsibility for the cost of his mother's surgeries and that he and his wife do not have paid work in China. They do not have jobs to return to in New Zealand.

[5] In response to QWU's first email setting out some of the above points, LSG replied that it still seeks costs and there was no proof of QWU's financial hardship. However, if the Authority accepted that a costs award would impose undue financial hardship on QWU, LSG invited the Authority to consider payment of costs by instalments.

[6] QWU responded by sending in copies of what he says are his mother's bills from the first stage of her surgery. Unfortunately, the documents were written in Chinese and I have not been able to read them, although I have been able to read the screenshots of QWU's bank account balances. Those documents that show that QWU and his wife have New Zealand bank accounts in which as at 8 April 2019 they have a total of \$8,843.00.

The law

[7] The power of the Authority to award costs arises from Section 15 of Schedule 2 of the Employment Relations Act 2000 (the Act). The principles the Authority applies are well settled and outlined in *PBO Limited (formerly Rush Security Ltd) v Da Cruz*.¹ In *Fagotti v Acme & Co Limited*,² the Employment Court recently affirmed these principles.

[8] The Authority must exercise the discretion to award costs in accordance with principle and not arbitrarily, and consistently with its equity and good conscience jurisdiction. Equity

¹ [2005] ERNZ 808, a judgment of the Full Court of the Employment Court, at page 819.

² [2015] NZEmpC 135

and good conscience must be considered on a case-by-case basis. ‘Without prejudice’, or Calderbank offers to settle before the investigation meeting can be taken into account.

[9] Generally “costs follow the event”, which means that a successful party should ordinarily be able to expect a reasonable contribution to its legal costs from the unsuccessful party. In this case, LSG is the successful party, having successfully defended QWU’s claims.

[10] The investigation meeting took 1.5 days. The starting point for my consideration of costs is the daily tariff amount of \$4,500 for the first day and half of \$3,500, being \$1,750 for the second day. Therefore, the appropriate starting point for my consideration of costs is \$6,250.

[11] LSG claims the Authority should increase the daily tariff amount to reflect its offer to settle with QWU before the investigation meeting, and asks for costs of \$8,250.00.

The offer to settle and its effect on costs

[12] On 28 September 2018, LSG sent QWU a letter headed “Without Prejudice Except as to Costs.” In that letter LSG offered to pay QWU \$4,500 as a tax free amount under s 123(1)(c)(i) of the Employment Relations Act 2000. LSG proposed that in return QWU would withdraw his claim, “with no issue as to costs.”

[13] LSG advised QWU that the letter was privileged and could not be provided to the Authority in relation to the issue of whether or not he was constructively dismissed, but that it could be provided to the Authority in relation to any costs award.

[14] The letter concluded with the following advice:

10. If you reject this offer, this matter proceeds to a hearing and you are unsuccessful, LSG may rely on this letter in support of a claim for a greater than usual costs award (i.e. greater than the \$8,000 starting point referred to above).³ This is because in those circumstances, you would have been better off accepting the offer. LSG would have been better off by virtue of avoiding additional costs in terms of its legal representation.

³ The investigation meeting had been scheduled for two days.

11. I recommend that you obtain specialist legal advice as to this offer and the potential implications of rejecting it.
12. LSG's offer remains open for acceptance until 5:00 pm on Wednesday 10 October 2018.

[15] LSG's offer to settle was a genuine Calderbank offer that was clear, took costs into account, by clarifying that it was not offering to pay QWU's costs to date, and gave a reasonable time for consideration of the offer.

[16] Unfortunately, QWU did not take any legal advice in relation to the offer to settle. He did not respond to the offer to settle and the proceedings in the Authority continued. He must be taken to have rejected the offer.

[17] QWU characterised LSG's offer to settle as it using its superior financial position to cause him further stress and anxiety. However, when viewed objectively LSG's offer, had it been accepted, would have meant that QWU and LSG would have been in better financial positions now. After the date of the offer to QWU, LSG has incurred \$8,000 (exclusive of GST) in legal costs.

[18] Had QWU accepted the offer made to him he would have been paid \$4,500 by LSG, not had to proceed with the investigation meeting and would not need to pay LSG any contribution to its legal costs. LSG is entitled to increased costs because it responsibly tried to compromise with QWU to avoid further legal costs, despite what turned out to be its well-placed confidence that it would succeed in defending QWU's claims.

QWU's financial situation

[19] In *Scarborough v Micron Security Products Ltd*,⁴ Chief Judge Inglis decided that the ability of the liable party to pay is relevant to determining the correct level of costs. However, it is not decisive and must be examined alongside the broader public interest and the interests of the successful party.

⁴ [2015] NZEmpC 105.

[20] I accept that QWU has limited financial resources and currently no job. QWU does have some savings and has the capacity to earn wages/salary over the next few years.

[21] LSG is entitled to expect some recompense of the costs that it incurred in defending QWU's claim, and it is in the general public interest that unsuccessful parties should make some financial contribution to the successful party's costs.

[22] Having considered all the relevant principles and both parties' submissions I consider the amount of \$7,000, is a fair and reasonable amount for QWU to pay, even if it may take some time for him to arrange to make that payment.

[23] I commend LSG for its suggestion that QWU can pay the costs award to it by way of instalments. QWU has chosen to view that offer negatively, however, it means that he is able to pay what he owes LSG over time and does not have to pay it all in a lump sum. That is an advantage to him, if he chooses to take that option.

Order

- 1. QWU must pay LSG Sky Chefs New Zealand Limited \$7,000 as a contribution towards LSG's legal costs either in one lump sum payment due on or before 31 May 2019; or by 14 equal payments of \$500 per payment starting on Friday, 31 May 2019 and continuing each fortnight after that until the amount is paid in full on 29 November 2019.**
- 2. If any payment is not made or is short-paid the full amount remaining outstanding becomes immediately due and payable.**

Christine Hickey
Member of the Employment Relations Authority