

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND
I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKĀURAU ROHE**

[2020] NZERA 524

3072752

BETWEEN

JING SHEN
Applicant

AND

ORIENTAL NATURAL
HEALTHY LIMITED
First Respondent

AND

ZENGLI SHEN (deceased)
Second Respondent

Member of Authority: Eleanor Robinson

Representatives: Applicant in person
Sam Lowery, counsel for the Respondent

Submissions: 25 November 2020 from the Applicant
9 December 2020 from the Respondent

Determination: 18 December 2020

COSTS DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] By determination [2020] NZERA Auckland 462 the Authority determined that the Applicant, Ms Jing Shen, had been unjustifiably dismissed and unjustifiably disadvantaged by the Respondent, the First Respondent, Oriental Natural Healthy Limited (ONHL).

[2] However Ms Shen had not been successful in her claim that she had been sexually abused and harassed by the Second Respondent, Mr Zengli Shen, nor in respect of her claim

to have been unjustifiably disadvantaged by ONHL in respect of its handling of her claim of sexual harassment, nor in respect of her claim to have been unjustifiably disadvantaged by ONHL failing to investigate a claim of bullying.

[3] In that determination it was noted that whilst Ms Shen represented herself during the Investigation Meeting, she might be able to claim for any legal costs incurred in the preparation of her case before the Authority.

[4] Ms Shen is claiming total costs of \$7,949.38 in respect of legal costs and has submitted invoices in support of her claim.

[5] This matter involved a two day investigation meeting.

[6] During a case management conference with the parties held on 14 September 2020 I took the opportunity to provide to the parties, who had attended one mediation but without resolution of the matter, an indication of the monetary level of any award which might be made to the Applicant in the event that she was successful in all of her claims.

[7] On that basis the Respondent submits that it offered to return to mediation with Ms Shen if she was prepared to negotiate a settlement in an amount below that indicated by the Authority. That offer was confirmed in a letter dated 14 September 2020 and headed: "Without prejudice save as to costs". It therefore operated as a form of Calderbank¹ offer, that is a without prejudice save as to costs offer (the Proposed Second Mediation).

[8] Counsel for the Respondent submits that the Proposed Second Mediation did not proceed due to Ms Shen not being willing to negotiate below the level indicated by the Authority during the case management conference.

[9] The matter proceeded to an Investigation Meeting held on 29 and 30 September 2020 at which Ms Shen was partially successful in her claims and was awarded an amount of remedies in the amount of \$13,328.55. This was significantly below the level indicated in the Authority's case management call if wholly successful in all of her claims, and significantly below the level to which ONHL was prepared to negotiate at the Proposed Second Mediation.

Principles

[10] The power of the Authority to award costs arises from Section 15 of Schedule 2 of the Employment Relations Act 2000 which states:

15 Power to award costs

¹ *Calderbank v Calderbank* [1976] Fam 93 (CA)

- (1) The Authority may order any party to a matter to pay to any other party such costs and expenses (including expenses of witnesses) as the Authority thinks reasonable.
- (2) The Authority may apportion any such costs and expenses between the parties or any of them as it thinks fit, and may at any time vary or alter any such order in such manner as it thinks reasonable.

[11] Costs are at the discretion of the Authority, as observed by the current Chief Judge Colgan in *NZ Automobile Association Inc v McKay*².

[12] The principles and the approach adopted by the Authority on which an award of costs are made are well settled and outlined in *PBO Limited (formerly Rush Security Ltd) v Da Cruz (Da Cruz)*³.

[13] It is a principle set out in *Da Cruz* that costs are not to be used as a punishment. It is also a principle that costs are modest. Costs are also reasonable as observed by the Court of Appeal in *Victoria University of Wellington v Alton-Lee* at para [48] “As to quantification, the principle is one of reasonable contribution to costs actually and reasonably incurred.”⁴

Costs Award

[14] The Authority’s power to award costs is at the discretion of the Authority pursuant to clause 15 of Schedule 2 of the Employment Relations Act 2000 (the Act).

[15] The opportunity presented to Ms Shen to return a second time to mediation in circumstances in which ONHL was prepared to increase its settlement offer upwards in light of the indication provided by the Authority of a realistic remedy outcome in the event that Ms Shen was wholly successful in her claims, provided an opportunity for her to settle the matter without incurring further costs.

[16] In the event Ms Shen rejected the Proposed Second Mediation offer and was only partially successful in her claims before the Authority, resulting in a lower remedy amount than that which might have been achieved at the Proposed Second Mediation had it taken place.

[17] I observe that the Employment Court noted that the public interest in the fair and expeditious resolution of disputes would be adversely affected if parties were permitted to ignore without prejudice offers without costs being impacted. As observed in *Lancom Technology Limited v Forman*:

² *NZ Automobile Association Inc v McKay* [1996] 2 ERNZ 622

³ *PBO Limited (formerly Rush Security Ltd) v Da Cruz* [2005] 1 ERNZ 808

⁴ *Victoria University of Wellington v Alton-Lee* [2001] ERNZ 305

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.⁵

[18] I consider that the Proposed Second Mediation is a factor that should be taken into consideration in determining the appropriate level of costs.

[19] The starting point for costs is the normal daily tariff as applied in the Authority. For a two day hearing this equates to \$8,000. Ms Shen is seeking \$7, 949.38.

[20] In all the circumstances I consider that an appropriate contribution towards costs taking into account the level of success achieved by both parties and the Proposed Second Mediation offer is \$4,000.00

[21] ONHL is ordered to pay Ms Shen the sum of \$4,000.00 costs, pursuant to clause 15 of Schedule 2 of the Employment Relations Act 2000.

Eleanor Robinson

Member of the Employment Relations Authority