

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI  
ŌTAUTAHI ROHE**

[2021] NZERA 267  
3111977

BETWEEN

SUNG LAK KIM  
Applicant

A N D

DOLLAR KING LIMITED  
First Respondent

HEE KEON LEE  
Second Respondent

Member of Authority: David G Beck

Representatives: Seungmin Kang, counsel for the Applicant  
Matthew Hutcheson, counsel for the Respondent

Investigation Meeting: On the papers

Submissions Received: 21 May 2021 from the Applicant  
8 June from the Respondent

Date of Determination: 22 June 2021

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**COST DETERMINATION OF THE AUTHORITY**

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**The Determination**

[1] On 7 May 2021 the Authority issued a determination finding that Sung Lak Kim had been unjustifiably dismissed and that Dollar King Limited should pay:

- i. \$20,769.23 gross lost wages pursuant to s 123(1)(b) of the Employment Relations Act 2000. Interest is to be paid on this amount in accord with Schedule 2 of the Interest on Money Claims Act 2016 for the**

- period from 10 February 2020 up until the date the amount is paid in full;**
- ii. \$15,000 compensation pursuant to s 123(1)(c)(i) of the Employment Relations Act 2000;**
  - iii. A \$3,894 nett contribution to Mr Kim's legal costs of obtaining a new work visa under s 123(1)(b) of the Employment Relations Act 2000.**

[2] The Authority also found breaches of good faith obligations but that there were insufficient grounds made out for penalty claims against Dollar King Limited and Hee Keon Lee in a personal capacity.

[3] The parties were asked to explore resolving costs by agreement but failed to do so. Mr Kim was legally aided so in assessing costs incurred and claimed, this matter is the subject of the Legal Services Act 2011 (LSA).

#### **Submission for Sung Lak Kim**

[4] Mr Kang provided a copy of correspondence from the Legal Services Commissioner evidencing that Mr Kim had been provided with a legal aid grant totalling \$10,722.44 inclusive of GST.

[5] Mr Kang briefly submitted that having successfully obtained an unjustified dismissal ruling his client seeks a contribution to costs of \$5,375 based on scale costs and an uplift to reflect the rejection of a *Calderbank* offer. In addition a contribution to detailed costs and disbursements of translation expenses and counsel travel and attendance was sought.

#### **Submissions for Dollar King Limited and Hee Keon Lee**

[6] Mr Hutcheson submitted that Mr Kim was only partially successful in his claims against Dollar King Limited as he had failed to obtain a claimed notice in lieu payment and had not persuaded the Authority to penalise Dollar King for claimed breaches. In regard to Mr Lee it was asserted that, as this claim was wholly unsuccessful, a contribution to Mr Lee's costs should be assessed. After traversing the factors to be considered under section 45 of the LSA it was suggested that \$1,000 was an appropriate amount for Mr Kim to contribute as

Mr Lee had been put to the cost of filing pleadings, evidence and submissions to counter the claim that a penalty be ascribed to him in a personal capacity.

### **Costs principles**

[7] The Authority's discretion to award costs is well established and arises from Section 15 of Schedule 2 of the Employment Relations Act 2000. This discretion, it is accepted, is guided by principles set out in *PBO Limited (formerly Rush Security Ltd) v Da Cruz*<sup>1</sup> including: that costs are not to be used as a punishment or as a reflection on how either party conducted proceedings, and that awards are to be made consistent with the equity and good conscience jurisdiction of the Authority.<sup>2</sup>

### **Settlement offer**

[8] The making of a settlement offer in the form of a *Calderbank* offer is a relevant factor when considering costs, where the offer does not better the award made by the Authority. Here the settlement was offered in a timely fashion, just after mediation on 24 June 2020, and although not a modest offer it did significantly differ from the Authority award that because of the effluxion of time included lost wages, and would have saved Dollar King Limited from incurring additional costs. To their credit Dollar King did make a counter offer but the parties were some distance apart in their respective expectations. At this point in time both parties were legally represented and correspondence highlighted the risk to Dollar King of eschewing the offer made.

[9] Whilst generally the Authority has a low level jurisdiction and hence a focus on scale costs, there is authority to suggest a 'steely' approach to *Calderbank* offers is required in the broader public interest<sup>3</sup> and the Employment Court has held that a *Calderbank* offer sometimes leads to an uplift in costs for the successful party seeking such on ordinary principles to encourage early settlement.<sup>4</sup>

[10] I intend to take into account the offer made by Mr Kim to settle at an early stage of litigation which he then succeeded in significantly in excess of the settlement offer.

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<sup>1</sup> *PBO Limited (formerly Rush Security Ltd) v Da Cruz* [2005] 1 ERNZ 808.

<sup>2</sup> Section 160(2) Employment Relations Act 2000.

<sup>3</sup> *Bluestar Print Group (NZ) Ltd v Mitchell* [2010] NZCA 385.

<sup>4</sup> *Stevens v Hapag-Lloyd (NZ) Ltd* [2015] NZEmpC 137 at [24].

## Assessment

[11] A general principle for a successful party is that costs should ‘follow the event’ and here Mr Kim was successful in his predominant unjustified dismissal claim and obtained significant remedies for such including a lost benefit award.

[12] In these circumstances, I am persuaded that given the *Calderbank* offer’s rejection that an uplift is required and that it would be equitable in all the circumstances to award Mr Kim his full legal aid grant.

[13] I have carefully considered the claim for costs on behalf of Mr Lee and despite the absence of evidence of Mr Kim’s financial circumstances, I am not convinced that this claim has reached the appropriate threshold of ‘exceptional circumstances’ alluded to in s 43(3) LSA and case law.<sup>5</sup> I do not consider it is equitable to award a contribution to Mr Lee’s costs as no compelling exceptional circumstances were identified in Mr Kim’s conduct of his unsuccessful claim against Mr Lee.

## Award

[14] **I order Dollar King Limited to pay Sung Lak Kim the sum of \$10,724.44 as being the full legal aid grant paid to Mr Kim’s counsel for the conduct of this matter.**

David Beck  
Member of the Employment Relations Authority

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<sup>5</sup> For a discussion of factors to consider for exceptional circumstances and case law on such I considered Judge Perkins decision: *Bachu v Davie Motors Ltd* [2011] NZEmpC45; ARC 73/09.