

- ii. \$18,000.00 compensation without deduction pursuant to s 123(1)(c)(i) of the Employment Relations Act 2000.

[2] The parties were asked to explore resolving costs by agreement but failed to do so.

Submission from Ming Hu

[3] Ms Chang, noting the investigation meeting took only half a day and would normally only attract half the daily tariff rate (\$2,250), submitted that having successfully obtained an unjustified dismissal ruling her client's situation warranted a contribution to costs of \$6,000 and the filing fee of \$71.56.

[4] The Authority normally adopts a daily tariff approach unless additional compelling circumstances warrant an uplift. Ms Chang sought an uplift claiming that such was warranted because after the investigation meeting a legal submission was required, and because New Zealand Newcan International Limited unreasonably turned down a Calderbank offer made on 25 November 2020 a day after the parties attended mediation. The Calderbank offer was to settle the personal grievance for a compensatory sum of \$6,000 and a contribution to costs of \$3,000 + GST.

[5] I received no submission from New Zealand Newcan International Limited.

Costs principles

[6] The Authority's discretion to award costs is well established and arises from Section 15 of Schedule 2 of the Employment Relations Act 2000. The discretion, it is accepted, is guided by principles set out in *PBO Limited (formerly Rush Security Ltd) v Da Cruz*¹ 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.²

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

² Section 160(2) Employment Relations Act 2000.

The settlement offer

[7] The making of a settlement offer in the form of a “without prejudice except as to costs” offer, known as a ‘Calderbank’, is a relevant factor where such does not better the award made by the Authority. Here the settlement amount was offered in a timely fashion and it was objectively a realistic offer. The offer made significantly differed from the eventual Authority award and if accepted at the time would have saved Ms Hu from incurring additional costs given that New Zealand Newcan International Limited chose not to obtain legal advice.

[8] I also have considered that no counter offer was made when objectively a sensible estimate of likely exposure given the facts of the case would have been appropriate and does not appear to have been undertaken by Ms Hu’s former employer.

Assessment

[9] A general principle for a successful party is that a contribution to costs should normally ‘follow the event’ and here Ming Hu was successful in her predominant unjustified dismissal claim and has been granted a significant compensatory remedy.

[10] In these circumstances, including taking the Calderbank offer into account, I conclude an increased half daily tariff should apply. I consider that in all the circumstances that should be set at \$4,500 and Ms Hu should recover her filing fee.

Award

[11] I order New Zealand Newcan International Limited to pay Ming Hu the sum of \$4,500 as a contribution to legal costs incurred and reimbursement of the Authority filing fee of \$71.56.

David G Beck
Member of the Employment Relations Authority