

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKĀURAU ROHE**

[2021] NZERA 537
3066375

BETWEEN	BANANAWORKS COMMUNICATIONS LIMITED Applicant
AND	YUNGU (JAMES) SHI First Respondent
AND	ZICHENG (BRICK) ZHANG Second Respondent
AND	IM DISTRIBUTION LIMITED Third Respondent
AND	SHU WANG Fourth Respondent
AND	HONGMEI HU Fifth Respondent

Member of Authority:	Eleanor Robinson
Representatives:	Geoffrey Jenkin, counsel for the Applicant Jessie Lapthorne, counsel for the First and Second Respondents Royal Reed, counsel for Third, Fourth and Fifth Respondents
Investigation Meeting:	1 and 2 July 2020, 16 December 2020, 22 June 2021, and 22 September 2021 (by Zoom)
Submissions Received:	22 September and 9 November 2021 from Applicant 29 October 2021 from First and Second Respondents 29 October 2021 from Third, Fourth and Fifth Respondents
Date of Determination:	01 December 2021

COSTS DETERMINATION OF THE AUTHORITY

[1] There have been three determinations in this matter:

- In a determination dated 26 February 2021 [2021] NZERA 75 I determined that Ms Shu Wang and Ms Hongmei Hu, should be joined as the Fourth and Fifth Respondents to the substantive claim by the Applicant, Bananaworks Communications Limited (BWC), against Mr Yungu Shi, First Respondent, and Mr Zicheng Zhang, Second Respondent;
- In a determination dated 10 August 2021 [2021] NZERA 352 I determined that the Restraint of Trade clauses in the employment agreements of Mr Yungu Shi, First Respondent, and Mr Zicheng Zhang, Second Respondent, were unenforceable, but that there were breaches of the implied terms of fidelity by them. No evidence of aiding and abetting the breaches by Mr Shi and Mr Zhang by the Third Respondent, IM Distribution Limited (IMD), or by the Fourth and Fifth Respondents was found;
- In a determination dated 1 October 2021 [2021] NZERA 425 I determined quantum and awarded damages and penalties to BWC against Mr Shi and Mr Zhang.

[2] Costs were reserved because the parties indicated that they wished to be heard on that issue. All parties have subsequently submissions in respect of costs.

Relevant background to costs

[3] The statement of problem was filed by BWC on 19 July 2019. The investigation of the issues raised in that application have been protracted including delays caused as a result of the Covid-19 pandemic and associated lockdowns, requests for documents to be produced, the introduction of a joinder application which required determination, and a separate hearing to determine quantum.

[4] The initial investigation into the substantive claims by BWC took place on 1 and 2 July 2020. It was protracted and needed to be resumed on 16 December 2020. Towards the conclusion of the investigation meeting held on 16 December 2020 BWC made an application for joinder of Ms Wang and Ms Hu in a personal capacity as the Fourth and Fifth Respondents.

[5] The investigation resumed on 22 June 2021 and a further investigation in respect of assessment of quantum took place by Zoom on 22 September 2021.

[6] Determination [2021] NZERA 75 and Determination [2021] NZERA 352 took place over four days: 1 and 2 July 2020 were two full days of an investigation meeting, and 16 December 2020 and 22

June 2021 were respectively half days of an investigation meeting. Determination [2021] NZERA 425 was a half day of an investigation meeting.

[7] That equates to three and a half days of an investigation meeting, which at the Authority's normal daily tariff rate would equate to \$13,250.00. This is the starting point from which costs can be increased or decreased based on a consideration of the conduct of the parties or nature of the case.

[8] The Employment Court in *PBO Limited (formerly Rush Security Limited) v Da Cruz* addressed the issue of costs in the Authority and established the following principles stated at paragraph [44]:

The Authority is able to set its own procedure and has, since its inception, held to some basic tenets when considering costs. These include:

- There is a discretion as to whether costs would be awarded and what amount.
- The discretion is to be exercised in accordance with principle and not arbitrarily.
- The statutory jurisdiction to award costs is consistent with the equity and good conscience jurisdiction of the Authority.
- Equity and good conscience is to be considered on a case by case basis.
- Costs are not to be used as a punishment or as an expression of disapproval of the unsuccessful party's conduct although conduct which increased costs unnecessarily can be taken into account in inflating or reducing an award.
- It is open to the Authority consider whether all or any of the parties costs were unnecessary or unreasonable. 13 [1994] 1 ERNZ 613 10
- That costs generally follow the event.
- That without prejudice offers can be taken into account.
- That awards will be modest.
- That frequently costs are judged against a notional daily rate.
- The nature of the case can also influence costs and this has resulted in the Authority ordering that costs lie where they fall in certain circumstances. ¹

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

[9] The parties have filed submissions in respect of costs. The Applicant BWC submits that it has incurred actual costs in excess of \$70,000.00. The First and Second Respondents submit that they incurred actual costs in excess of \$90,000.00. The Third, Fourth and Fifth Respondents submit that they have incurred actual costs in excess of \$30,000.00.

[10] These costs are all in excess of the usual tariff and all parties have made submissions in respect of costs seeking an uplift in the normal tariff as applied in the Authority as follows:

First Submissions of the Applicant

[11] In the first submissions of counsel for the Applicant, received on 22 September 2021 it was submitted that the behaviour of the First and Second Respondents had been particularly egregious and the Authority should show its disapproval of their actions by awarding costs at the level sought of \$30,000.00 against the First and Second Respondents jointly and severally.

[12] The Applicant submits that it opposes any costs being awarded to the Third, Fourth and Fifth Respondents on the basis that their lack of supervision over the First and Second Respondents enabled them to commit the actions which were to the detriment of the Applicant such that the Third, Fourth and Fifth Respondents should shoulder some of the responsibility for these actions. Further that they did not comply with the order of the Authority made in the Minute of the Authority dated 5 March 2020.

Submissions of the First and Second Respondents

[13] Counsel for the First and Second Respondents submits that the Applicant was not successful in its preliminary claims as set out in Determination [2021] NZERA 352 for the following reasons;

- i. The fact that costs follow the event is a fundamental principle and it is submitted that taking into account the successful defence of the Applicant's primary claims, the First and Second Respondents were on the whole, more successful than the Applicant;
- ii. The damages sought by the Applicant of \$214,000.00 were sixty-seven times higher than the damages that were awarded by the Authority in Determination [2021] NZERA 425.
- iii. The damages sought relied upon a finding that the restraints were enforceable, however they were found not be enforceable by the Authority so that the Applicant was unsuccessful in its primary claim.

- iv. The remedies which were awarded to the Applicant were only a fraction of the sum sought, thus that the overall outcome would be highly unlikely to regard the Applicant as the more successful party.

[14] It is submitted that the Applicant increased the costs of the First and Second Respondents by joining the Third, Fourth and Fifth Respondents to pursue ultimately unsuccessful claims for the following reasons:

- i. The time requirement for the investigation meeting was unnecessarily inflated by the Applicant's decision to join the Third Respondent to a claim that was wholly unsuccessful; and
- ii. It meant that counsel for the Third Respondent was given the opportunity to cross-examine the Applicant and the First and Second Respondents, which substantially increased the time required for the first two days of the investigation meeting;

[15] It is submitted that the nature of the case and the outcome is such that the Authority should either grant costs in favour of the First and Second Respondents, or allow costs to lie where they fall.

[16] It is submitted that the Applicant's expectations were unrealistic and should be taken into account when deciding the issue of costs for the following reasons:

- i. They were unrealistic and misconceived being predominantly reliant upon a finding that the restraint was enforceable, and losses were also claimed in relation to companies which were never the Applicants clients;
- ii. The Applicant's expectations were not conducive to any realistic settlement of the dispute being achieved which left the First and Second Respondents with no choice but to defend the claims which gave rise to high costs and took a significant personal toll on them.

[17] Counsel for the First and Second Respondents submits that they should be awarded costs of \$11,500.00 based upon the tariff rate for the three day investigation for the above reasons.

[18] In the alternative, counsel for the First and Second Respondents counsel submits that costs should lie where they fall to account for the significant success in defending the case.

[19] It is also submitted that in the event that it is decided by the Authority to make a costs award in favour of the Applicant, it should be reduced in light of:

- i. Only two days of the investigation meeting time were related to the claim against the First and Second Respondents, as such the starting point should be \$8,000.00; and
- ii. The matter should be held to be one of 'mixed success' and the tariff reduced accordingly by 50% of the above sum in recognition of the other party's success ²

Submissions of the Third, Fourth and Fifth Respondents

[20] Counsel for the Third, Fourth and Fifth Respondents submits the Applicant was unsuccessful in its claims against the Third, Fourth and Fifth Respondents in that the Authority found that they did not aid and abet the First and Second Respondents in relation to the breaches which were found in respect of them.

[21] The Third, Fourth and Fifth Respondents are accordingly seeking costs at an increased daily tariff rate of \$7,000.00 for each day of the Investigation Meeting. This on the basis that:

- a) IMD offered to resolve the matter by sending a *Calderbank* Offer in a letter headed 'Without prejudice save as to costs' to the Applicant on 22 July 2019.³ The Offer was made on the basis that the Applicant would withdraw its claims against the Third, Fourth and Fifth Respondents. The Offer was not accepted by the Applicant.
- b) The Applicants claim against the Third, Fourth and Fifth Respondents lacked any merit and increased their costs.

[22] It is submitted that the actual costs collectively incurred by the Third, Fourth and Fifth Respondents were \$33,150.40 inclusive of GST in legal fees. The actual costs incurred by the Third Respondent were significantly higher since it was involved from the lodging of the Applicants statement of problem on 4 July 2019.

² *Coomer v J H McCallum and Son Ltd* [2017] NZ EmpC 156.

³ *Calderbank v Calderbank* [1976] Fam 93 (CA).

[23] On the basis that costs generally follow the event and the Applicant was unsuccessful in pursuing the aiding and abetting claims against them, the Third, Fourth and Fifth Respondents, are entitled to costs.

[24] The Calderbank Offer dated 22 July 2019 sent on behalf of the Third Respondent informed the Applicant that:

- a) It had no knowledge of the previous employment agreements of the First and Second Respondents;
- b) It had no knowledge of any representations made by the First and Second Respondents;
- c) It was lead to believe that the First and Second Respondents had taken care of their departure and the termination of their previous employment agreements with the Applicant; and
- d) It had taken steps to inform the relevant non-parties that it did not condone the First and Second Respondents' actions.

[25] On that basis the Third Respondent made an offer that the Applicant withdraw its proceedings against it with no issue as to costs.

[26] It is further submitted that there was no evidentiary basis for the Applicant pursuing its claims against the Third, Fourth and Fifth Respondents.

[27] The Third, Fourth and Fifth Respondents are accordingly seeking an increased costs award of \$28,000.00, being \$7,000.00 for each day of investigation.

Further submissions of the Applicant in response

(i) The First and Second Respondent submissions

[28] Counsel submits that the there is no basis in law or fact to support the submission that the claim for damages was breach of the restraint and this was the Applicant's primary claim. On the contrary the Applicant's submission substantially concentrated on claims that the First and Second Respondents were in breach of express conditions and/or statutory and/or implied terms of fidelity and good faith with respect to the solicitation of clients during the terms of employment.

[29] In Determination [2021] NZERA 352 breaches of the duty of fidelity were found by the Authority which were ‘serious’, though not of the ‘most serious type’.

[30] The issue of damages took up very little time, being dealt with during an online hearing on 22 September 2021 in which the Authority accepted submissions made by counsel. The First and Second Respondents were never required to deal with the evidence and/or submissions with respect to damages in relation to those concerning Douglas Pharmaceuticals, the main thrust of the damages claim.

[31] The Applicant submits that in *Coomer v J A McCallum and Son Limited*, Judge Smith referred to *Weaver v Auckland Council Ltd* citing paragraphs [3] and [31] of the judgment in which it was stated:⁴

[30] The Court of Appeal began its decision by recording that costs are discretionary. Dealing with who is entitled to costs the Court said –

“But it is well settled that the party that lost should pay the costs of the party that won. The Supreme Court in *Shirley v Wairapa District Health Board*, in referring to what is now r14.2(a) (High Court Rules), made clear that the “loser, and only the loser, pays”, unless there are exceptional circumstances”.

[31] In the present case, however, the only party to have succeeded by any ‘realistic appraisal’ were the appellants. It is true that they did not succeed to the full extent of their claim, but only to roughly half that extent, yet success on more limited terms is still success. We do not therefore see a proper basis upon which the usual rule that a party who fails with respect to the proceeding should pay costs to the party who succeeds should not apply. That said, it is appropriate that the costs ultimately awarded to the appellant should be reduced in accordance with r14.2(a) (High Court Rules), because, although the appellant succeeded the time and resources necessary for the respondent to meet ultimately unsuccessful arguments significantly increased its costs.⁵

[32] The Applicant submits that whilst *Coomer* was a case of mixed facts, it is distinguishable on its facts because in *Coomer* the applicant hardly succeeded at all, whereas in this case the Applicant was the winner in terms of r14.2(a) to an overwhelming degree.

[33] It is submitted that joinder of the Third, Fourth and Fifth Respondents relates to the costs properly payable by the First and Second Respondents because the involvement of the Third, Fourth and Fifth Respondents enabled the Authority to investigate fully the actions of the First and Second Respondents.

⁴ *Coomer* above n2.

⁵ *Weaver v Auckland Council Ltd* [2017] NZCA 330.

(ii) *The Third, Fourth and Fifth Respondents submissions*

[34] Counsel states that the reason for the formal application of joinder in respect of the Fourth and Fifth Respondents was because at the hearing on 18 December 2020 the Fourth and Fifth Respondents gave evidence that the Third Respondent had ceased trading on or about September/October 2019.

[35] It is submitted that an award of costs in favour of a company that is not trading or is about to be struck off the register is not appropriate. In order to enforce such an order the Third Respondent would have to take steps to have the striking off process reversed.

[36] It is accepted by the Applicant that the claim against the Fourth and Fifth Respondents failed. It is submitted that there are exceptional circumstances which justify an order that costs of the Third, Fourth and Fifth Respondents should lie where they fall.

[37] The exceptional circumstances are the making of an order by the Authority on 5 March 2020 that the Third Respondent disclose all tax invoices issued to Douglas Pharmaceuticals and ANL limited from January 2019 onwards. The Third Respondent applied for a review of that order and the Authority decided not to make any further order. As a consequence the original order in the Minute dated 5 March 2020 stood and this was never complied with by the Third Respondent. It is submitted that had it done so, the outcome of the case against the Fourth and Fifth Respondents may have been significantly different.

[38] In regard to the Calderbank Offer dated July 2019, it is submitted that it was unrealistic to expect that such an offer would be accepted.

What costs should be awarded and to which party?

[39] This was a protracted matter in which all parties had some degree of success. In *Coomer* the Employment Court observed that in these cases of mixed success, the Authority must: “stand back and look at things in the round”.⁶

[40] As observed in *Coomer* it is also a principle, that it is usual for costs ‘to follow the event’.

⁶ *Coomer v J H McCallum and Son Ltd* [2017] NZ EmpC 156 at [43].

[41] In this case, I accept the submission that the three later grievances were not unreasonably raised, but observe that they were not upheld by the Authority.

[42] 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 discretionary and awards made are consistent with the Authority's equity and good conscience jurisdiction.

[43] Of relevance in this instance is the principle that costs will be modest. The Employment Court further observed at para [47]:

... we urge representatives of parties to be conscious of the costs that are accumulating as a matter proceeds. Cases should be approached economically and in a way that is likely to leave a successful party with a satisfactory outcome. There is an overall need to ensure that costs being incurred are reasonable in the light of the amount that is likely to be recovered as remedies and costs from the Authority.⁷

[44] It is clearly established case law that: "*costs are not to be punitive or an expression of disapproval of a party's conduct*".⁸ The submission by the Applicant that a costs award should reflect the Authority's disapproval of the actions of the First and Second Respondents I find would be using costs for such a purpose.

[45] It has been submitted by counsel for the First and Second Respondents that they were more successful than the Applicant because they were able to successfully defend the majority of claims against them. That fact was acknowledged in the remedies, being the level of damages and quantum of penalty awards made against them. Nonetheless the Applicant was the successful party in the proceedings which was reflected in the award of damages and penalties to it in respect of the First and Second Respondents.

[46] Having considered the matter and the principle that costs should be modest, I consider a costs award against the First and Second Respondents at a level in excess of the daily tariff rate is appropriate.

[47] The application for joinder against the Fourth and Fifth Respondents was the decision of the Applicant, and I consider it appropriate that a costs award against the First and Second Respondents should be decreased on the basis of additional costs being incurred by them as a result of the joinder investigation hearing, although I take into account the fact that it was their decision to attend it.

⁷ Above n1 at [47].

⁸ Above n1.

[48] In respect of the Third, Fourth and Fifth Respondents, the Applicant successfully applied to have the Fourth and Fifth Respondents joined to the initial claim which was against the First, Second and Third Respondents. Whilst the joinder application was successful, the ultimate outcome was that the claims against the Third, Fourth and Fifth Respondents were unsuccessful.

[49] Counsel for the Applicant submitted that the Third Respondents' lack of supervision over the First and Second Respondents enabled them to commit the actions which were to the detriment of the Applicant and on that basis, that they should shoulder some of the responsibility for these actions.

[50] The Third, Fourth and Fifth Respondents were found not to have aided and abetted the actions of the First and Second Respondents. To take note of this submission I find would be to attribute fault in the costs determination which was not determined in the substantive matter.

[51] I do accept that the Third Respondent did not comply with a direction of the Authority, contained in the Minute dated 5 March 2020.

[52] In respect of the Calderbank Offer dated 22 July 2019, 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*:

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.⁹

[53] The Third, Fourth and Fifth Respondents were wholly successful in defending the claims against them and I consider that the Calderbank Offer is a factor that should be taken into consideration in determining the appropriate level of costs.

[54] I also accept the submission of the Applicant that costs cannot be paid to the Third Respondent which is in the process of being removed from the Companies Office Register and adjust the amount to be awarded accordingly.

⁹ *Lancom Technology Limited v Forman* [2018] NZEmpC 30 at [38].

[55] Standing back and considering the matter in the round, I consider that costs should be awarded as follows:

[56] **I order Mr Shi and Mr Zhang jointly and severally to pay BWC a contribution to costs in the sum of \$14,000.00, pursuant to clause 15 of Schedule 2 of the Employment Relations Act 2000. The First and Second Respondents are also ordered to pay BWC the Authority filing fees in the sum of \$71.56.**

[57] **I order BWC to pay IMD, Ms Wang and Ms Hu a contribution to costs in the sum of \$7,500.00, pursuant to clause 15 of Schedule 2 of the Employment Relations Act 2000. The contribution to costs award is to appropriately appointed between the Fourth and Fifth Respondents.**

**Eleanor Robinson
Member of the Employment Relations Authority**