

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**[2017] NZERA Auckland 271
5643075**

BETWEEN QIANG DENG
 Applicant

AND HENRY FENG LAWYERS LTD
 Respondent

Member of Authority: Eleanor Robinson

Representatives: May Moncur, Advocate for Applicant
 Lee Goffin, Counsel for Respondent

Submissions received: 18 August 2017 from Applicant
 31 August 2017 from Respondent

Determination: 08 September 2017

COSTS DETERMINATION OF THE AUTHORITY

[1] By preliminary determination [2017] NZERA Auckland 118 the Authority found that the claims of unjustifiable dismissal, sexual harassment and bullying made by the Applicant, Ms Qiang (Zoe) Deng against the Respondent, Henry Feng Lawyers Limited (HFL), should not be set aside as frivolous and vexatious pursuant to s.12A, Schedule 2 of the Employment Relations Act 2000 (the Act).

[2] By determination [2017] NZERA Auckland 235 the Authority found that Ms Deng had been unjustifiably dismissed by HFL, although she was not successful in her claims that she had been sexually harassed or bullied during her employment.

[3] Ms Deng was successful in the preliminary matter and partially successful in the substantive matter. Costs were reserved in the hope that the parties would be able to settle this issue between them. Unfortunately they have been unable to do so, and Ms Deng has filed submissions in respect of costs.

[4] This matter involved the preliminary matter being determined ‘on the papers’ with the agreement of the parties, and a one day investigation meeting in relation to the substantive matter.

[5] Ms Moncur, on behalf of Ms Deng, citing actual costs in respect of both issues of \$9,103.40, is seeking a contribution towards her costs of \$5,500.00.

[6] Ms Goffin, on behalf of HFL, submits that HFL should be awarded a contribution to its costs in relation to the preliminary matter in the sum of \$1,006.00 based upon its need to provide documentation and interview witnesses.

[7] In relation to the substantive matter HFL submits that costs should reflect Ms Deng’s representative’s failure to verify information and her conduct which was unhelpful and unnecessarily extended the hearing time.

Principles

[8] 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) 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.

[9] Costs are at the discretion of the Authority, as observed by the current Chief Judge Colgan in *NZ Automobile Association Inc v McKay*¹.

[10] 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*².

[11] It is a principle set out in *PBO Limited (formerly Rush Security Ltd) v Da Cruz*³ that costs are modest. Costs are also reasonable as observed by the Court of Appeal in *Victoria*

¹ [1996] 2 ERNZ 622

² [2005] 1 ERNZ 808

³ [2005] 1 ERNZ 808

*University of Wellington v Alton-Lee*⁴ at para [48] “As to quantification, the principle is one of reasonable contribution to costs actually and reasonably incurred.

[12] It is also a principle that: “Costs are not to be used as a punishment or as an expression of disapproval of the unsuccessful parties conduct, although conduct which has increased costs unnecessarily” can be taken into consideration and thereby increase the notional daily tariff rate.

Determination

[13] The Investigation Meeting in respect of the preliminary matter was dealt with “on the papers”. It was a relatively straightforward matter, no hearing was required and the matter was decided on the basis of a telephone conference and on written submissions from the parties. Minimal time would have been required for preparing the legal submissions as the law in this area is well settled.

[14] Costs normally follow the event and Ms Deng was the successful party in the matter. I consider it appropriate to base the level of costs on the normal tariff in the Authority and to take a half day investigation meeting as the appropriate amount of time required to be spent on this straightforward matter.

[15] Accordingly HFL is ordered to pay Ms Deng the sum of \$1,750.00 towards her legal costs.

[16] In relation to the substantive matter I take into account the fact that Ms Deng was only partially successful in her claims against HFL, and did not succeed in two of her three claims. I noted that in determination [2017] NZERA Auckland 235 I stated that I considered this was an appropriate case for letting costs lie where they fall, however Ms Deng has nonetheless sought costs in respect of the substantive matter.

[17] In consideration of the extent to which both parties have been successful in this matter and whilst bearing in mind the fact that costs normally follow the event, I take as a starting point therefore costs of \$1,500.00 (being a one-third ratio based upon the notional daily tariff in the Authority of \$4,500.00 for a first day of hearing) as being payable to the Applicant.

[18] Costs may be raised or lowered in accordance with the principle that conduct which unnecessarily increased costs may be taken into account. In that respect I observe that the

⁴ [2001] ERNZ 305

conduct of Ms Moncur did necessitate my intervention on more than one occasion which had the effect of adding to the duration of the meeting.

[19] Having had regard to the principles set out in *Da Cruz*, the time taken for the Investigation Meeting, and the conduct of the parties, I consider that a contributory award towards the Applicant's actual costs is reasonable.

[20] I consider it appropriate to take the factors identified above into consideration and consider that the sum of \$1250.00 is appropriate in respect of the substantive matter.

[21] I order HFL to contribute \$3,000.00 towards Ms Deng's costs.

Eleanor Robinson
Member of the Employment Relations Authority