



comply with the terms of a record of settlement entered into by the parties on 9 May 2016. A statement in reply was lodged in accordance with the directions of the Authority, on 15 June 2016. Mr Ng-Shiu raised counter claims in his statement in reply that the matters raised by Dansar were vexatious and frivolous and without merit and should be dismissed. Mr Ng-Shiu claimed payment of \$15,000 as compensation.

[3] On 12 July 2016 Dansar provided formal notice to the Authority that its application was being withdrawn. The investigation meeting set down for 5 August 2016 was then vacated.

[4] By Notice of Direction dated 14 July 2016 the parties were advised that as there were no longer any claims for Mr Ng-Shiu to answer, or against which he could make counter-claims, if Mr Ng-Shiu wished to pursue his claims against Dansar Projects Limited he was required to file a statement of problem and pay the appropriate filing fee.

[5] The parties were advised that given the early withdrawal of the claims against Mr Ng-Shiu plus taking into account the claims and counter-claims if there were any issue as to costs it was likely they would lie where they fall. The parties were then given a timetable for the lodging of submissions in the event that costs were at issue.

[6] The parties have not resolved the issue of costs and I am in receipt of submissions from both parties as to how to deal with this matter.

[7] The discretion to award costs, while broad, is to be exercised in a principled way. The primary principle is that costs follow the event.

#### **Application for joinder**

[8] Mr Ng-Shiu has made an application for joinder of Mr Witt personally to be jointly and severally liable for any costs award in this matter.

[9] I have declined the application for joinder. The Employment Court has addressed such applications and accepted that a serious dereliction of duty would be required to justify a representative's or advisor's joinder for the purpose of costs.<sup>1</sup>

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<sup>1</sup> NZ Medical Laboratory Workers Union Inc v Capital Coast Health Ltd [1998] 2 ERNZ 107 at page 120.

Representatives must be able to represent their client without fear of an award for costs and I have, as the Court did in *Capital Coast Health*, assumed that Mr Witt was at all times acting on the instructions of his client.

[10] I am not satisfied Mr Ng-Shiu has established conduct on the part of Mr Witt that would justify his joinder for the purposes of costs.

### **Determination of costs**

[11] Under normal circumstances the Authority would apply a starting point of a notional daily tariff for quantifying costs. However, the circumstances applying to this matter are not usual. The proceedings were lodged and in accordance with the Act a statement in reply was also lodged which contained counter-claims against Dansar.

[12] The Authority convened a case management call and the matter was set down for an investigation meeting and timetabled directions were made with respect to the lodgement and service of witness statements. Dansar's witness statements were due to be lodged and served on 13 July 2016. On 12 July 2016 Dansar gave notice that the proceedings were withdrawn and would not be progressed.

[13] As this matter did not involve an investigation meeting and was withdrawn before any evidence was required to be lodged by either Dansar or Mr Ng-Shiu the appropriate starting point is an assessment of the actual costs incurred by Mr Ng-Shiu and an assessment of whether those costs were reasonable.

[14] As held recently by the Employment Court, the assessment of an appropriate contribution to costs in the Authority requires a different approach to assessing costs to that used by the Employment Court.<sup>2</sup> As noted in *PBO Ltd (formerly Rush Security Ltd) v Da Cruz*,<sup>3</sup> awards in the Authority will be modest taking into account conduct which increases costs unnecessarily. Indemnity costs may be justified in relatively rare cases where a party's conduct is particularly egregious.<sup>4</sup>

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<sup>2</sup> *Booth v Big Kahuna Holdings Limited* [2015] NZEmpC 4 at [6].

<sup>3</sup> (2006) 7 NZELC 98,128; [\[2005\] ERNZ 808](#); (2005) 3 NZELR 1 (EMC).

<sup>4</sup> *Tomo v Checkmate Precision Cutting Tools Limited* [2015] NZEmpC 2 at [9].

[15] Mr Ng-Shiu claims indemnity costs of \$6,532.00. I am not satisfied the conduct of the applicant in lodging its proceedings meets the threshold for an award of indemnity costs.<sup>5</sup>

[16] At the most Mr Ng-Shiu was put to the expense of preparation for the statement in reply which also included a counter-claim against Dansar and attendance at the case management call. It is not clear on the documentation received by the Authority what proportion of the costs incurred by Mr Ng-Shiu related to the counter-claims.

[17] Taking into account the work done as well as the timeliness of the withdrawal, I conclude that Mr Ng-Shiu is entitled to a contribution to his costs in the sum of \$500. Dansar Projects Limited is ordered to pay a contribution to Mr Ng-Shiu costs of \$500 within 14 days of the date of this determination.

Vicki Campbell  
Member of the Employment Relations Authority

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<sup>5</sup> See *Rodkiss v Carter Hold Harvey Ltd* [2015] NZEmpC 147 which applies the tests set out in *Bradbury v Westpac Banking Corp* [2009] NZCA 234, [2009] 3 NZLR 400.