



# New Zealand Employment Relations Authority Decisions

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## Dong v Kitchen Master Limited (Auckland) [2018] NZERA 219; [2018] NZERA Auckland 219 (18 July 2018)

Last Updated: 25 July 2018

### IN THE EMPLOYMENT RELATIONS AUTHORITY AUCKLAND

[2018] NZERA Auckland 219  
3023309

BETWEEN LILI DONG Applicant

A N D KITCHEN MASTER LIMITED First Respondent

AND SUIFANG LIANG Second Respondent

Member of Authority: Anna Fitzgibbon

Representatives: Daniel Zhang, Counsel for Applicant

Paul Pang, Counsel for Respondents

Investigation Meeting: Determined on the papers

Submissions Received: 11 July 2018 from Applicant

27 June 2018 from Respondents

Date of Determination: 18 July 2018

### COSTS DETERMINATION OF THE EMPLOYMENT RELATIONS AUTHORITY

**The applicant, Ms Lili Dong is ordered to contribute \$8,000 towards the costs of the first respondent, Kitchen Master Limited and the second respondent Ms Suifang Liang. Ms Dong is to reimburse disbursements totalling \$103.50, both sums within fourteen days of the date of this determination.**

#### The substantive determination

[1] In a written determination of the Authority, issued on 18 June 2018<sup>1</sup> the Authority determined the underlying and true nature of the relationship between the parties was that of an independent contractor, not employment. Accordingly, the Authority had no jurisdiction to investigate the applicant's claims against the respondents.

[2] Costs were reserved.

#### Authority's power to award costs

[3] The Authority's power to award costs against a party to another is set out in clause 15 of Schedule 2 of the [Employment Relations Act 2000](#) (the Act). The Authority is bound by the principles set out in *PBO Limited v De Cruz*<sup>2</sup> when setting costs awards. I am not going to repeat the principles as they are well established.

#### Respondents' submissions

[4] Counsel for the respondents claims that the applicant, Ms Dong, should pay costs of \$8,000 to the first respondent and

\$4,000 to the second respondent together with disbursements or \$103.50. Counsel submits that the proceeding against the second respondent Ms Liang was unnecessary and not relevant to Ms Dong's claim that she was an employee of the first respondent, Kitchen Master Limited. Counsel also referred to the allegations made by Ms Dong which were really allegations of personal or commercial debt between the parties.

[5] Counsel for the respondents has provided invoices totalling in excess of \$15,000.

### **Applicant's submissions**

[6] Counsel for the applicant disputes the claims made by counsel for the respondents and submits that the default position of the Authority should be two days tariff at \$8,000. Counsel submits that the applicant was not legally represented and therefore some leeway should be given to her "not knowing the nuanced procedural

principles". Overall, it is argued that access to justice is important and that a modest

<sup>1</sup> [2018] NZERA Auckland 192.

<sup>2</sup> [2005] NZEmpC 144; [2005] 1 ERNZ 808.

sum of \$2,000 should be awarded in the circumstances. No evidence of Ms Dong's financial circumstances were provided to the Authority.

### **Authority's notional daily tariff**

[7] I consider that the Authority's usual notional daily tariff based approach to costs is appropriate in this case.

[8] I accept that it is appropriate for Ms Dong to make a contribution towards the costs of the respondents on the basis that costs follow the event. Ms Dong was wholly unsuccessful in her claims.

[9] The starting point in awarding costs in the Authority when an investigation meeting has taken place is the daily tariff which stands at \$4,500 for the first day of an investigation meeting and \$3,500 for every subsequent day.

[10] Counsel for the respondents seeks an uplift in the notional daily tariff on the basis that the second respondent should not have been a party and that the way in which Ms Dong acted increased costs for the respondents significantly. I do take into account the fact that Ms Dong was not represented. I consider that in the circumstances the notional daily tariff should be adhered to. The investigation meeting took two long days with a great deal of preparation for all concerned because of the considerable disputes between the parties. Further, there was the requirement to have an interpreter in both the Mandarin and Cantonese languages which increased the period of time of the investigation meeting.

[11] I consider in the circumstances of this case, the notional starting tariff of

\$8,000 should apply. Accordingly, Ms Dong is ordered to pay the respondents the sum of \$8,000 towards their legal costs, which is the equivalent of two days at the notional daily tariff, the sum to be paid within 14 days of the date of this determination.

### **Disbursements**

[12] Disbursements claimed are for the filing fee together with other disbursements. These total \$103.50. I consider the disbursements to be reasonable and make an order that they are payable by Ms Dong within 14 days of the date of this determination.

**Anna Fitzgibbon**

**Member of the Employment Relations Authority**