

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2018] NZERA Christchurch 24
5638155

BETWEEN

XIANGYUE (JOE) GE
Applicant

AND

Y & S HOLDINGS LIMITED
(in liquidation)
Respondent

Member of Authority: Christine Hickey

Representatives: Robert Thompson, advocate for the applicant

Costs submissions received: From the applicant on 30 November 2017
None from the respondent

Determination: 26 February 2018

COSTS DETERMINATION OF THE AUTHORITY

[1] On 9 November 2017, I issued a determination¹ that Mr Ge had been unjustifiably dismissed and that Y & S Holdings Limited (Y & S) owed him unpaid wages and holiday pay. I reserved the matter of costs.

[2] On 30 November 2017, I received submissions from Mr Thompson on Mr Ge's behalf. On 17 January 2018, Ms Tucker advised the Authority that she no longer represented the respondent. On 30 January 2017, the senior Authority officer emailed Ms Luo, a director of Y & S, and invited her to make submissions on costs by 6 February 2018. I since discovered that Y & S went into voluntary liquidation on 8 January 2018.

¹ [2017] NZERA Christchurch 191

The law on costs in the Authority

[3] The power of the Authority to award costs arises from Section 15 of Schedule 2 of the Employment Relations Act 2000.

[4] The principles the Authority applies are well settled and outlined in *PBO Limited (formerly Rush Security Ltd) v Da Cruz*.² In *Fagotti v Acme & Co Limited*,³ the Employment Court affirmed these principles.

[5] Costs principles include:

- a. A discretion on whether to award costs and if so what amount.
- b. The discretion must be exercised in accordance with principle and not arbitrarily.
- c. The jurisdiction to award costs is consistent with the Authority's equity and good conscience jurisdiction.
- d. Equity and good conscience must be considered on a case-by-case basis.
- e. Costs should not be used as a punishment or an expression of disapproval of the unsuccessful party's conduct although conduct that increased costs unnecessarily can be taken into account in inflating or reducing an award.
- f. It is open to the Authority to consider whether all or any of the parties' costs were unnecessary or unreasonable.
- g. 'Without prejudice' offers can be taken into account.
- h. Awards of costs will be modest, and must be reasonable.
- i. Frequently costs are judged against a notional daily rate.
- j. Costs generally follow the event; that is, the successful party's costs are likely to be ordered paid by the unsuccessful party.

² [2005] ERNZ 808, a judgment of the Full Court of the Employment Court, at page 819.

³ [2015] NZEmpC 135

- k. The nature of the case can also influence costs. That means that the Authority orders that costs lie where they fall in certain circumstances.

Mr Ge's submissions

[6] Mr Thompson made submissions on Mr Ge's behalf on 30 November 2017. He indicated that the parties had not been able to reach agreement on costs.

[7] Mr Thompson submits that the lowest amount of costs that Y & S should pay to Mr Ge is \$8,377.56, which is the total of:

- \$4,500 for the first day
- \$3,500 for the second day
- \$71.56 for the filing fee
- \$306.00 for hearing fees for the second day

[8] Mr Thompson also asks me to uplift the daily tariff, because of conduct by Y & S towards Mr Ge after the investigation meeting but before I issued the determination. Mr Thompson submits that the Y & S's behaviour in engaging a private investigator to gather information about Mr Ge, which had the potential to damage his new employment relationship required Mr Thompson to spend additional time protecting Mr Ge's position at a cost of \$900.

The daily tariff

[9] The starting point for my consideration of costs is that Y & S, as the unsuccessful party, should contribute to Mr Ge's costs. That contribution is based on the daily tariff of \$4,500 for the first day and \$3,500 for the second day. The investigation meeting lasted two days. Therefore, the starting point for my consideration of costs is \$8,000.00.

Out-of-pocket expenses

[10] Mr Ge has also been charged \$71.56 to file his claim in the Authority and \$306 as a hearing fee for the second day of the hearing. I consider it reasonable that Y & S pay him those expenses, being \$377.56.

Uplift in the tariff?

[11] In May 2017, the investigation process was still underway when I became aware that Y & S were seeking information about Mr Ge from a private investigator.

Ms Tucker also sent an email to Mr Ge's then employer seeking information about when Mr Ge commenced work and what, if anything, he said about Y & S's motels when he first approached his new employer. Mr Thompson was very concerned about false information that Y & S's private investigator spread about Mr Ge. Therefore, I called a meeting with the representatives to discuss the appropriateness of Y & S's use of the private investigator during the Authority's proceedings.

[12] I consider that Y & S caused Mr Ge to incur further cost. Y & S's behaviour justified Mr Thompson alerting the Authority to Y & S's actions and caused me to call a meeting with the representatives to resolve matters of concern.

[13] Mr Thompson says he had to charge Mr Ge a further \$900. However, I consider Y & S should contribute the amount of a further \$400 to cover the extra costs Mr Ge needlessly incurred.

Conclusion and Order

[14] Y & S Holdings Limited must pay Xiangyue (Joe) Ge \$8,777.56 as a contribution towards his costs of representation.

Christine Hickey
Member of the Employment Relations Authority