

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2022] NZERA 406
3145982

BETWEEN	WEI WANG Applicant
AND	ALLSTAR ROOFING LIMITED Respondent

Member of Authority: Pam Nuttall

Representatives: David Kim, advocate for the Applicant
Cherie Holland, counsel for the Respondents

Submissions received: 13 July 2022 and 15 August 2022 from Applicant
26 July 2022 and 19 August 2022 from Respondent

Determination: 23 August 2022

SECOND DETERMINATION OF THE AUTHORITY

[1] In a determination dated 7 July 2022 a number of issues raised by the applicant were addressed¹. I found that, although Mr Wang had been paid for this first three months working with Allstar Roofing Limited according to the employment agreement between the parties, a question of underpayment of minimum wages arose. Because the employer had kept no record of the hours worked for this period, pursuant to s132(2) Employment Relations Act 2000 (the Act), Mr Wang's record as to his hours worked for this three month period was accepted as proven.

¹ *Wei Wang v Allstar Roofing Limited, Mingyang Ma & Mengyao Yu* [2022] NZERA 299.

[2] Mr Wang had been paid for the first three months of his employment on the basis of an agreed annual salary of \$46,800.00 gross or \$900.00 per week. However, as established in *Victoria Law and others v Board of Trustees of Woodford House*

an employee in receipt of a salary (or of remuneration so expressed) is not thereby excluded from coverage and falls under the category of “in all other cases” in the rates specified in the statutory Minimum Wage Orders...Salaried employees are not excluded from coverage by the Minimum Wage Act because of the description of their remuneration as being on an annual basis.²

[3] Accordingly Mr Wang was directed to recalculate his wages claim for the first three months of his employment in terms of the hours worked according to his records and what he was entitled to receive under the relevant Minimum Wage Order. Should there be a discrepancy between his entitlement under the Minimum Wage Order and payment received, it was open to Mr Wang to seek further orders.

[4] Mr Wang submitted a recalculated wage arrears claim but on the basis of an hourly rate of \$22.50 per hour, rather than on the basis of the \$17.70 per hour entitlement under the Minimum Wage Order. The respondent lodged an alternative wage calculation on a similar basis.

[5] A case management conference was convened by telephone to clarify the basis for Mr Wang’s recalculated wage arrears claim. The parties agreed that the wage arrears claim should have been calculated on the basis of Mr Wang being entitled to be paid at least \$17.70 gross per hour for every hour worked during his first three months of employment.

[6] Subsequently Mr Wang submitted a recalculated wage claim on the basis of 800 hours worked in the first three months of employment. Mr Wang’s entitlement for these hours under the Minimum Wage Order was \$14,160.00 and he had been paid \$11,160.00. Mr Wang claims \$2,931.70 in wage arrears.

[7] I have already made orders for that Mr Wang be paid unpaid public holidays entitlements and compensation under s123(1)(c)(i) of the Act by Allstar Roofing Limited.

² *Victoria Law and others v Board of Trustees of Woodford House* [2014] NZEmpC 25 at [71].

[8] I further order that Mr Wang is to be paid \$2,931.70 in wage arrears by Allstar Roofing Limited and that all these payments are to be made with 28 days of the date of this determination.

Costs

[9] Mr Wang sought an order for costs totalling \$8444.66. The award sought comprised \$8,000 as the Authority's usual tariff for a two-day investigation meeting, reimbursement of the \$71.56 fee paid to lodge his grievance application, \$306.66 for the second day's hearing fee and \$66.40 for carparking for two days.

[10] Allstar Roofing Limited opposed an award of costs on the grounds that the applicant had achieved only a mixed measure of success and that his claims were considerably higher than the result he actually achieved. The submission was that the case law cited indicated that costs should lie where they fall where there is a mixed measure of success.

[11] The Authority has power under clause 15 of Schedule 2 of the Act to award costs. This power is discretionary and must be used in a principled manner. Principles guiding the Authority's approach to costs include:

- The statutory jurisdiction to award costs is consistent with the Authority's equity and good conscience jurisdiction.
- Costs generally follow the event.
- Awards will be modest.
- Frequently costs are judged against a notional daily tariff
- Costs are not to be used as a punishment or as an expression of disapproval for an unsuccessful party's conduct.

[12] The notional tariff of \$4,500 for the first day of an investigation meeting and the usual rate of \$3,500 applied for a second or any subsequent day may be adjusted upward or downward as appropriate to the particular case. Such adjustments may take account of settlement offers made by either party, the financial means of a liable party to pay costs, the preparation required in particularly complex matters and whether conduct of any party unnecessarily increased the costs they incurred.

[13] The use of the tariff is an accepted and well-understood 'broader brush' approach, more appropriate to the nature of the Authority's investigative role, than that used in the cost regimes developed by the courts where the adjudicative method used is different and from which the measure of supposed "mixed success" originates.

[14] However I must also consider the requirement that costs follow the event. Mr Wang has not succeeded in one of his personal grievance claims or achieved large financial awards. He has successfully established, however, that employment standards have been flouted and that he has been disadvantaged in his employment. An award at the tariff level achieves an appropriately modest result which complies with the principles on which the Authority awards costs. Accordingly Mr Wang is awarded \$8,000 towards his costs based on the notional tariff for a two day hearing.

[15] No invoices were provided to support claims of expenses, so the only reimbursement awarded is for the Authority filing fee of \$71.56.

Pam Nuttall
Member of the Employment Relations Authority