

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2023] NZERA 333
3169302

BETWEEN ZHENG WANG
Applicant

AND JASMINE CATERING LIMITED
Respondent

3173762

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Applicant

AND ZHENG WANG
Respondent

Member of Authority: Rachel Larmer

Representatives: David Kim, advocate for the Applicant
Martin Lyttelton, advocate for the Respondent

Investigation Meeting: On the papers

Submissions and other 7 June 2023 from Mr Wang
Information received: 9 June 2023 from Jasmine Catering Limited
19 June 2023 from Mr Wang
21 June 2023 from Jasmine Catering Limited

Date of Determination: 23 June 2023

COSTS DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Mr Zheng Wang has sought a costs order in his favour.

[2] Mr Wang was the successful party regarding the claims he made against his former employer Jasmine Catering Limited (“*Jasmine Catering*”), see *Wang v Jasmine Catering Ltd.*¹

¹ [2022] NZERA 263.

He also successfully defended Jasmine Catering's counterclaim against him, see *Jasmine Catering Ltd v Wang*.²

[3] Mr Zhang sought recovery of his full legal costs of \$10,392.46 GST inclusive plus reimbursement of \$71.56 for his filing fee. This amount covered costs associated with his original claim and the counterclaim.

[4] Jasmine Catering disputed that Mr Wang had actually incurred this amount of costs. It said he was represented on a contingency fee basis only, so the "service fees" amounting to \$8,000 charged by Mr Kim were not costs that had actually been incurred by Mr Wang.

[5] Jasmine Catering submitted Mr Wang's costs should be limited to 33% of the total amount he recovered, as per the terms of the "Legal Services Agreement" Mr Kim lodged with the Authority during the course of the investigation meeting. Mr Wang recovered \$3,142.20 gross, i.e. \$1,036.92.

The Authority's investigation

[6] Costs have been determined 'on the papers'.

[7] The Authority encouraged the parties to attempt to resolve costs by agreement, but if that was not possible then a timetable was set for the parties to lodge costs submissions. These were to cover costs associated with Mr Wang's original claim and Jasmine Catering's counterclaim.

[8] Both parties filed costs submissions in accordance with the timetable directions.

[9] As a result of Jasmine Catering challenging Mr Wang's claim to have incurred in excess of \$10,000 actual legal costs, the Authority directed Mr Wang and Mr Kim to file affidavits in support of the costs that had been claimed. They both did so.

[10] Jasmine Catering was then given the opportunity to respond to these affidavits, and it did so.

² [2022] NZERA 264.

Relevant law

[11] The Authority derives its power to award costs from clause 15 of Schedule 2 of the Employment Relations Act 2000 (the Act). Although costs are discretionary, a successful party will normally be required to contribute to the successful party's actual legal costs.

[12] The Authority usually adopts a notional daily tariff-based approach to assessing costs. The tariff for a one-day investigation meeting is currently \$4,500 and then \$3,500 for each subsequent day of investigation meeting times.

[13] The Employment Court in *PBO Limited (formerly Rush Security Limited) v Da Cruz and Fagotti v Acme & Co Limited* set out costs principles that the Authority must have regard to when assessing costs.³ These are so well known there is no need to set them out again here.

Issues

[14] The following issues are to be determined:

- (a) What legal costs did Mr Wang actually incur?
- (b) What costs should Mr Wang be awarded on the counterclaim?
- (c) What is the notional starting point for assessing costs for his original claim?
- (d) Should the notional starting tariff be adjusted?
- (e) What costs should Mr Wang be awarded?
- (f) What disbursements should Mr Wang be awarded?

What legal costs did Mr Wang actually incur?

[15] Mr Wang signed a Legal Service Agreement with Migrant Employment Law Service Limited ("MELS") on 11 February 2022. This recorded that he was to pay costs based on a 'no win, no fee' contingency basis, calculated at 33% of the amount he was awarded plus GST.

[16] After Jasmine Catering lodged its counterclaim on 30 May 2022 Mr Wang agreed to pay MELS a fixed fee of \$5,000 plus GST to represent him in defending it. This amount was to be paid after the Authority had determined the counterclaim.

³ *PBO Ltd* [2005] ERNZ 808 and *Fagotti* [2015] NZEmpC 135.

[17] Mr Kim and Mr Wang said in the affidavits they lodged on 19 June 2023 that after the first day of the investigation meeting they “*had the feeling*” that the amount awarded (if successful) would not be as much as expected.

[18] Mr Wang wanted Mr Kim to lodge more documents to support his claim, so he agreed to pay MELS a further \$3,000 plus GST. This was to be charged after the Authority had issued its determination.

[19] Mr Kim’s affidavit attached a GST invoice to Mr Wang for \$10,392.46 which consisted of:

- (a) \$1,036.92 contingency fee;
- (b) \$155.54 GST on contingency fee;
- (c) \$3,000 additional fee agreed on 17/18 January 2023;
- (d) GST on additional fee \$450;
- (e) Service fee for the counterclaim \$5,000;
- (f) GST on the counterclaim service fee \$750.

[20] Mr Wang has not paid anything towards this invoice yet. Due to Mr Wang’s current lack of funds, he and MELS agreed that he will pay this invoice after costs have been determined by the Authority and Jasmine Catering has paid him the money he has been awarded for costs.

[21] Although Jasmine Catering disputed that the GST invoice was legitimate, and claimed that Mr Wang would not have to pay it if he was not awarded that much in costs, this submission was speculative.

[22] The Authority has received two affidavits that have deposed to the fact Mr Wang has been charged, and is expected, and will be required, to pay the costs he has been invoiced. As affirmed evidence this has to be acceptable as proof of the amount of costs Mr Wang has actually incurred.

What is the notional starting point for assessing costs?

[23] The Authority heard Mr Wang’s original claims and Jasmine Catering’s counterclaim consecutively. The total time involved in the investigation of both matters was three days.

Further investigation was required after the investigation meeting to investigate the Mandarin employment agreement Mr Wang produced for the first time during the investigation meeting.

[24] The notional starting point for assessing costs for both matters is \$11,500, being \$4,500 for the first day of the investigation meeting and \$3,500 for the subsequent days.

[25] However, that should be further refined by calculating how much actual time was spent on the counterclaim, because it was minimal compared to Mr Wang's original claims.

What costs should Mr Wang be awarded for the counterclaim?

[26] In terms of the counterclaim, that took up half a day, on the third day of the investigation meeting. Adjusting the notional starting tariff for that on a pro-rata basis results in an award of costs to Mr Wang of \$1,750, being half of the notional daily tariff of \$3,500 for the third day of an investigation meeting.

[27] There are no grounds on which to further adjust that.

[28] Accordingly, Jasmine Catering is ordered to contribute \$1,750 towards Mr Wang's actual legal costs on the counterclaim (3173762).

Should the notional starting tariff be adjusted?

[29] The notional starting point for assessing costs on the original claim is \$9,750, consisting of \$4,500 first day, \$3,500 second day and \$1,750 for half of the third day.

[30] The Authority must then consider whether this notional starting tariff for the original claim needs to be adjusted to reflect the particular circumstances of this case.

Increase to tariff?

[31] The parties did not identify any factors they said should result in the notional starting tariff being adjusted, and the Authority was not aware of any. Accordingly the notional starting tariff was not to be increased.

Decrease to tariff?

[32] Jasmine Catering's submission that the notional starting tariff should be reduced to reflect Mr Wang's mixed success and the fact that the way in which he conducted these proceedings increased costs succeeded.

[33] The extent of additional work required as a result of Mr Wang unexpectedly introducing new document during the course of the investigation meeting extended the time required by half a day. Another half a day in time and costs was incurred as a result of further investigation that had to be done after the investigation meeting.

[34] The notional starting tariff should be reduced by \$3,500 to reflect that (the equivalent of a second day of investigation meeting time).

[35] A further reduction of \$1,750 should be made to reflect that most of the investigation meeting time was spent investigating claims and evidence that Mr Wang did not succeed on. Because this evidence was not satisfactorily covered in Mr Wang's witness statements, considerable time was devoted to ensuring he had an opportunity to present this evidence verbally when he gave his evidence during the investigation meeting.

[36] These adjustments result in a costs award to Mr Wang for his original claim of \$4,500.

What disbursements should Mr Wang be awarded?

[37] Mr Wang is entitled to recover his \$71.56 filing fee.

Outcome

[38] Within 28 days of the date of this determination, Jasmine Catering is ordered to pay Mr Wang \$6,321.56 GST inclusive, consisting of:

- (a) \$4,500 towards the actual costs of his original claim;
- (b) \$1,750 towards the actual costs of the counterclaim;
- (c) \$71.56 to reimburse his filing fee.

Rachel Larmer
Member of the Employment Relations Authority