

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI
TE WHANGANUI Ā TARA ROHE**

[2023] NZERA 658
3198419

BETWEEN	LIN YANG Applicant
AND	THORNDON CAFÉ LIMITED Respondent

Member of Authority:	Shane Kinley
Representatives:	Stephen Parry, counsel for the Applicant Xiaoyan Zhang, director, for the Respondent
Investigation Meeting:	On the papers
Submissions received:	11 September 2023 from the Applicant 24 September 2023 from the Respondent
Determination:	07 November 2023

COSTS DETERMINATION OF THE AUTHORITY

Background

[1] On 28 August 2023 I issued a determination in relation to an employment relationship problem that found Lin Yang was unjustifiably dismissed by Thorndon Café Limited (TCL), Mr Yang's lost wages as a result of his dismissal were offset by increased income from driving for Uber and TCL had not correctly accounted for or paid Mr Yang's annual holiday pay or public holidays entitlements under the Holidays Act 2003 (HA2003). I also found Mr Yang's claims for unpaid wages, sick leave and bereavement leave had not been made out.¹

¹ *Yang v Thorndon Café Limited* [2023] NZERA 483 at [59].

[2] I ordered that TCL pay Mr Yang:²

- a. \$6,547.07 for lost wages under s 123(1)(b) of the Employment Relations Act 2000 (the Act);
- b. compensation in the amount of \$20,000.00 without deduction under s 123(1)(c)(i) of the Act;
- c. \$1,721.32 for unpaid annual holiday pay; and
- d. \$140.00 for an unpaid public holiday.

[3] Costs were reserved and the parties were encouraged to resolve this matter between themselves.³

[4] Unfortunately the parties have been unable to reach agreement on costs and Mr Parry has filed submissions on behalf of Mr Yang seeking a contribution to Mr Yang's costs from TCL.

[5] The discretion to award costs, whilst broad, is to be exercised in a principled way. The principles and the approach adopted by the Authority on which an award of costs are made are well settled and outlined in *PBO Limited (formerly Rush Security Ltd) v Da Cruz (Da Cruz)*.⁴

[6] The primary principle is that costs 'follow the event'. The Authority has power to award any party to pay to any other party such costs and expenses as the Authority thinks reasonable.⁵ Costs are awarded in the Authority generally starting from the daily tariff, currently \$4,500 for the first day and \$3,500 for each subsequent day, with upward and downward adjustments made if appropriate to the circumstances of the case.⁶ In this case the investigation meeting took slightly less than one full day (commencing at approximately 9.30am and ending at approximately 3pm), with oral submissions presented during that time. I expressed my preliminary view that three quarters of the notional daily rate is the appropriate starting point for a determination of costs.⁷

² Ibid at [60].

³ Ibid at [62].

⁴ *PBO Limited (formerly Rush Security Ltd) v Da Cruz* [2005] 1 ERNZ 808.

⁵ Employment Relations Act 2000, schedule 2, clause 15.

⁶ For further information about the factors considered in assessing costs, see <https://www.era.govt.nz/assets/Uploads/practice-direction-of-era.pdf>.

⁷ Note 1 above at [64].

The parties' submissions

[7] Mr Parry submitted on behalf of Mr Yang that indemnity costs of \$5,507 plus GST should be awarded on the basis that TCL had engaged in the Authority's proceeding in "manifest bad faith" and as Mr Yang had "offered on four occasions to settle these proceedings for a sum substantially less than was awarded by the Authority". Two of the settlement offers were noted to have been made at mediation where TCL was represented by counsel, while a copy of a without prejudice save as to costs (Calderbank) offer was made directly to the Director of TCL, Ms Zhang, on 21 December 2022. A copy of the Calderbank offer of 21 December 2022 to Ms Zhang and her counteroffer was provided.

[8] The submission for Mr Yang that TCL had engaged in the Authority's proceeding in "manifest bad faith" was based on an email from Ms Zhang dated 7 September 2023 which advised "[TCL] ceased operations at the end of March."

[9] Submissions for TCL were made by Ms Zhang by email disputing "the opposing counsel's claim of malicious intent; our sole purpose in seeking court intervention was to resolve the issue." Ms Zhang also provided details of an offer to settle made on 28 February 2023, for "\$10,000 plus personal liability also will paid in 5 equal monthly" [sic]. She says that this offer was not responded to.

[10] Ms Zhang also raised a personal impecuniosity issue, noting that she was now working part-time having sold "the shop in March of this year", which I infer means TCL, with debts to IRD. Ms Zhang did not provide details of the sale of TCL, her debts to IRD or a proposal for payment, saying only that "I can only afford to make weekly payments until the matter is settled."

Analysis

[11] Mr Yang was the successful party in this case and costs usually follow the event. There is no reason to displace that approach in this case and Mr Yang is entitled to an award of costs.

[12] Submissions for Mr Yang claimed that the investigation meeting ran until 3.30pm, slightly later than the finish time of 3pm that I have recorded. It was not clear what portion of a day Mr Yang considered was appropriate as a starting point. In the absence of submissions to the contrary, I consider that the three quarters of the notional

daily rate is the appropriate starting point for a determination of costs. This generates a starting point of \$3,375.

[13] The Calderbank offer made on behalf of Mr Yang was to settle this matter for \$12,000 plus a \$1,500 contribution to costs. It was not clear if this included GST or not.

[14] While Ms Zhang (who did not always clearly distinguish between her personal liability and that of TCL) made a counter-offer to settle it was for a lesser amount, although it did include a statement that it included personal liability. It was not labelled a without prejudice save for costs offer, which likely reflected the fact that Ms Zhang was personally dealing with matters at that time without a representative.

[15] The practice direction of the Authority notes that:⁸

3. The Authority uses a notional daily tariff as the starting point for assessing costs. The tariff is based on the length of the investigation meeting held in each matter. This tariff may then be adjusted upwards or downwards according to the circumstances of each case. ...

9. For instance, where a successful party's behaviour unnecessarily increased its costs, the Authority may reduce the daily tariff amount. Conversely, if an unsuccessful party turned down an effective settlement offer, the Authority may increase the costs above the daily tariff.

[16] I consider that Mr Yang is entitled to rely on the Calderbank offer that was presented on his behalf to TCL and an uplift to costs is appropriate. The settlement offer made on behalf of Mr Yang would have provided a better financial outcome than TCL achieved, given Mr Yang was awarded a reasonably significantly higher amount of remedies (slightly more than \$28,400 plus costs from this determination) than he offered to settle for (\$12,000 plus \$1,500 costs).

[17] I have taken into account the Court of Appeal's comments that a "steely" approach should be taken when a party has rejected what turned out to be a reasonable offer to settle.⁹ I do not consider, however, that this is a case where indemnity costs sought on behalf of Mr Yang are appropriate. I do consider, however, it is appropriate to take TCL's rejection of an effective settlement offer into account in awarding an uplift to costs based on the daily tariff from \$3,375 to \$4,500 (an uplift of a third or \$1,125).

⁸ Note 6 above at page 5.

⁹ *Bluestar Print Group (NZ) Ltd v Mitchell* [2010] NZCA 385 at [20].

[18] In relation to the claim that TCL was behaving in manifest bad faith by not disclosing that it is no longer trading and was not trading at the time of scheduled investigation meetings, I do not consider that this means that a further uplift to costs is appropriate. TCL was entitled to defend the claims against it. While it would have been more in keeping with the expectation of the good faith duty that parties be responsive and communicative for TCL to have disclosed that it was no longer trading, this occurred after the employment relationship it had with Mr Yang had ended.

[19] Ms Zhang has raised personal impecuniosity as a factor to take into account, along with what appears to be an ongoing offer of personal liability, although she did not specifically suggest what an appropriate payment plan would be and what it would cover.

[20] I accept that it is not appropriate for the Authority to impose hardship upon an unsuccessful party to proceedings. However, I also note the observation of the Court that:¹⁰

... the fact that a costs award would impose undue financial hardship on an unsuccessful litigant is not, in my view, decisive. Even accepting that in this jurisdiction an unsuccessful party's current financial position is relevant to an assessment of costs, like other considerations it must be weighed in the exercise of the Court's discretion. The interests of both parties, and broader public policy considerations, must also be taken into account. ...

[21] The matter before me is between Mr Yang and TCL, rather than Mr Yang and Ms Zhang. Ms Zhang's raising of personal impecuniosity implied but did not directly provide evidence about TCL's ability to pay or not (notwithstanding the advice that TCL is no longer trading). I, therefore, decline to reduce the costs awarded against TCL on the basis of the evidence provided about Ms Zhang's personal circumstances.

Disbursements

[22] While not separately claimed, Mr Yang is also entitled to be paid the Authority's filing fee of \$71.56.

¹⁰ *Tomo v Checkmate Precision Cutting Tools Ltd* [2015] NZEmpC 2 at [22].

Order

[23] I order that Thorndon Café Limited must pay Lin Yang \$4,500 as a contribution towards his costs in relation to this matter and disbursements of \$71.56 within 14 days of the date of this determination.

Shane Kinley
Member of the Employment Relations Authority