

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 258B/09
5161313

BETWEEN LISA LING ZHANG
 Applicant

AND HOLLYWOOD BAKERY
 (HOLDINGS) LIMITED
 Respondent

Member of Authority: Robin Arthur

Representatives: Qiang Li for Applicant
 David Liu for Respondent

Submissions received: 3 August 2009 from Respondent
 No reply from Applicant

Determination: 14 September 2009

COSTS DETERMINATION OF THE AUTHORITY

[1] By determination AA258/09 (31 July 2009) the Authority found Hollywood Bakery (Holdings) Limited had complied with the terms of a settlement agreement made in April 2009 to provide wage records, pay any outstanding entitlements and confirm Lisa Zhang's regular working hours.

[2] The company now seeks an order for its costs on a solicitor-client basis against both Ms Zhang and her advocate, Qiang Li.

[3] Ms Zhang has received a copy of the company's costs submissions because she collected it in person from the Authority's offices. Neither she nor Mr Li have lodged any memorandum on costs in response.

[4] Ms Zhang has filed a challenge to the Authority's determination in the Employment Court (ARC 64/09). As usual in such circumstances the Authority proceeds to determine costs for the matters that were before it although any award of costs might later be altered by the Court if Mr Zhang's challenge was successful.

[5] Applicable principles on costs in the Authority include:¹

- (i) costs generally follow the event; and
- (ii) costs may be awarded on the basis of a notional daily rate adjusted up or down to take account of relevant principles applied flexibly to the particular characteristics of the case; and
- (iii) conduct of either party which unnecessarily increased costs can be taken into account in raising or reducing the level of costs awarded; and
- (iv) offers to settle on a without prejudice except as to costs may be taken into account; and
- (v) awards of costs in the Authority are modest.

[6] The company successfully defended itself against the allegations of Ms Zhang. It is entitled to an award of costs.

[7] It seeks an award of \$17,648 on the basis of fees invoiced by Mr Liu. Supporting invoices are provided but do not itemise the elements of attendance, time taken or the applicable hourly rate of counsel. I cannot assess from that information that all actual costs were reasonably incurred. I see no reason that costs in this case should not be assessed on the basis of a notional daily rate adjusted up or down for relevant factors, such as party conduct, pursuit of irrelevant or unnecessary arguments, and offers to settle.

[8] The notional daily rate for a one-day investigation meeting of this type – where witness statements were provided in advance, witnesses attended and were questioned, and the representatives provided oral closing submissions – is \$3000. I accept this rate should be increased for the following factors:

- (i) Ms Zhang's case was pointless from the start – she had been provided with the material required by the settlement agreement and offered but rejected

¹ *PBO Ltd v da Cruz* [2005] ERNZ 808, 819 (EC).

a cheque for outstanding wages which exceeded her own calculation of what was due.

- (ii) The investigation meeting was needlessly lengthened by arguments from Mr Li, acting as Ms Zhang's advocate, which were based on deep misconceptions of the relevant New Zealand employment law – such as the view that Ms Zhang's employment agreement was invalid because it was signed by the company's general manager and not its director (and despite Ms Zhang's own direct evidence that she knew other employees' agreements were also signed by managers and not directors).
- (iii) The company warned, by way of a letter on a without prejudice as to costs basis on 11 May 2009, that it would seek costs on a higher than usual basis if it was successful.

[9] The company seeks orders that Mr Li be jointly and severally liable with Ms Zhang for any costs award. It submits Mr Li was “*the real driving force behind Ms Zhang's claims*” and was pursuing “*his own personal agenda*”. While this point is not fully developed in the submissions, I take it to be a reference to another case in which Mr Li acted as advocate for a former employee of the company, in that case his ex-wife (see Authority determination AA 161/08, 30 April 2008). Mr Li made a number of irrelevant comments during the investigation meeting about Ms Zhang's application which indicated his animosity to the company.

[10] There are rare or exceptional cases in civil litigation where the conduct of a representative, in pursuit of a hopeless claim and causing a gross waste of public resources, may result in an order for costs against that representative personally. *L v Chief Executive of the Ministry of Social Development* [2008] 19 PRNZ 116 (HC, Harrison J) is one such example.

[11] While the Authority can acknowledge considerable costs and concern to the company caused by Ms Zhang's claim, I am not persuaded an award of costs against Mr Li personally is warranted. The relatively informal and low-level nature of the Authority's procedures under the Employment Relations Act 2000 (the Act) – where parties may be represented by a person who is neither a professional advocate nor legally-trained practitioner – sometimes requires a level of tolerance which, quite properly, would not be accorded to counsel in the civil courts. The important point in

the Authority is that any less-than-desirable conduct by a representative does not disadvantage the other party is having its case fairly heard – and the company here points to no such shortcoming in process or outcome of the investigation.

[12] I note, in passing, a ‘mechanical’ point that costs may only be awarded against a “*party*” (clause 15, Schedule 2 of the Act) so that a representative would first need to be joined as a party to a matter (s221 of the Act) in order to respond to a costs application. Joinder may be ordered “*at any stage of the proceedings*”.

Determination

[13] For the reasons given, Ms Zhang is to pay to Hollywood Bakery (Holdings) Limited, within 28 days of the date of this determination, the sum of \$4000 as a reasonable contribution to its costs. Costs to be paid within 28 days of the date of this determination.

[14] I can make no allowance for whether Ms Zhang has any ability to pay the award of costs because she has chosen not to respond to the company’s application.

Robin Arthur
Member of the Employment Relations Authority