

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

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

[2024] NZERA 760  
3239699

BETWEEN	BOWEN ZHANG Applicant
AND	YUNFEI NIE First Respondent
AND	NYF LIMITED Second Respondent

Member of Authority:	Nicola Craig
Representatives:	Paul Young, advocate for the Applicant Martin Lyttelton, advocate for the Respondents
Submissions received:	4, 11 and 29 November 2024 from the Applicant 25 and 29 November 2024 from the Respondents
Determination:	18 December 2024

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**COSTS DETERMINATION OF THE AUTHORITY**

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**The Authority's determination**

[1] On 24 October 2024 the Authority issued a determination resolving issues between Bowen Zhang, Yunfei Nie and his company NYF Limited (NYF or the company).<sup>1</sup>

[2] There was no employment agreement. Mr Zhang's position through the proceeding was that he was employed by Mr Nie personally. NYF Limited was added as a party at the Authority's instigation, with the parties' agreement, as it was initially NYF's position that it was the employer.

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<sup>1</sup> *Bowen Zhang v Yunfei Nie and NYF Limited* [2024] NZERA 638.

[3] The Authority determined:

- Mr Zhang was employed by NYF
- Mr Zhang raised a grievance in time with NYF and his ability to pursue the grievance was not impacted by a plan to have him on a trial period
- The work was permanent rather than casual
- Mr Zhang was not dismissed
- Mr Zhang was disadvantaged by unjustified action of NYF in not providing him with full time work
- Remedies of \$838.23 lost wages and \$1,000.00 compensation were awarded.

[4] The parties were encouraged to resolve the question of costs by agreement, but resolution has not been reached.

[5] Mr Zhang's representative initially emailed the Authority advising he was travelling abroad and was unable to print or sign a piece of paper (for costs submissions). Some comments on costs were included. He later provided a memorandum on costs expanding somewhat on the points in the email.

[6] Separate submissions were later received on behalf of Mr Nie and NYF.

[7] Invoices were sought and provided from Mr Zhang and Mr Nie regarding costs incurred.

### **Mr Zhang's costs application**

[8] Mr Zhang seeks \$8,000 as the tariff for two days. In addition, an uplift of \$1,000 is sought on the basis that translations seen as misleading were provided for Mr Nie and NYF and correcting them required work.

### **Mr Nie's costs application**

[9] As Mr Zhang had not proved his grievances against Mr Nie and no order was made against Mr Nie, Mr Nie seeks a "full costs award" in favour of himself. He seeks an award of \$6,420 excluding GST being actual costs which are less than the notional daily tariff for two days of \$8,000.

## **NYF's costs submissions**

[10] Calculations provided for NYF refer to Mr Zhang only having received 3% from the Authority's determination of the total amount he sought, excluding legal costs. NYF argues that Mr Zhang should receive 3% of the notional daily tariff of \$8,000.

[11] Further, Mr Zhang is criticised for adding unnecessary complexity to his grievance claims and refusing to bring his claim against NYF rather than Mr Nie.

[12] Alternatively, NYF considers Mr Zhang should not be awarded any costs as he was offered by Mr Nie a larger amount than he was awarded.

## **The Authority's costs principles**

[13] The Authority has the power to award costs.<sup>2</sup> This power is discretionary but must be used in a principled manner. In *PBO Ltd (formerly Rush Security Ltd) v Da Cruz* principles guiding the Authority's approach to costs are outlined including:

- The statutory jurisdiction to award costs is consistent with the Authority's equity and good conscience jurisdiction
- Equity and good conscience is to be considered on a case by case basis
- Costs are not to be used as a punishment or as an expression of disapproval for an unsuccessful party's conduct, although conduct which increased costs unnecessarily can be taken into account in inflating or reducing an award
- Costs generally follow the event
- Awards will be modest
- Frequently costs are based on a notional daily tariff.<sup>3</sup>

## **Costs analysis**

[14] The starting point is the tariff based on the length of the investigation meeting. The notional daily tariff allows for \$4,500 for the first day and \$3,500 for subsequent days.

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<sup>2</sup> Employment Relations Act 2000, Schedule 2, cl 15.

<sup>3</sup> *PBO Ltd (formerly Rush Security Ltd) v Da Cruz* [2005] 1 ERNZ 808, confirmed in *Fagotti v Acme & Co Ltd* [2015] NZEmpC 135.

[15] This is a situation where the costs outlined as having been billed to Mr Zhang were considerably more than the amount he received. That is not a desirable basis on which to conduct litigation.

#### *Offers to settle*

[16] The parties refer to offers made at a 22 July 2023 meeting between Mr Zhang, his representative and Mr Nie. These were not captured in writing at the meeting. They are referred to in documents from the following week - a statement from Mr Nie lodged with the statement in reply and an email from his representative referred to below.

[17] It is not evident that the offers at the meeting were *Calderbank* offers, namely offers which it was identified could be provided (to the decision-maker) if the question of costs arose. There is some difficulty with verbal offers given the requirements to be satisfied for an offer to be regarded as a *Calderbank* offer.

[18] The 22 July offers are disregarded.

[19] On 28 July 2023 Mr Nie and NYF's representative emailed, with "a without prejudice save as to costs" heading, to Mr Zhang's representative. The offers at the 22 July meeting were referred to but Mr Nie's offer was not reiterated, instead a smaller amount was offered. Other than by way of the heading the email does not provide advice about what will happen if the offer is not accepted. In any event, the email makes an offer substantially less than the amount awarded by the Authority to Mr Zhang.

[20] I do not take any of these offers into account in setting costs.

#### *Conclusion*

[21] Mr Zhang was successful in some of the issues. He should be seen as the successful party in relation to NYF as a grievance was found and remedies awarded in relation to it.

[22] The matter was investigated over two separate days. However, both days finished before the Authority's usual closing time.

[23] Undue complexity developed before, during and after the investigation meeting with both parties having responsibility in part for that.

[24] By way of example, the parties' responsibility for difficulties with the translation of the WeChat messages. It would have been preferable if the identity of the person who had provided the translation was mentioned earlier and/or an independent source of translation, at least for critical portions, sought. Given the independent interpreter preferred Mr Zhang's interpretation on several points, the respondents left themselves open to the allegations made on Mr Zhang's behalf. On the other hand, it would also have been preferable a more legible translation was provided earlier for Mr Zhang or concerns about the provided translation identified sooner.

[25] Mr Zhang has been invoiced for a not inconsiderable amount of costs and has received a smaller award. However, on the basis of the evidence which the Authority can consider, Mr Zhang had no other basis on which to achieve his success in being awarded \$1,838.23 against NYF, other than to pursue litigation.

[26] Turning to Mr Nie, in other circumstances, having been found not to be the employer and not to be liable for any awards, he might have been eligible for a costs award. However, he must bear some responsibility given:

- Mr Nie is the sole director and spokesperson of NYF
- As set out in the first determination, the advertisement for the role did not identify "NYF" as a limited liability company
- No employment agreement was provided to Mr Zhang which would have identified who Mr Nie saw as the employer
- The decision that NYF was the employer was made by a fine margin.

[27] Standing back and looking at the justice of the matter overall I consider that Mr Zhang should receive an award of costs of \$5,000 and no other award should be made.

[28] Mr Zhang is also entitled to be reimbursed for the Authority's filing fee.

### **Orders**

[29] I order NYF Limited to pay Bowen Zhang within 28 days of the date of this determination:

- \$5,000.00 as a contribution to his costs; and

- \$71.55 for the Authority's filing fee.

Nicola Craig

Member of the Employment Relations Authority