



# Employment Court of New Zealand

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## hang v Hollywood Bakery (Holdings) Limited AC46A/09 [2009] NZEmpC 134 (18 December 2009)

Last Updated: 8 January 2010

### IN THE EMPLOYMENT COURT

AUCKLANDARC 46A/09ARC 64/09

IN THE MATTER OF a challenge to determination of the Employment Relations Authority

AND IN THE MATTER OF an application to strike out statement of claim

AND IN THE MATTER OF an application for costs

BETWEEN LING ZHANG

Plaintiff

AND HOLLYWOOD BAKERY (HOLDINGS) LIMITED

Defendant

Hearing: By memoranda

Judgment: 18 December 2009

### COSTS JUDGMENT OF JUDGE M E PERKINS

[1] On 3 December 2009 I issued a judgment granting the defendant's application to strike out the statement of claim. As a result of that I dismissed the plaintiff's challenge to the determinations of the Employment Relations Authority (the Authority). In addition I ordered the plaintiff to pay to the defendant the sum of \$4,000 by way of costs awarded by the Authority in its second determination. I then allowed a period of 14 days for the parties to provide memoranda as to costs in respect of the proceedings in this Court. Such memoranda have now been received.

[2] Mr Liu, in his submissions on behalf of the defendant, has helpfully referred to the three main Court of Appeal decisions dealing with costs awards in this Court: *Victoria University of Wellington v Alton Lee*<sup>[1]</sup>, *Binnie v Pacific Health Limited*<sup>[2]</sup> and *Health Waikato Limited v Elmsly*<sup>[3]</sup>. He also refers to a recent decision of this Court, *Merchant v Chief Executive of the Department of Corrections*<sup>[4]</sup>, which provides a summary of the principles contained in the Court of Appeal decisions:

*The fundamental purpose of an award of costs is to recompense a party who has been successful in litigation for the cost of being represented in that litigation by counsel or an advocate. A useful starting point is two-thirds of the costs actually and reasonably incurred by that party but that proportion may be adjusted up or down according to the circumstances of the case and the manner in which it was conducted. Ability to pay is also a factor to be taken into account.*

[3] In applying the calculation to reach the starting point the Court must adopt the two-step approach specified in *Binnie*. The first step is to decide whether the costs actually incurred by the defendant were reasonably incurred. The second step is to then determine what contribution, if any, the plaintiff should make to those costs. In *Health Waikato* there was some discussion as to the applicability of the High Court approach to costs based on scale with regular updating of the bands of daily recovery rates. In this case, Mr Liu has helpfully provided a calculation of what category 2, band B (2B) costs would have been if the High Court scale was applied. That would have amounted to the sum of \$5,600. The actual costs incurred by the defendant amount to \$8,102.25 inclusive of GST. The invoice from Mr Liu's firm has been attached to the memorandum. Mr Liu submits that the plaintiff would pay

two-thirds of that amount if the existing practice in this Court was adopted and that should be an appropriate starting point. Two-thirds of the actual costs amounts to \$5,401.50. The reasonableness of that figure can be measured by a comparison with the calculation under 2B of the High Court scale.

[4] Mr Qusimodo Li, who appeared as Ms Zhang's advocate, has filed a written memorandum on costs. Once again I am bound to comment that the submissions contained in the memorandum are almost incomprehensible. Doing the best I can to make sense of what Mr Li is submitting, I perceive that Ms Zhang is content to abide the Court's decision on costs. Nevertheless, and allegedly as a result of the defendant's actions, she claims to be now impecunious. Her present financial state is to some extent confirmed by documents attached in Mr Liu's submissions relating to the sale of her house. However, an analysis of those documents does reveal that she may have obtained equity from the sale in the vicinity of about \$50,000.

[5] The position Ms Zhang finds herself in as a result of unsuccessful action in the Authority and the Court arises from her failure to take adequate legal advice rather than from any actions by the defendant. Clearly, in seeking recovery of costs against her, the defendant will need to allow credit for the sum of \$2,361.52 owing under the settlement to which I referred in my substantive judgment. Nevertheless, with a combination of the costs awarded by the Authority of \$4,000 and the costs I intend to award in respect of these Court proceedings, a substantial sum will remain owing by her.

[6] The proceedings in this Court were frivolous. Mr Liu has submitted that the starting point of two-thirds should be increased to four-fifths to take account of the fact that the defendant has been forced to participate in such proceedings of this kind. However, using my discretion to meet the overall justice of the matter I consider that to depart from existing practice is not warranted.

[7] I have carefully considered the attendances set out in the invoice for fees and the hourly rate charged by the defendant's solicitors. I consider the fee charged as reasonable, particularly when compared with what would have been calculated as party to party costs under 2B in the High Court. Indeed, the final costs award amounts to less than such High Court costs.

[8] In disposition of the matter, the plaintiff is ordered to pay costs of \$5,401.50 to the defendant in respect of the Court proceedings and in addition the sum of \$4,000 in costs awarded in the Authority and confirmed in my substantive judgment.

**M E Perkins**  
**JUDGE**

Judgment signed at 10.45am on 18 December 2009

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[1] [\[2001\] NZCA 313](#); [\[2001\] ERNZ 305 \(CA\)](#).

[2] [\[2003\] NZCA 69](#); [\[2002\] 1 ERNZ 438 \(CA\)](#).

[3] [\[2004\] NZCA 35](#); [\[2004\] 1 ERNZ 172 \(CA\)](#).

[4] [\[2009\] ERNZ 108](#), 110.

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