

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

[2014] NZERA Christchurch 212  
5407917

BETWEEN                      BAO HO VAN NGUYEN and  
   VU HO VAN NGUYEN  
   Applicants

   HUE KIM THI TA  
   trading as LITTLE SAIGON  
   RESTAURANT

AND                                Respondent

Member of Authority:        Christine Hickey

Representatives:            Philip Cheyne, Counsel for the Applicants  
   Rob Davidson, Counsel for the Respondent

Costs submissions  
received:                      2 December 2014 from the Applicants  
   15 December 2014 from the Respondent

Determination:              18 December 2014

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**COSTS DETERMINATION OF THE AUTHORITY**

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**A. Hue Kim Thi Ta must pay Vu Ho Van Nguyen and Bao Ho Van Nguyen \$6,000 as a contribution towards their legal costs.**

**B. Hue Kim Thi Ta must pay Vu Ho Van Nguyen and Bao Ho Van Nguyen \$71.56 in reimbursement of the filing fee and \$153.33 reimbursement of the hearing fee.**

[1]     On 5 November 2014 I issued a determination finding in favour of Vu and Bao Ho Van Nguyen's claims. I reserved the issue of legal costs. Both parties have now made submissions on legal costs.



[2] The Authority's jurisdiction to make costs orders is found in clause 15 of Schedule 2 of the Employment Relations Act 2000 (the Act). Costs are at the discretion of the Authority.

[3] Each case is to be treated in light of its own circumstances. The primary purpose of costs is to compensate the successful party. Vu and Bao Ho Van Nguyen were successful in their claims.

[4] The principles and the approach adopted by the Authority on which an award of costs is made are well settled and were outlined in *PBO Limited (formerly Rush Security Ltd) v Da Cruz*<sup>1</sup> a judgment of the Full Court of the Employment Court.

[5] The Court in the *Da Cruz* case noted that in exercising its discretion the Authority frequently judges costs against a notional daily hearing rate. That notional rate is currently \$3,500 per day. That may be adjusted up or down depending on a number of factors.

[6] Costs must be reasonable and costs awards are generally modest. Costs should not be used as a punishment or an expression of disapproval of the unsuccessful party's conduct although conduct which increased costs unnecessarily can be taken into account in inflating or reducing an award.

[7] The investigation meeting took one and a half days including submissions although supplementary evidence was provided after the investigation meeting. The starting point for my consideration of costs is the tariff for one and a half days; \$5,250.00.

### **The parties' submissions**

[8] On behalf of Vu and Bao Ho Van Nguyen it is submitted that the daily tariff amount should be increased to \$10,500 and that disbursements of \$153.33, the hearing fee, and \$71.56, the filing fee should also be reimbursed by Ms Ta.

[9] Counsel for the applicants submits that the daily tariff amount should be increased because:

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<sup>1</sup> [2005] ERNZ 808

- (a) The respondent's conduct of the case increased the amount of work necessary by applicant's counsel because the respondent failed to comply with the Authority's direction in a timely manner.
- (b) Neither of the applicants speaks English which extended the investigation meeting time and meant that counsel's pre-investigation communication with the applicants required the services of an interpreter requiring more time than is assumed when relying on the standard daily tariff approach.
- (c) Further work was required after the investigation meeting to respond to the Member's inquiry.
- (d) Additional time was required to arrange for Bao Ho Van Nguyen's need to give evidence by Skype from Vietnam.

[10] Mr Davidson for Ms Ta considers costs should be considerably less than the \$10,500 claimed or should lie where they fall. He rejects the applicant's reasons for an increase in the daily tariff approach. He submits:

- (a) The way the respondent conducted the case at the investigation meeting cannot be of any concern to the Authority.
- (b) That the respondent provided written and oral evidence which assisted the Authority in its deliberation and determination.
- (c) The applicants did not speak English and required the services of an interpreter which increased the investigation meeting time but Ms Ta should not be expected to meet that extra cost.
- (d) The respondent needed to defend the claims because of the large amount of money claimed. Also her defence did not lack substance and the investigation meeting was not extended due to her actions.
- (e) The cost of the awards made against Ms Ta and the costs incurred in defending the applicants' claims are likely to *cripple* Ms Ta financially.



**Determination**

[11] This is not an appropriate case for costs to lie where they fall. Vu and Bao Ho Van Ngyuen were almost entirely successful in their claims. Therefore, it is axiomatic that Ms Ta must make a reasonable contribution to their costs. The appropriate starting point for my consideration is \$5,250.

[12] I do not consider that the fact that the applicants do not speak English or that Bao needed to give evidence by Skype from Vietnam which increased counsel's preparation time can be reasons to increase the quantum of costs that Ms Ta must pay.

[13] After the investigation meeting I requested a copy of Bao Ho Van Ngyuen's IRD summary of earnings be provided to me which would usually be a simple matter not requiring much, if any time, to be expended by counsel. Because Bao was in Vietnam it was not a simple matter. However, the fact that Bao chose to bring proceedings while living in Vietnam is not a reason to increase the share of legal costs Ms Ta should bear.

[14] The submission that Ms Ta failed to comply in a timely fashion with Authority directions in relation to providing evidence has more force. The timetable for the exchange of evidence was set at a teleconference on 28 March 2014 and was for the applicants' evidence to be provided by 30 May 2014 and for the respondent's evidence in response to be provided by 20 June 2014. A further teleconference was held on 13 May 2014 which confirmed those dates, although the investigation meeting date was moved to a week later than originally set.

[15] The applicants' evidence was lodged with the Authority and served on the respondent on 27 May 2014. The respondent's evidence came in on different dates, all of which were after 20 June 2014; the first being on 24 June 2014 and the last on 21 July 2014, just two days before the investigation meeting.

[16] I accept that the piecemeal and late production of evidence would have increased the amount of time the applicants' counsel required to prepare for the investigation meeting especially at the last minute. However, I do not accept that it is

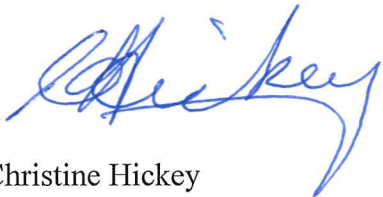


reasonable to increase the amount of costs to the extent the applicants' counsel submits.

[17] I consider that a \$750 rise in the costs Ms Ta should pay appropriately and reasonably reflects the increase in the applicants' counsel's preparation time due to Ms Ta's late production of evidence.

[18] The Authority can take into account a party's financial circumstances in exercising its discretion when making an order for costs and may do so if a party would genuinely be unable to pay the costs. Mr Davidson submits that Ms Ta has been financially compromised by the awards made against her. However, that submission was not accompanied by any financial information from Ms Ta setting out her income and outgoings. Therefore, I have no evidence on which to exercise my discretion in Ms Ta's favour and cannot do so.

[19] Having taken into account the submissions from both parties and the principles set out in *Da Cruz* and other relevant Employment Court cases I determine that Ms Ta must pay \$6,000 towards the applicants' legal costs and reimburse them the cost of the filing fee and the hearing fee.



Christine Hickey

Member of the Employment Relations Authority

