

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2014] NZERA Christchurch 163
5449771

BETWEEN WEN CHUAN CHIEN
 First Applicant

A N D WEI LIN CHANG
 Second Applicant

A N D SWEETHEARTS AT
 BERRYFIELDS LIMITED (IN
 LIQUIDATION)
 Respondent

Member of Authority: David Appleton

Representatives: Royal Reed, Counsel for Applicants
 Yin Yu, Advocate for Respondent

Submissions Received: 18 September 2014 from Applicants
 None from respondent

Date of Determination: 21 October 2014

COSTS DETERMINATION OF THE AUTHORITY

[1] By way of a determination dated 17 September 2014¹ the first applicant (Mr Chien) and the second applicant (Ms Chang) largely succeeded in their personal grievance claims against the respondent. Mr Chien was awarded the total sum of \$20,661.52 and Ms Chang the total sum of \$14,444. Costs were reserved.

[2] The day after the Authority's determination was released, the respondent was placed into liquidation, and the Authority received cost submissions on behalf of Mr Chien and Ms Chang from Ms Reed.

¹ [2014] NZERA Christchurch 147

[3] Although no submissions have been received by the Authority from or on behalf of the respondent, one of the liquidators wrote to the Authority on 3 October 2014, in reply to an enquiry from the Authority, agreeing that the decision to award costs remains at the discretion of the Authority and that the liquidators do not wish to be noted as either endorsing or rejecting my ultimate decision. The liquidator did point out that any costs awarded to Mr Chien and Ms Chang against the respondent would be unsecured debts, and that Mr Chien and Ms Chang would rank equally in respect of any costs award among other unsecured creditors for the total amount payable by the respondent.

[4] Section 248 of the Companies Act 1993 does not preclude the Authority from determining the matter of costs in this matter as, despite the fact that the memorandum of costs lodged on behalf of Mr Chien and Ms Chang was received same day that the respondent went into liquidation, the costs sought by the applicants were incurred before that liquidation took place, and costs follow the event. I rely on the case of *Orakei Group (2007) Limited (formerly PRP Auckland Limited) v Hilton Doherty* 28 October 2008, WRC 5/08 in reaching this conclusion.

[5] Ms Reed submits that Mr Chien and Ms Chang have incurred significant legal costs in having to pursue their rights right up to the investigation meeting. She submits that the respondent was unreasonable in pursuing a defence that was without merit. She asks that the respondent pay a contribution of \$3,000 each towards the costs incurred by Mr Chien and Ms Chang.

Determination

[6] The Authority's power to award costs is set out in clause 15 of Schedule 2 of the Employment Relations Act 2000, which provides as follows:

15 Power to award costs

(1) The Authority may order any party to a matter to pay to any other party such costs and expenses (including expenses of witnesses) as the Authority thinks reasonable.

(2) The Authority may apportion any such costs and expenses between the parties or any of them as it thinks fit, and may at any time vary or alter any such order in such manner as it thinks reasonable.

[7] It is not necessary to set out in detail the very well-known principles that govern the award of costs in the Authority, as set out in the seminal case of *PBO Ltd v Da Cruz*, [2005] 1 ERNZ 808, although it is relevant to cite the following:

- a. costs are not to be used as a punishment or as 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;
- b. it is open to the Authority to consider whether all or any of the parties' costs were unnecessary or unreasonable;
- c. that costs generally follow the event;
- d. that awards will be modest; and
- e. that frequently costs are judged against a notional daily rate.

[8] Whilst elements of the respondent's defence were found to be without merit, not all of it was, and so I do not accept that, overall, it contributed in any material way in unreasonably increasing costs. However, I am satisfied that costs should follow the event, and that an award of costs should be made in favour of Mr Chien and Ms Chang.

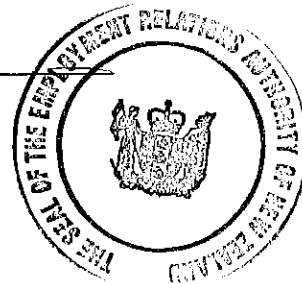
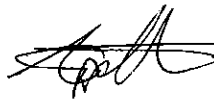
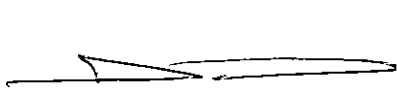
[9] Ms Reed does not give any indication of what costs have actually been incurred by her clients, and so it is impossible to consider whether all or any of their costs were unnecessary or unreasonable. However, I am satisfied that some level of costs will have been reasonably incurred by Mr Chien and Ms Chang in bringing their claims, and that it is likely that they will have reasonably incurred at least \$3,000 each.

[10] However, the claims of Mr Chien and Ms Chang were investigated together in a meeting that lasted from 9.30am until 3.15pm, with a 30 minute break. This is less than one day, and whilst \$3,000 is the appropriate rate (out of a daily tariff of \$3,500) I see no reason why the costs award should be \$3,000 to Mr Chien and Ms Chang each.



[11] Mr Chien's claim took up around two thirds of the investigation meeting and Ms Chang's the remaining third. Accordingly, I believe that it is just to order that the respondent contributes to the costs of Mr Chien and Ms Chang in the following proportions:

- a. To Mr Chien, the sum of \$2,000; and
- b. To Ms Chang, the sum of \$1,000.



David Appleton
Member of the Employment Relations Authority

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