

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI
TE WHANGANUI-Ā-TARA ROHE**

[2020] NZERA 273
3041572

BETWEEN	YANG (ELLE) LYU First Applicant
AND	KUAN MIN (KENT) CHEN Second Applicant
AND	BEAR PAW CAFÉ PATISSERIE SANDWICH LIMITED Respondent

Member of Authority:	Michael Loftus
Representatives:	Royal Reed, counsel for the Applicants Jordan Todd, counsel for the Respondent
Submissions Received:	29 June 2020 from Respondent Nil from Applicants
Determination:	7 July 2020

COSTS DETERMINATION OF THE AUTHORITY

[1] On 6 April 2020 I issued a determination in which I concluded neither applicant, Yang Lyu or Kuan Chen, was an employee of the respondent, Bear Paw. That meant the Authority lacked jurisdiction to consider their substantive claims which were therefore dismissed.¹

[2] Costs were reserved and Bear Paw, as the successful party, now seeks a contribution toward those it incurred defending the claims.

¹ [2020] NZERA 141

[3] Normally the Authority will use a daily tariff when addressing costs with the starting point being \$4,500 for an investigation's first day and \$3,500 for each subsequent day.² From there adjustment may occur depending on the circumstances.

[4] In this instance the investigation took two full days which would, applying the tariff, see a contribution of \$8,000. Despite incurring greater costs, that is what Bear Paw seeks. The claim is supported with a copy of the invoice and a detailed breakdown of how the costs were incurred.

[5] When Mr Todd raised the issue with the applicant's solicitors the answer was they no longer had instruction and attempts to contact the applicants directly by e-mail went unanswered. The Authority got the same response when it forwarded the formal costs application and there was then no reply to a subsequent request the applicants' solicitors provide an alternate address for their clients.

[6] In *Noble v Ballooning Canterbury.Com Limited* the Court recently considered a situation in which a solicitor could not obtain instructions regarding costs and was unable to provide an alternate address through which its client could be served.³

[7] In *Noble* the Court made it clear an inability to obtain instruction was insufficient ground for a solicitor to simply withdraw. Counsel needed to take what the Court described as *reasonable steps* to ensure an operable address for service was provided and in the interim the notified address for service for the applicants, which is that of their solicitor, remains valid.

[8] The applicant's solicitors' inability to provide a substantive reply does not, however, preclude me from determining the matter as it has been properly served and the applicants cannot avoid responsibility by simply ignoring the issue.

[9] As already said, Bear Paw seeks application of the tariff. The Employment Court deems the tariff approach reasonable and there is no criticism of the amount. In this case its application would also see an award that is less than costs actually incurred and which I consider reasonable. In the absence of a contrary argument there is no reason why the tariff should not be applied.

² refer *PBO Ltd (formerly Rush Security Ltd) v Da Cruz* [2005] ERNZ 808 and *Fagotti v Acme & Co Ltd* [2015] NZEmpC 135

³ *Robert Noble v Ballooning Canterbury.Com Limited* [2020] NZEmpC 60

[10] Despite an objection from Bear Paw at the time, the applicants' claims were heard concurrently. The result was the same so I conclude the applicants are jointly and severally liable for the order now to be made.

Order

[11] Given the above I order Yang Lyu and Kuan Chen (jointly and severally) pay Bear Paw Café Patisserie Sandwich Limited \$8,000 (eight thousand dollars) as a contribution toward the costs it incurred defending their claims.

Michael Loftus
Member of the Employment Relations Authority