

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2020] NZERA 349
3077934

BETWEEN	ROGER RONG CHIU Applicant
AND	ANCES LIMITED (IN LIQUIDATION) First Respondent
AND	JIN WU Second Respondent
AND	XIAOMIN SONG Third Respondent

Member of Authority:	Michael Loftus
Representatives:	Julian Springer, counsel for Applicant Marty Braithwaite, advocate, and Michelle Hua, counsel for Respondent
Submissions Received:	25 May, 12 June and 1 July 2020 from Applicant 4 June and 3 July 2020 from Respondents
Determination:	26 August 2020

COSTS DETERMINATION OF THE AUTHORITY

[1] On 24 April 2020 I issued a determination addressing Roger Chiu's claim the respondents be compelled to pay wages due. Penalties were also sought.

[2] I found Mr Chiu was an employee of ANCES and therefore entitled to the wages he had been denied as a result of the respondents assertion he was never employed. Pursuant to ss142W and 142Y of the Employment Relations Act 2000 (the Act) responsibility for payment passed to Jin Wu, personally, should ANCES fail to pay.

[3] That said, Mr Chiu's success was only partial given his failure to attain wages for a considerable portion of the period claimed. Penalties were not imposed.

[4] Costs were reserved and Mr Chiu now seeks a contribution toward those he incurred.

[5] Normally the Authority will use a daily tariff approach when addressing a costs claim, with the normal starting point being \$4,500 for the first day and \$3,500 for each day thereafter.¹ From there adjustment may be made depending on the circumstances.

[6] The investigation took approximately two and a half days which would, applying the tariff, see a contribution in the order of \$9,750 but Mr Chiu seeks the greater sum of \$14,625 plus disbursements totalling \$378.22.

[7] With respect to the issue of partial success Mr Chiu, having referred to *Coomer v J H McCallum and Son Ltd*,² submitted its conclusion it is appropriate to *stand back and look at things in the round* would lead to a conclusion he was the successful party. This is by virtue of his success in establishing employment and thereby nullifying the respondents' defence.

[8] In support of the uplift Mr Chiu noted total costs of just over \$21,000 before arguing the uplift was justified given:

- a. Attempts to delay the hearing by the Respondents which unnecessarily increased costs;
- b. The Respondents alleged failure to engage in meaningful attempts to settle including failing to respond to a Calderbank offer;
- c. The First Respondent's failure to comply with the timelines for payment set out in the determination; and
- d. Actions of the Respondents which, it is alleged, sought to mislead the Authority.

¹ *PBO Ltd (formerly Rush Security Ltd) v Da Cruz* [2005] ERNZ 808 and *Fagotti v Acme & Co Ltd* [2015] NZEmpC 135

² *Coomer v J H McCallum and Son Ltd* [2017] NZEmpC 156 at [43]

[9] The Respondents deny there is any justification for an increase in the tariff. They say, despite incurring costs of over \$17,000 and what they considered a significant level of success, they initially proposed costs lie where they fall. They suggest they should now be entitled to a contribution toward costs as Mr Chiu rejected their offer and the bulk of his claims failed.

[10] On 25 June 2020, and subsequent to the initial exchange of submissions, ANCES was placed in liquidation. This means claims against it can no longer continue.³ The liquidation did, however, bring further exchanges with Mr Chiu asking that, as a result, both the second and third respondents be held liable for any costs award as *the controlling director* (Mr Wu) and *majority shareholder* (Ms Song).

[11] Only Ms Song replied arguing, for various reasons, the request was inappropriate as far as she was concerned. On this I agree as there were no findings of liability against Ms Song which means there is not, as far as she is concerned, an event to which costs can be attributed and then follow.

[12] Returning to the original application. Both parties submitted fulsome submissions which have not been recorded or summarised in this determination.⁴ Suffice to say they have been considered.

[13] The key issue is where does success lie and what is the *event* costs are to follow? In this respect I conclude the key issue was whether or not Mr Chiu was an employee. He said he was and should therefore have been paid wages. ANCES denies wages were payable on the grounds Mr Chiu was not an employee. On this crucial point Mr Chiu was totally successful.

[14] Where he was less than successful was in respect to the remedies that then accrued. Indeed, and applying the respondents maths, his success was 13.63% of his claim and he failed with respect to the penalty claims.⁵

[15] Applying *Coomer* and standing back to look *at things in the round* I conclude Mr Chiu is correct and it is he who should be the recipient of a costs award. That is because he was totally successful with respect to the determining issue – whether or not he was an employee. The argument about the resulting award and his failure to

³ Section 248(1)(c) of the Companies Act 1993

⁴ Section 174E(b)(ii) of the Employment Relations Act 2000

⁵ Paragraph 11 of the submission dated 4 June 2020

attain all he sought was, I conclude, akin to an applicant who successfully argues s/he has a personal grievance and then loses the right to remedies because of contributory conduct. The Court has previously said that does not detract from the fact the applicant succeeded with respect to the *event* and costs should follow. In a personal grievance setting the *event* is establishing a grievance – here it was establishing the fact of employment.

[16] I also note Mr Chiu's lack of success was due to a conclusion part of the claim emanated not from the employment relationship but a separate arrangement between the parties. While this meant the Authority lacked jurisdiction Mr Chiu had little choice but to pursue the issue here. That is because he initially sought redress through the Disputes Tribunal but it directed he approach the Authority as it normally does when the question of employment or not may be determinative. Unsurprisingly the result in the Authority means that part of the claim has now returned to the Disputes Tribunal. I also note I raised the jurisdictional issue on the second day and, as a result, little time was spent on the it.

[17] Turning now to the arguments for an increase in the tariff. For the following reasons they fail to convince.

[18] The argument the attempt to delay unnecessarily increased costs relies on a submission a request for adjournment was spurious as it was based on an asserted situation the respondent knew, or should have known, was easily addressed and rectified. Despite that it still had to be addressed.

[19] Reference is also made to paragraph 47 of the substantive determination where I commented adversely on the evidence of both Mr Wu and Ms Song. It is submitted their conduct needlessly wasted time by repeated attempts to mislead via *contradictory...convoluted* evidence and this should now be recognised by way of an uplift to tariff costs.

[20] The argument in respect to the adjournment fails if, for no other reason, no delay resulted. The comments about the respondents evidence also fail to convince as it was that very evidence which lead to Mr Chiu's success.

[21] The argument the respondents failed to adhere to the Authority's timelines and pay the amounts awarded resulted in further cost and warrants an uplift to the tariff does not persuade for the following reasons. First it is an issue relevant to compliance

and not the way in which the original hearing was conducted. Second, it has the appearance of a request to punish and the principles applicable to an award of costs preclude that.

[22] There is then the Calderbank. Suffice to say it sought considerably more than Mr Chiu ultimately received and while there was no response that detracts from, indeed nullifies, its value.

[23] There is then the argument the respondents failed to negotiate in a meaningful way. I have to say the evidence before me would suggest both parties transgressed in this respect and there is some merit to the respondents' claim Mr Chiu's approach was along the lines of *stand and deliver*.

[24] The arguments about misleading the Authority are simply a reference to the evidence which led to the substantive outcome. To take that into account would, once again, raise the prospect of punishment which is precluded in a costs setting.

[25] Finally I note that in his reply submission Mr Chiu raised the issue of GST. He did so on the basis it might act as a counter should I choose, for some reason, to reduce his award. I have applied the tariff which has generally (but not always⁶) been considered all-inclusive so the question of reduction does not apply and I also note this was not originally sought or argued as a ground justifying increase.

[26] As already said, the arguments tendered on Mr Chiu's behalf fail to convince me an increase in the tariff is warranted.

[27] These conclusions raise the last point – who is responsible for the costs award which will inevitably follow? The substantive outcome was ANCES was liable but in the event it could not pay liability for the total award would, pursuant to ss 142 and 142Y of the Act, pass to Mr Wu personally.

[28] In other words, each was jointly and severally liable.

[29] As events transpire the liquidation means ANCES can't, and the liquidator's first report suggests inevitably won't, pay. That means, given the foregoing and my earlier conclusion Ms Song cannot be held liable, responsibility for the coming order passes, in its entirety, to Mr Wu personally.

⁶ *Stormont v Peddle Thorp Aitken Limited* [2017] NZEmpC 159

Conclusion and orders

[30] For the above reasons I conclude Mr Chiu is entitled to a contribution toward costs but the tariff remains appropriate. I also conclude that as a result of ANCES's liquidation responsibility for payment falls on Mr Wu.

[31] As a result I order the second respondent, Jin Wu, pay Roger Chiu the sum of \$9,750.00 (nine thousand, seven hundred and fifty dollars) being a contribution toward the costs Mr Chiu incurred.

[32] Payment is to be made no later than 4.00pm on Friday 18 September 2020.

Michael Loftus
Member of the Employment Relations Authority