

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE**

[2021] NZERA 103
3084472
3085154

BETWEEN MINGXIA YU
 Applicant in 3084472

AND YAN JIN
 Applicant in 3085154

AND URBAN DÉCOR LIMITED
 Respondent

Member of Authority: Nicola Craig

Representatives: Paul Young, advocate for the applicants
 Daniel Zhang, counsel for the respondent

Investigation Meeting: On the papers

Submissions received: 4 March 2021 for the applicants
 8 March 2021 for the respondent

Date of Determination: 12 March 2021

COSTS DETERMINATION OF THE AUTHORITY

- A. Urban Décor Limited is to pay within 28 days of the date of this determination:**
- (i) Mingxia Yu the sum of \$3,000.00 as a contribution to her costs along with \$71.56 for the filing fee; and**
 - (ii) Yan Jin the sum of \$3,000.00 as a contribution to her costs, along with \$71.56 for the filing fees.**

[1] The Authority found in an earlier determination that Mingxia Yu and Yan Jin (the employees) were unjustifiably dismissed by Urban Décor Limited trading as

Promax Colours (Urban Décor or the company).¹ The company was ordered to pay sums of lost wages and compensation to both employees.

[2] The employees now seek costs against the company.

Submissions for Ms Yu and Ms Jin

[3] The submissions suggest that indemnity costs might be awarded. This argument relies on:

- (a) the company's challenge to whether Ms Yu's personal grievance was raised in time;
- (b) delays in providing CCTV footage requested by the employees' representative; and
- (c) unrelated questions being asked to witnesses by the company's representative.

[4] Although no invoices are provided a breakdown of time is included. This covers 76.6 hours at an hourly rate of \$350 per hour. The total is \$26,810.

[5] In what I take to be an alternative submission, three days of the notional daily tariff is described as a reasonable cost. That is \$11,500; \$4,500 for the first day and \$3,500 each for two subsequent days.

Submissions for Urban Décor

[6] The company argues that it succeeded in just about every single factual dispute and some of the legal disputes.

[7] The parties made settlement offers to each other. As early as March 2020 it is submitted that Urban Décor's representative provided an analysis of each issue claimed and concluded that, at best, a significantly reduced award was predicted. Calderbank offers of \$3,200 for each of the employees was made. The employees responded by \$14,000 non-economic loss compensation claims along with lost wages for the entire period claimed. This was later changed to around nine and five months' pay.

¹ *Mingxia Yu and Yan Lirovision n v Urban Décor Limited* [2021] NZERA 60.

[8] It is also submitted that the contribution deduction in the earlier determination of 50% should also apply to costs.

[9] A number of arguments are put forward against the indemnity costs claim. In addition criticism is made of scandalous allegations included in the claims and witness statements.

Costs discussion

[10] The Authority has the power under clause 15 of Schedule 2 of the Employment Relations Act 2000 (the Act) to award costs. The Authority's discretion is governed by principles which were outlined by the full Employment Court in *PBO Limited (formerly Rush Security Limited) v Da Cruz*.² These include that costs will usually follow the event and the discretion be exercised in accordance with principle and not arbitrarily, considering equity and good conscience.

[11] In addition, costs are not to be used as a punishment or as an expression of disapproval for an unsuccessful party's conduct, although conduct which increased costs unnecessarily can be taken into account in inflating or reducing an award.

Indemnity costs

[12] Indemnity costs, allowing for full reimbursement, are reserved for exceptional cases, with "exceptionally bad behaviour".³

[13] Several grounds were put forward. Firstly, that the questions of whether Ms Yu's grievance was raised in time. I do not see this as sufficient to justify indemnity costs. The statement of problem was brief on the nature of the claim. The email which I found to have raised the grievance was not produced until well into the investigation meeting despite Urban Décor's representative having brought up the raising issue some months before and that being noted in an Authority minute.

[14] Urban Décor's reluctance to provide CCTV footage is criticised. While the employees were entitled to be provided with relevant CCTV footage, their seeming reluctance to provide almost any particulars until the footage was provided does not sit well with the regime for the resolution of employment relationship problems regime.

² *PBO Limited (formerly Rush Security Limited) v Da Cruz* [2005] 1 ERNZ 808.

³ *Bradbury v Westpac Banking Corp* [2009] NZCA 234 at [28].

[15] For the employees it is suggested that irrelevant questions were asked on behalf of Urban Décor. No details are provided. I see no merit in this complaint.

[16] I conclude that there is no basis for indemnity costs.

Tariff claim

[17] The investigation meeting covered three days, all with late finishes. The notional daily tariff for three days is \$11,500. That is the starting point.

[18] Ms Yu successfully established that her dismissal grievance was raised in time. Both employees were successful in their unjustified dismissal claims and were awarded some remedies, albeit reduced by half for their contribution.

[19] On the other hand I accept that Urban Décor was successful in establishing that Ms Yu and Ms Jin were aware of the company's phone policy, that they left the workplace saying that they quit and that the evidence for the remedies sought was very modest. The company also successfully argued for a reduction to any remedies for contribution.

Calderbank offers

[20] A Calderbank offer of \$3,200 each was made by Urban Décor. In the end they received total awards around \$6,500. In order to achieve remedies at that level Ms Yu and Ms Jin needed to go to an investigation meeting. I do acknowledge that the awards are far closer to the offer by Urban Décor than to the employees' offer.

Unnecessarily prolonging the meeting

[21] Both parties contributed unnecessarily to the length of the investigation meeting although in different ways.

[22] For Ms Yu and Ms Jin, there was the provision of statements of problem and witness statements containing substantially inadequate detail regarding events on the critical day when they left the factory during their shift. Important documents including an appendix to an employment agreement and the email raising Ms Yu's grievance were not lodged until part way through the meeting. Evidence about other former employee's employment concerns did not assist.

[23] Several witness statements lodged for Urban Décor contained extensive identical evidence between several witnesses, without explanation. Exploring how that had come about added to the time of the investigation meeting.

Outcome

[24] Taking into account all of the evidence I conclude that the total amount of costs awarded should be \$6,000.

[25] I order Urban Décor Limited to pay Ms Yu and Ms Jin within 28 days of the date of this determination the sum of \$3,000 each as a contribution to their costs along with \$71.56 each for the Authority's filing fee.

Nicola Craig
Member of the Employment Relations Authority