

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

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

[2022] NZERA 422  
3147201

BETWEEN	ANDY CHEN First Applicant
AND	WEI ZHANG Second Applicant
AND	WJ CORPORATION LIMITED Respondent

Member of Authority:	Sarah Blick
Representatives:	Benjamin Hinchcliff, counsel for the applicants Wei Liu, for the respondent
Investigation meeting:	On the papers
Submissions or information received:	8 August 2022 from the applicants 15 August 2022 from the respondent
Determination:	26 August 2022

---

**COSTS DETERMINATION OF THE AUTHORITY**

---

[1] The Authority issued a determination on 28 July 2022 which found the applicants Mr Chen and Ms Zhang were unjustifiably dismissed by WJ Corporation Limited (WJCL). It awarded remedies of reimbursement of lost wages under s 123(1)(b) and interest and compensation under s 123(1)(c)(i) of the Employment Relations Act 2000 (the Act).<sup>1</sup>

---

<sup>1</sup> *Chen and Anor v WJ Corporation Limited* [2022] NZERA 349.

[2] The issue of costs was reserved and a timetable set for filing memoranda if the parties were unable to resolve costs themselves. The applicants now apply for a costs award in their favour.

### **Applicants' claim for costs**

[3] The applicants say their actual legal costs were \$12,017.50. A breakdown of how and when the costs were incurred and supporting evidence has not been provided.

[4] The applicants seek a costs award of \$4,500.00 as a starting point with an uplift of 25 per cent taking into account a settlement offer made on a *Calderbank* basis. This would total \$5,625. On 7 April 2021 an advocate from counsel for the applicants' firm emailed WJCL a "without prejudice save as to costs" offer. The email does not set out the effect of that or that it is made on a *Calderbank* basis. The offer proposed to settle the claims against WJCL if it agreed to pay \$3,000.00 under s 123(1)(c)(i) to each of the applicants along with \$1,800.00 plus GST to counsel's firm, apparently in legal costs.

[5] The applicants also seek a further \$400.00 to cover their costs in preparing a costs memorandum. Total costs sought therefore amount to \$6,025.00. The applicants also seek reimbursement of the Authority filing fee of \$71.56.

### **WJCL's response**

[6] In response to the application for costs, Mr Liu (WJCL's director) outlines correspondence between WJCL and counsel for the applicants regarding costs following the investigation meeting. Email correspondence between the parties has been filed in support. There is no indication in the correspondence that it was conducted on a without prejudice basis, nor have the applicants objected to the correspondence being filed or considered by the Authority. The correspondence shows the applicants offered to accept \$5,000.00 in costs, and in response WJCL offered to pay half of that, being \$2,500.00. In response the applicants made a counteroffer of \$4,500.00 to resolve costs, to which WJCL again offered \$2,500.00, which was not accepted.

[7] WJCL asks the Authority to take into account the extreme difficulty and financial hardship it and Mr Liu will face if ordered to pay the costs now sought. WJCL

says due to the effects of COVID-19 it has not been able to operate its business, and in the past eight months it has not received any income.

### **Costs principles**

[8] The Authority has power under clause 15 of Schedule 2 of the Act to award costs. This power is discretionary and must be used in a principled manner. In *PBO Ltd (formerly Rush Security Ltd) v Da Cruz* the Employment Court set out principles guiding the Authority's approach to costs which include:

- The statutory jurisdiction to award costs is consistent with the Authority's equity and good conscience jurisdiction.
- Equity and good conscience is to be considered on a case by case basis.
- 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.
- Costs generally follow the event.
- Awards will be modest.
- Frequently costs are judged against a notional daily tariff.<sup>2</sup>

### **Costs analysis**

[9] The applicants were the successful parties. It is usual that costs will follow the event and the unsuccessful party will be required to make a contribution towards the successful party's costs.

[10] The notional daily tariff is a starting point, and the applicable daily tariff is \$4,500. Factors to consider next are matters which would lead to an increase or decrease from the tariff.

[11] It was initially agreed this matter could be determined on the papers by way of affidavit evidence and submissions. Upon receipt of the affidavits and written submissions, it became apparent a key evidential dispute existed around what was discussed between the parties on the applicants' last day of employment. The statement

---

<sup>2</sup> *PBO Ltd (formerly Rush Security Ltd) v Da Cruz* [2005] 1 ERNZ 8080, confirmed in *Fagotti v Acme & Co Ltd* [2015] NZEmpC 135.

of problem did not provide any details about the relevant discussion, which could have identified this dispute earlier. To ensure the dispute was aired, an investigation meeting by audio visual link (Zoom video conferencing) was held. The applicants attended and were represented by counsel, and Mr Liu attended for WJCL.

[12] Actual investigation meeting time was about a half day. It is appropriate to allow a further quarter of a day taking into account written submissions were filed prior to the investigation meeting. This provides a starting point for costs as \$3,375.00 based on the daily tariff.

[13] The applicants seek an uplift in the daily tariff based on WJCL declining to accept the April 2021 settlement offer. I am not satisfied this was an effective offer, as the effect of it was not spelled out to WJCL. I note that WJCL has never been legally represented during the Authority's investigation - Mr Liu has represented and did so at the investigation meeting with the assistance of a Mandarin-speaking interpreter. No uplift to the tariff is made in relation to the offer.

[14] In all the circumstances it is not appropriate to order costs in relation to the costs application.

[15] Taking into account all the relevant factors, I make no further adjustment to the starting point.

### **Conclusion**

[16] WJ Corporation Limited is ordered to pay \$3,375.00 in costs and \$71.56 (being the Authority filing fee) to be divided in equal shares between Andy Chen and Wei Zhang as a contribution to its costs within 21 days of the date of this determination.

Sarah Blick  
Member of the Employment Relations Authority