

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2022] NZERA 515
3123734

BETWEEN	BOMI YOON Applicant
AND	MGK HOMES LIMITED First Respondent
AND	MINGON KANG Second Respondent

Member of Authority:	Sarah Blick
Representatives:	Seungmin Kang, counsel for the applicant Mark Beech, counsel for the respondents
Investigation meeting:	On the papers
Submissions or information received:	23 August 2022 and 29 September 2022 from the applicant 16 September 2022 from the respondent
Determination:	7 October 2022

COSTS DETERMINATION OF THE AUTHORITY

[1] The Authority issued a determination on 9 August 2022 which found the applicant Ms Yoon was unjustifiably dismissed by MGK Homes Limited (MGK). I awarded remedies of reimbursement of lost wages under s 123(1)(b), compensation under s 123(1)(c)(i) of the Employment Relations Act 2000 (the Act), along with an amount in special damages.¹ The total remedies amounted to \$40,121.09.

[2] The issue of costs was reserved and a timetable set for filing memoranda in the event the parties were unable to resolve costs themselves. The applicant now applies for costs.

¹ *Yoon v MGK Homes Limited & Anor* [2022] NZERA 377.

[3] A challenge to the Authority's determination was filed in the Employment Court along with an application for a stay of proceedings. The Authority has not received any advice that the stay application has been granted.

What principles apply to costs?

[4] The Authority's power under to award costs is set out in clause 15 of Schedule 2 of the Employment Relations Act 2000 (the Act). The power is discretionary with its use governed by principles.² These include that costs will usually follow the event and the discretion is exercised in accordance with principle and not arbitrarily, considering equity and good conscience. When considering costs, the starting point is the Authority's daily tariff is \$4,500 for the first day of an investigation meeting and \$3,500 for subsequent days.

What costs should be awarded here?

Ms Yoon's submissions

[5] Ms Yoon received legal aid in relation to this matter. Ms Yoon submits although her claim for penalties against MGK and Mr Kang, the second respondent, was dismissed, she succeeded in all other claims against MGK and was awarded remedies. Ms Yoon says the investigation meeting took a full day with written submissions filed after the meeting. Ms Yoon submits the appropriate starting point is \$5,375 in costs, being the one day tariff plus a quarter of a second day. The meeting did not go to a second day - the quarter day factors in closing submissions which were filed in writing at a later date.

[6] From that, Ms Yoon seeks an uplift of \$4,201.34 on the grounds MGK unreasonably rejected Ms Yoon's two *Calderbank* offers – one made on 15 March 2021 offering to accept \$20,000 and one made on 18 May 2021 offering to accept \$21,500 in resolution of this matter.

[7] Ms Yoon also seeks reimbursement of disbursements incurred totalling \$1,200.89, which include the Authority's filing fee of \$71.56, translation costs of

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

\$304.75, and travel and accommodation costs of \$824.58, all including GST. Invoices were provided in support.

[8] Counsel for Ms Yoon submits the above travel costs were necessary. Counsel is based in Napier and says he was unaware of any civil legal aid lawyer in Tauranga who was available to be briefed and to appear as an agent for the investigation meeting. Counsel says a private lawyer's costs would have well exceeded counsel's travel costs and would not have been approved by legal aid. Furthermore, it is said it was important for counsel (who is bilingual in Korean and English) to appear in person to provide the best assistance possible to Ms Yoon during the investigation meeting as she has limited English skills, all parties are Korean, and many documents were originally in Korean.

[9] Counsel submits that Ms Yoon is entitled to be paid full disbursements, either by way of reasonable disbursements, and/or by way of further increased costs (for travel costs) based on the respondents' unreasonable rejection of Ms Yoon's offers.

[10] At the Authority's request, counsel filed documentation from the Legal Service Commissioner about Ms Yoon's legal aid confirming the total claims paid to date in relation to this matter as \$10,777.23 including GST where applicable. Ms Yoon seeks that amount which includes costs (including for her costs application) and disbursements.

Respondents' submissions

[11] The respondents do not accept the costs Ms Yoon claims are warranted. They say it was at counsel for Ms Yoon's sole request that closing submissions were not made orally but filed in writing at a later date in order to accommodate his travel arrangements. Counsel for the respondent says he was willing and able to make closing submissions at the investigation meeting. It would therefore be wholly unfair to penalise the respondents for accommodating Ms Yoon by adding an additional 0.25 hours to the daily tariff.

[12] The respondents say technical delays regarding the interpreter connecting remotely delayed the investigation meeting and increased the costs of the parties. Counsel submits this issue should not prejudice the respondents and should be factored into any costs award.

[13] The respondents submit the costs sought are in excess of what should be ordered and that a half day tariff of \$2,250 is more appropriate given that there were only two scheduled witnesses, and Mr Park's evidence (which was given at the Authority's request) was *de minimis*.

[14] The respondents further say it was reasonable for them to decline the *Calderbank* offers given the facts of the case which are unusual, if not novel. It was not a 'garden variety' case that could be easily resolved as it included fundamental issues around the 90-day period for raising a personal grievance, an alleged mutual agreement to terminate the employment relationship as well as cultural nuances.

[15] The respondents submit that costs incurred by out-of-town counsel should not be considered as those costs were unreasonably incurred and should therefore not be the subject of a costs award. Counsel does not accept that there was no civil legal aid lawyer available in Tauranga to assist Ms Yoon, and says in order to advance that submission, evidence from Legal Services would be required and evidence from Ms Yoon as to who she contacted. Counsel notes Mr Kang is in the same position as Ms Yoon in terms of his command of the English language, yet he chose local counsel with the assistance of Mr Park to interpret.

[16] The respondents submit Ms Yoon has had the benefit of legal aid and submits she had less incentive to minimise costs.

[17] The respondents also object to paying Ms Yoon's translation costs.

[18] Finally, the respondents say Ms Yoon was only partially successful as Mr Kang was successful insofar as no penalties were awarded against him. Case law suggests that the Court has considered it appropriate to discount costs sought, in light of a mixed outcome.

Costs analysis

[19] A general principle for a successful party is that costs should 'follow the event' and here Ms Yoon was predominantly successful and obtained significant remedies. While the penalty claim against Mr Kang was dismissed, his inclusion as a respondent could not in my view have had any meaningful impact on costs. As the successful party

Ms Yoon is entitled to a contribution towards her costs, and as the unsuccessful party, MGK is liable to pay them.

[20] Taking into account a delay at the commencement of the investigation meeting in relation to the interpreter and counsel's request to make written closing submissions, I assess the starting point at \$4,125 of the applicable daily tariff. This discounts 30 minutes for issues around the interpreter. I also do not accept it is appropriate in the circumstances to increase the tariff by a further 0.25 hours due to the filing of written closing submissions.

[21] Factors to consider next are matters which would lead to an increase or decrease from the tariff. The two settlement offers were marked "Without prejudice save as to costs". Only the second offer of 18 May 2021 notes Ms Yoon would rely on the offer (of \$21,500 in full and final settlement) and seek increased or indemnity costs if it was not accepted and she was awarded higher than that offered. That offer contained an analysis of Ms Yoon's case and MGK's defence, referring to a relevant authority. I accept the second offer constituted an effective *Calderbank* offer. Had MGK accepted that offer, it would have been in a better position now and Ms Yoon's costs would not have been incurred.

[22] The offers were made well before substantial costs would have been incurred in preparation and allowed sufficient time for consideration and acceptance of the offers.

[23] Ms Yoon was awarded significantly more than the without prejudice offers made. I am not persuaded the facts of this matter are so unusual or novel that it was reasonable to reject the offers. In these circumstances, I am persuaded that the respondents' rejection of a very reasonable offer warrants a substantial uplift from what would otherwise have been awarded in costs. I find \$6,500 to be an appropriate amount. Costs of out of town representation and accommodation have not factored into that assessment, nor have costs related to Ms Yoon's costs submissions.

[24] Reasonable translation costs such as those sought should not be borne by Ms Yoon as the successful party. Ms Yoon is entitled to reimbursement of translation costs of \$304.75. She is also entitled to reimbursement of the Authority's filing fee of \$71.56.

Outcome

[25] MGK Homes Limited is ordered to pay Bomi Yoon within 14 days of the date of this determination:

- a. \$6,500 in costs;
- b. \$304.75 in translation costs;
- c. \$71.56 being the Authority filing fee.

Sarah Blick
Member of the Employment Relations Authority