

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2023] NZERA 320
3173924

BETWEEN LILI WANG
 Applicant

AND GREENTREE NM CATERING
 LIMITED t/a MASTER BAO
 Respondent

Member of Authority: Helen Doyle

Representatives: David Kim, advocate for the Applicant
 Martin Lyttelton, advocate for the Respondent

Investigation Meeting: On the papers

Submissions Received: 7 June 2023 from the Applicant
 9 June 2023 from the Respondent

Date of Determination: 19 June 2023

COSTS DETERMINATION OF THE AUTHORITY

Substantive Determination

[1] In a determination dated 26 May 2023 the Authority found that Ms Wang was owed wage arrears, additional payment for working on a public holiday, and for an alternative day and holiday pay. The issue of costs was reserved.

[2] The determination provided that if costs were not agreed Mr Kim may lodge and serve a costs submission within 14 days from the date of the determination. Mr Lyttelton had a further 14 days from receipt of the submission to reply.

[3] The Authority has now received submissions from both Mr Kim and Mr Lyttelton and will proceed to determine the issue of costs.

Submissions from the Applicant

[4] Mr Kim has asked that the Authority determine the issue of costs. He has attached an email exchange showing attempts to resolve costs were unsuccessful.

[5] Mr Kim submits that he had agreed with Ms Wang a fixed amount of \$5,000 plus GST would be charged as a service fee and would be paid after costs are either resolved or determined by the Authority.

[6] Mr Kim seeks a contribution of \$4,500 toward costs, together with the filing fee of \$71.56.

The Respondent's submissions

[7] Mr Lyttelton referred to the practice note about costs in the Authority with a focus on paragraph 11 of the practice note as follows:

When the parties cannot agree costs and an Authority determination is needed, a party seeking costs must clearly set out in its submission what amount is claimed and the reasons for that position. The claim should be supported by copies of invoices for any fees or other expenses incurred, the time taken by the practitioner or advocate and the relevant hourly fee.

[8] Mr Lyttelton submits that the claim for costs is not supported by invoices for any fees or expenses incurred and does not therefore comply.

[9] Mr Lyttelton says in his submission that there is an understanding that Mr Kim is working on a contingency basis. Mr Lyttelton asked the Authority to order that Mr Kim provide copies of all invoices from him to Ms Wang in this case, and evidence that she has paid for them.

[10] Mr Lyttelton further submits that Ms Wang and Mr Kim's conduct unnecessarily increased the costs to the parties and that costs were not reasonably incurred, and Ms Wang did not succeed on all claims. Mr Lyttelton has set out that initially the claim was for \$9,632.15 net, however, the award in total was \$2,112.69 being 22 percent of what Ms Wang had claimed.

Analysis and conclusions

[11] Mr Lyttelton raised issues about whether Ms Wang has incurred actual costs and, if so, in what amount. He placed emphasis on the fact that no invoices were provided and the hourly rate and time recording was not provided, in breach of the practice note of the Authority.

[12] Mr Kim has set out that the basis for payment as agreed between him and Ms Wang is a fixed amount of \$5000 plus GST and will be paid after costs have been determined. Mr Lyttelton had suggested a contingency arrangement is in place and the Authority should investigate into this by requesting further information. Given the arrangement Mr Kim refers to, there will be no invoices to request, or payments made.

[13] There may be some cases where the Authority is of the view that further investigation into actual costs incurred may be necessary. In an Authority determination involving the same representatives and Ms Wang it was considered this was necessary. In that matter there had been a two-day investigation meeting, issues about actual costs incurred, three respondents and some other complicating factors that I do not consider exist in this matter.¹

[14] Ultimately costs are a matter of discretion. In the exercise of that discretion in a principled and not arbitrary manner I intend to proceed to determine costs. I am satisfied that Ms Wang will incur costs even if Mr Lyttelton takes issue with the fixed service arrangement that Mr Kim refers to of \$5000. Ms Wang had a measure of success on monetary matters that included minimum entitlements. She would not have achieved that success without progressing the matter to an investigation meeting. Ms Wang is entitled to an assessment of a contribution towards costs.

[15] The investigation meeting commenced at 11am on 17 February 2023 to suit the interpreter and the Authority. The matter had to be adjourned from an earlier scheduled investigation meeting date of 14 February 2023 due to the impact of a weather event for one of the representatives. The Authority minute book records that the investigation meeting finished at 4.15 pm. There was a half an hour luncheon adjournment between 1 pm and 1.30pm.

¹ *Wang v Happy Eating Limited and others* [2023] NZERA 41.

[16] Based on the Authority's daily tariff costs are assessed at \$4,500 for the first day of investigation.

[17] It is appropriate in this matter given the start and finish times did not equate to a full day for the starting point to be three quarters of a day or \$3,375.

[18] Mr Lyttelton correctly submits that Ms Wang withdrew claims for penalties, a grievance of unjustified dismissal and associated remedies, after the Authority investigation meeting. Mr Kim did this quite promptly and before Mr Lyttelton provided submissions. It did however increase costs for preparation and investigation for Greentree NM Catering Limited. Ms Wang was further not completely successful with her monetary claims.

[19] I have weighed the employment relationship was a very short one and the amount of time occupied by evidence about the withdrawn claims was not as significant as it could be in other cases. Taking this into account and that Ms Wang was not fully successful with her monetary claims, it is appropriate to reduce the starting point for an assessment of costs of \$3,375 by \$1000.

[20] I conclude in the exercise of my discretion that an appropriate award of costs in this matter is the sum of \$2,375 together with reimbursement of the filing fee of \$71.56.

Orders

[21] I order that Greentree NM Catering Limited pay to Lili Wang the sum of \$2,375 costs together with a filing fee of \$71.56.

Helen Doyle
Member of the Employment Relations Authority