

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2023] NZERA 331

3168684

BETWEEN	ANSON (ZHONGER) HUANG Applicant
AND	OPTIMAL GPR & CCTV DRAIN INSPECTION LIMITED First Respondent
AND	DONG CONSTRUCTION LIMITED Second Respondent
AND	DONG (TONY) WANG Third Respondent
AND	XIAOXUE (MIKKY) ZHANG Fourth Respondent

Member of Authority:	Rachel Larmer
Representatives:	May Moncur advocate for the Applicant No appearance by Respondents
Investigation Meeting:	On the papers
Submissions Received:	29 May and 1 June 2023 from the Applicant
Date of Determination:	23 June 2023

COSTS DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Authority issued a substantive determination in this matter on 25 May 2023.¹

¹ *Huang v Optimal GPR & CCTV Drain Inspection Ltd and Others* [2023] NZERA 265.

[2] The Applicant, Mr Anson (Zhonger) Huang succeeded in his claims against the First Respondent, Optimal GPR & CCTV Drain Inspection Limited (“*Optimal*”) and against the Fourth Respondent, Xiaoxue (Mikky) Zhang.

[3] Mr Huang’s claims against the Second Respondent, Dong Construction Limited (“Dong Construction”) and the Third Respondent, Mr Dong (Tony) Wang did not succeed.

[4] Mr Huang sought an award of \$4,500 plus disbursements in his favour.

The Authority’s investigation

[5] Costs were determined ‘on the papers’.

[6] The Authority set out a timetable for the filing of costs submissions in the substantive determination.² Mr Huang filed costs submissions on 29 May 2023.

[7] The Authority asked Mr Huang to provide specific information about his actual costs, and he did so on 1 June 2023.

[8] The Respondents were required to lodge their costs submissions (if any) by 15 June 2023. The costs directions in the substantive determination stated that no submissions would be accepted outside of the timetable, without the Authority’s prior leave.

[9] None of the Respondents lodged costs submissions or any costs related information.

Relevant law

[10] The Authority derives its power to award costs from clause 15 of Schedule 2 of the Employment Relations Act 2000 (the Act). Although costs are discretionary, a successful party will normally be required to contribute to the successful party’s actual legal costs.

[11] The Authority usually adopts a notional daily tariff-based approach to assessing costs. The tariff for a one-day investigation meeting is currently \$4,500 and then \$3,500 for each subsequent day of investigation meeting times.

² Above, n1 at [183] and [184].

[12] The Employment Court in *PBO Limited (formerly Rush Security Limited) v Da Cruz and Fagotti v Acme & Co Limited* set out costs principles that the Authority must have regard to when assessing costs.³ These are so well known there is no need to set them out again here.

Issues

[13] The following issues are to be determined:

- (a) What costs did Mr Huang actually incur?
- (b) Who can Mr Huang recover costs from?
- (c) What is the notional starting point for assessing costs?
- (d) Should the notional starting tariff be decreased?
- (e) Should the notional starting tariff be increased?
- (f) What costs and disbursements should Mr Huang be awarded?
- (g) How should the costs that are awarded be apportioned between Optimal and Ms Zhang?

What costs did Mr Huang actually incur?

[14] Mr Huang's actual costs were \$8,960.93 including GST. Of that, \$7,235.93 were incurred after 25 November 2021 (not 2022), subsequent to Mr Huang's formal written settlement offer not being accepted.

[15] These settlement communications occurred between Ms Moncur and the Respondents' then representative, advocate Mr John Wood.

[16] Mr Huang offered to settle for much less than he was awarded by the Authority. Had his offer been accepted then all parties would have avoided the time and costs incurred from 25 November 2021 onwards.

³ [2005] ERNZ 808 and [2015] NZEmpC 135.

Who can Mr Huang recover costs from?

[17] Mr Huang succeeded with his claims against Optimal and Mr Zhang, so he is entitled to recover a contribution towards his actual costs from them. Mr Huang is not entitled to recover costs from Dong Construction or Mr Dong.

What is the starting point for assessing costs?

[18] This matter involved a half day investigation meeting, so the starting point for assessing costs is \$2,250 being half of the current notional daily tariff of \$4,500 for a one day investigation meeting.

Should the notional starting tariff be reduced?

[19] None of the parties identified any factors that should result in the notional starting tariff being reduced.

[20] However, the Authority considered there needed to be some reduction to reflect that Mr Huang had mixed success, and that some of the investigation meeting time was used on claims against Dong Construction and Mr Dong that did not succeed.

[21] The Authority finds that a reduction of \$500 is sufficient to adequately reflect that, due to the minimal amount of time spent on these unsuccessful claims. That adjustment reduces the notional starting tariff to \$1,750.

Should the notional starting tariff be increased?

[22] Ms Moncur submitted that the Authority should award Mr Huang costs of \$4,500, being double the notional starting tariff of \$2,250.

[23] That submission was accepted. Mr Huang was put to unnecessary additional time and costs because of the way in which Optimal and Ms Zhang elected to conduct themselves.

[24] In particular, the following acts/omissions unnecessarily and unreasonably increased Mr Huang's actual costs:

- (a) Failure to provide him with a written employment agreement;
- (b) Failure to keep legally complaint wage and time records and holiday and leave records for Mr Huang;

- (c) The late denial of the existence of an employment relationship;
- (d) Failure to provide Mr Huang and the Authority with relevant evidence/information;
- (e) Failure to comply with timetable directions;
- (f) Failure to respond to the Authority's attempts to communicate with them;
- (g) Lack of clarity over representation;
- (h) Repeatedly claiming Ms Moncur had conflict of interest, requiring her to lodge an affidavit on that issue;
- (i) Refusing to accept the Authority's finding that there was no conflict of interest and repeatedly raising it, even after being told not to;
- (j) The failure to accept a reasonable settlement offer, before these proceedings were even filed; and
- (k) The failure to attend the investigation meeting and the failure to advise of their non-attendance before the first day of the investigation meeting;

[25] The notional starting tariff should be increased by \$2,750 to reflect these factors.⁴

What costs should Mr Huang be awarded?

[26] Mr Huang is awarded \$4,571.56 costs and disbursements, consisting of \$4,500 towards his actual costs plus \$71.56 to reimburse his \$71.56 filing fee.

How should the costs that are awarded be apportioned between Optimal and Ms Zhang?

[27] The costs Mr Huang has been awarded should be apportioned as follows:

- (a) Optimal is to pay \$3,000 towards Mr Huang's actual costs plus it must reimburse him \$35,78, being half of the \$71,56 filing fee;
 - (b) Ms Zhang is to pay \$1,500 towards Mr Huang's actual costs plus she must reimburse him \$35,78 being half of the filing fee.
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Outcome

[28] Within 28 days of the date of this determination, Optimal is ordered to pay Mr Huang \$3,035,78 and Ms Zhang is ordered to pay him \$1,535.78 towards his costs and disbursements.

Rachel Larmer
Member of the Employment Relations Authority