

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2023] NZERA 382
3191279

BETWEEN

YOUYI ZHANG
Applicant

AND

CUE INTERNATIONAL (NZ)
PTY. LIMITED
Respondent

Member of Authority: Rowan Anderson

Representatives: Simon Greening and Kylie Hudson, counsel for the
Applicant
Ashley Sharp and Laura Sowden, counsel for the
Respondent

Investigation Meeting: On the papers

Submissions received: 11 July 2023 from the Applicant
28 June 2023 from the Respondent

Determination: 18 July 2023

COSTS DETERMINATION OF THE AUTHORITY

[1] Youyi (Anna) Zhang lodged a statement of problem with the Authority claiming that she was unjustifiably dismissed from her employment with Cue International (NZ) Pty. Limited (Cue International). Ms Zhang sought remedies in the form of compensation for lost wages and for humiliation, loss of dignity, and injury to feelings.

[2] Ms Zhang's claims were ultimately withdrawn. At approximately 6.10pm on 13 June 2023 the Authority, and Cue International, were sent notice of the withdrawal by email at approximately 6.10pm. This was the evening prior to a scheduled investigation meeting that was to commence at 9.30am on Wednesday 14 June 2023.

[3] The scheduled investigation meeting was convened, with some slight delay on account of technological issues and whilst contact was made with the applicant's

counsel. However, the investigation meeting was adjourned shortly after confirmation was provided that Ms Zhang had withdrawn her claims. Prior to adjourning I advised that directions would be issued in relation to the issue of costs. Written confirmation of the directions was sent to counsel on 14 June 2023, including a timetable during which the parties were to seek to resolve the issue, and alternatively for the lodgement of memoranda should agreement not be reached.

[4] The parties have not been able to agree on costs, and Cue International now asks the Authority for orders as to the costs it incurred in defence of the claims made by Ms Zhang.

Submissions

Submissions for Cue International

[5] Cue International seeks a contribution towards its costs in the amount of \$41,718.20 on the basis that the sum represents its actual costs in the one-month period leading up to the scheduled investigation meeting. It submits that such an order would reflect the costs reasonably incurred in defending the claims up to the point at which they were withdrawn. In addition to other factors submitted to be relevant, Cue International referred to costs being incurred because of Ms Zhang's late filing of evidence and submissions of 12 June 2023.

[6] Cue International also provided an outline of the events it says resulted in costs being incurred, including in relation to lodging a statement in reply, attendance at a case management conference, preparation of witness statements, the provision of advice, engagement of counsel, expense incurred as a result of the 12 June 2023 memorandum and witness statement lodged on behalf of Ms Zhang, and attendance at the scheduled investigation meeting on account of the late withdrawal.

Submissions for Ms Zhang

[7] Counsel for Ms Zhang lodged submissions acknowledging the late withdrawal and submitting that any award of costs against Ms Zhang should be limited to 50 per cent of the relevant daily tariff, that being a total sum of \$2,250.

[8] Counsel for Ms Zhang submitted that as the matter did not proceed there was no successful party, whilst acknowledging that costs can be awarded against her having regard to the withdrawal of the proceedings and the costs incurred by Cue International.

[9] Ms Zhang says that Cue International's submissions do not identify any factors that would justify an uplift to the daily tariff, let alone to the extent of the contribution sought which she submits is approximately 11 days at that tariff rate. Ms Zhang referred to two previous cases in the Authority where proceedings were unilaterally withdrawn by an applicant, three, and 21, days prior to the relevant investigation meetings.¹ Costs awards were made in those cases in the sum of \$2,250 and \$2,000 respectively.

Analysis

Costs principles

[10] The Authority has discretion to award costs, may order any party to pay costs and expenses as it thinks reasonable, and may apportion such costs and expenses between the parties as it thinks fit.²

[11] The principles as to the exercise of that discretion are well known, including that costs will generally follow the event, that awards will be modest, that Calderbank offers may be taken into account in setting costs, and that costs are not to be used as a punishment or as an expression of disapproval of the unsuccessful party's conduct.³

[12] The daily tariff is usually taken as a starting point,⁴ although is not to be used in a rigid manner, with principled adjustments made having regard to the to the particular characteristics of a case.

Application of the daily tariff

[13] I find that Cue International, having regard to the late withdrawal of the proceedings, is entitled to an award of costs.

[14] The substantive proceeding was set down for a one-day investigation meeting. There was, at least in practical terms, little notice that Ms Zhang was intending to withdraw her claims. Additionally, the notification of withdrawal did not have the effect of immediately resolving the proceedings in circumstances where costs, as identified by the Authority at the case management conference held on 14 November 2023 and in subsequent written directions, were still in issue.

¹ *Davis v MDL Civil and engineering Limited* [2022] NZERA 271 and *Stewart Financial Group v McDonald* [2020] NZERA 362.

² Employment Relations Act 2000, Schedule 2, clause 15.

³ *PBO Limited (formerly Rush Security Limited) v Da Cruz* [2005] ERNZ 808 at [44] to [46].

⁴ Practice Note 2: Costs in the Employment Relations Authority, issued 29 April 2022.

[15] Such was the lateness of the email notification, being after business hours the evening prior to the investigation meeting, that the investigation meeting was convened, and counsel were required to attend. Whilst the investigation meeting did not proceed in terms of consideration of the claims made by Ms Zhang, confirmation as to the withdrawal was required and the issue of costs remained unresolved and required discussion and the making of directions. In terms of the daily tariff, I consider the appropriate starting point as being one-fifth of the daily tariff, that being a sum of \$900.

[16] I accept Cue International incurred costs in preparation for the investigation meeting, preparation that counsel would have completed by the time of receiving the email notification as to the withdrawal. Such was the timing of the withdrawal email that Cue International and their counsel cannot reasonably have been expected to make significant alternate arrangements as to the utilisation of all the time set aside for the investigation meeting, at least with the exception of most of the afternoon.

[17] Whilst it would not always be the case where proceedings are unilaterally withdrawn at short notice, particularly where short but at least some meaningful notice is given where a much more modest uplift may be appropriate, I consider an uplift equivalent to two-fifths of a day appropriate in this case, that being an additional sum of \$1,800.

[18] I do not consider there is a basis for any downwards adjustment. The timing of the withdrawal, including in circumstances where the issue of costs remained unresolved, provides no basis for a downwards adjustment.

[19] Contrary to what is submitted by counsel for Ms Zhang, I consider that Cue International's submissions do disclose a basis for an uplift to the tariff amount. I find that the late submission of additional material on 12 June 2023, two days prior to the investigation meeting and in the context where directions for the lodgement of witness statements had been issued in November of 2022 requiring Ms Zhang to lodge any witness statements by 17 May 2023, resulted in Cue International unreasonably incurring additional costs.

[20] Whilst I accept some additional expense was incurred, the relevant statement was confined in nature, effectively to observations regarding a single meeting. I find

the time and expense in obtaining any necessary instructions would have been reasonably limited and not significantly out of the ordinary in terms of proceedings of this nature. Only a modest adjustment is warranted in the circumstances, and I consider an appropriate amount to be \$200.

Orders

[21] For the above reasons I order Youyi Zhang to pay Cue International (NZ) Pty. Limited, within 28 days of this determination, \$2,900 as a contribution to towards its costs of representation.

Rowan Anderson
Member of the Employment Relations Authority