

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2023] NZERA 41
3128955

BETWEEN LILI WANG
 Applicant

AND HAPPY EATING LIMITED
 First Respondent

AND YING CAO
 Second Respondent

AND XIAO LIANG SUN
 Third Respondent

Member of Authority: Rachel Larmer

Representatives: David Kim, advocate for the Applicant
 Martin Lyttleton, for the Respondents

Investigation Meeting: On the papers

Submissions and Other 12 September 2022 from the First Respondent
Information Received: 14 and 18 September 2022 from the Applicant
 19 September 2022 from First Respondent
 20, 21 and 28 September 2022 from Applicant
 5 October 2022 from Applicant
 19 October 2022 from First Respondent
 22 November 2022 from First Respondent
 29 November 2022 from Applicant
 1 December 2022 from Applicant

Date of Determination: 27 January 2023

COSTS DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Authority has issued two determinations involving these parties.

[2] The first determination was issued by Member Campbell on 10 March 2021.¹ That determination involved assessing the admissibility of disputed evidence in the Statement of Problem and attachments, that were alleged to have contained privileged material that breached mediation confidentiality.²

[3] The Authority upheld the Respondents' claim that privileged material had been improperly included in the documents that had been lodged by the Applicant. The Authority ordered the Applicant to remove/redact all material that breached mediation confidentiality. Costs were reserved, to be dealt with along with costs for the substantive matter.³

[4] The second determination was the substantive determination issued by Member Nuttall on 29 August 2022.⁴

[5] Ms Wang had claimed a total of \$154,434.09 in the Statement of Problem she lodged on 17 December 2020, which consisted of \$19,434.09 for wage arrears, \$15,000 for an unjustified dismissal personal grievance claim and total penalties of \$120,000 against the three respondents.

[6] Ms Wang's wage arrears claims against the First Respondent did not succeed. Ms Wang's claims against the Second and Third Respondent did not succeed.

[7] Ms Wang's unjustified dismissal claim against the First Respondent (Happy Eating Limited) succeeded to the extent that the Authority determined that she had been dismissed in a procedurally unfair manner. The Authority awarded Ms Wang \$4,000 distress compensation under s 123(1)(c)(i) of the Employment Relations Act 2000 (the Act) for her procedurally unjustified dismissal.⁵

¹ *Wang v Happy Eating Limited and Ors* [2021] NZERA 96.

² Other claims made about the disputed material were not upheld.

³ Above n1, at [63].

⁴ *Wang v Happy Eating Limited and Ors* [2022] NZERA 424.

⁵ Above n4, at [74].

[8] Paragraphs [76] - [79] of the substantive determination dealt with costs. The parties were encouraged to resolve costs by agreement, with a timetable being set for the parties to file costs submissions should agreement not be reached.

[9] Paragraph [78] of the substantive determination stated that costs submissions had to include a breakdown of how and when the costs were incurred and needed to be accompanied by supporting evidence to prove the actual costs incurred.

[10] Costs were not agreed, so Ms Wang sought a costs order against the First Respondent. Ms Wang was unable to apply for costs against the Second and Third Respondents because they (and not her) were the successful parties, because her claims against them had not succeeded.

Authority's investigation

[11] By agreement, the costs application was determined 'on the papers'.

[12] The First Respondent challenged whether any legal fees had actually been paid and it invited the Authority to conclude they had not. Ms Wang was therefore put to the formal proof of her claim that she had actually incurred legal fees.

[13] The First Respondent also submitted that Ms Wang's conduct meant that she should not be awarded any costs.

[14] Both parties filed submissions. Ms Wang filed costs information along with affidavits from herself and her advocate, Mr David Kim, to prove the amount of costs she had actually incurred.

[15] Ms Wang said that she had been charged \$300 plus GST per hour and had paid her advocate (Mr Kim) via his business Migrant Employment Law Service Limited ("*MELS*") total legal costs of \$19,320 GST inclusive.

[16] Ms Wang said she had paid her legal costs in cash, using cash she had brought into New Zealand with her when she first arrived here. The Authority asked Mr Kim to provide bank records from MELS to prove the cash payments Ms Wang made had been received by MELS.

[17] Mr Kim informed the Authority there were no such records. He explained that Ms Wang's cash payments were not paid into MELS's bank account, so there were no banking

records to prove the amount of legal costs that had actually been paid by Ms Wang. These funds were apparently retained by MELS in cash.

[18] The Authority held a Case Management Conference (CMC) with the parties on 25 October 2022 to discuss issues that had arisen from the costs information Ms Wang had provided.

[19] There was a discussion during the CMC about the cash payments and lack of MELS's banking records to prove that its legal fees had been received in cash from Ms Wang. The Authority also raised concern with Mr Kim about the tax issues associated with cash payments not being recorded in a MELS bank account.

[20] When the Authority inquired into what tax had been deducted from these payments, if there was no record of the payments being made to MELS, Mr Kim said that in accordance with advice received from his longstanding accountant he (Mr Kim) just wrote on the invoice "*paid*" and the date the payment was received.

[21] That was the full extent of the records of the legal fees Ms Wang had paid, meaning the only record of the cash payments made by Ms Wang were the handwritten notations Mr Kim had made on the invoices that he said had been paid in cash.

[22] When the Authority suggested that arrangement could attract the Inland Revenue Department's (IRD's) attention because it appeared to be irregular, Mr Kim said that he was satisfied that there were no irregularities.

[23] MELS does operate a business bank account because the Authority was provided with a screenshot from its current account of a transaction that had occurred on 25 November 2022, in which MELS refunded Ms Wang \$14,835. There was no explanation of why that amount was refunded from MELS's bank account when the money Ms Wang had paid had not been paid into the MELS bank account.

[24] Although the First Respondent challenged the fact that any legal fees had been paid, and the amounts of any payments Ms Wang made, the Authority was ultimately satisfied that Ms Wang did pay MELS for advocacy services Mr Kim provided.

[25] The Authority formed that conclusion based on invoices being provided to Ms Wang and on historical WeChat messages that showed money being asked for and Ms Wang saying

she would be paying the requested money in cash. These were historical records that predated the Authority's substantive investigation meeting, so were considered more likely than not to be genuine, as opposed to having been created to support Ms Wang's costs application.

[26] The actual payment of legal fees was also supported by the affidavits filed by Ms Wang and Mr Kim, and by the fact she had been refunded money from MELS as proved by the banking screenshot that Ms Wang provided to the Authority.

[27] The Authority noted that because the claims Ms Wang made against the First Respondent (Ms Cao) and the Second Respondent (Mr Sun) did not succeed, she was not entitled to recover costs from those respondents. Accordingly, this cost determination relates to the First Respondent's costs liability only.

Issues

[28] The following issues are to be determined:

- (a) Should Ms Wang be awarded costs?
- (b) What costs and disbursements has Ms Wang claimed?
- (c) What was the notional starting point for assessing costs in this matter?
- (d) Should the notional starting tariff be adjusted to reflect the particular circumstances of this matter?
- (e) What disbursements should Ms Wang be awarded?

Legal Position

[29] 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, an unsuccessful party will normally be required to contribute to the successful party's actual legal costs.

[30] 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 time.

[31] 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.⁶

[32] Although the Authority recognised that Ms Wang did not succeed on every claim she had put before it for determination, that did not mean she was not the successful party. The Employment Court in *Coomer v JA McCallum & Son Limited* made it clear that mixed success is nevertheless to be treated as success for the purposes of awarding costs.⁷

[33] Ms Wang was required to pursue Authority proceedings in order to achieve the success she obtained. Because she was held to have been dismissed, and was awarded \$4,000 for a procedurally unjustified dismissal, Ms Wang can be said to be the successful party, even though her success was limited.

Should Ms Wang be awarded costs?

[34] There is no reason to depart from the usual principle that costs generally follow the event, meaning that Ms Wang should be awarded some costs. Mixed or limited success is still to be viewed by the Authority as success for the purposes of awarding costs.

[35] Ms Wang's mixed success was a factor that could be appropriately accounted for by making adjustments to the notional starting tariff, in accordance with the Authority's usual costs' assessment process. Ms Wang's limited or mixed success was therefore not a factor that disqualified her from obtaining an award of costs in her favour.

What costs and disbursements has Ms Wang claimed?

[36] Ms Wang's initial costs application filed on 31 August 2022 sought to recover total costs and disbursements of \$10,264.56, being \$8,000 costs plus \$2,264.56 disbursements.

[37] On 29 November 2022 Mr Kim filed an amended costs memorandum that explained that Ms Wang had been refunded some of the costs she had paid MELS. He said Ms Wang sought costs for a two day investigation meeting and noted that she now claimed disbursements of \$491.56.

⁶ [2005] ERNZ 808 and [2015] NZEmpC 135.

⁷ [2017] NZEmpC 156.

[38] On 1 December 2022 Mr Kim filed a banking screen shot that established that MELS had refunded Ms Wang \$14,835 of the total legal fees she had paid.

[39] Mr Kim also confirmed to the Authority on 1 December 2022 that due to this refund, the actual legal costs Ms Wang had paid was \$4,485 GST inclusive, so she sought to recover that amount plus disbursements of \$491.56, being \$420 translation fees plus \$71.56 filing fee.

What was the notional starting tariff for assessing costs in this matter?

[40] The notional starting tariff would normally have been \$8,000, because this matter involved a two-day substantive investigation meeting. However, that was not the starting point that should be adopted in this matter because Ms Wang's actual costs were less than that notional starting tariff.

[41] A party can only be awarded maximum costs equal to the actual costs they have incurred. In this case, Ms Wang incurred maximum costs of \$4,485 GST inclusive. The notional starting point for assessing costs is therefore \$4,485 GST inclusive for the two day investigation meeting.

[42] However, the Authority recognised that amount was also not the appropriate starting point for assessing costs in this matter, because the total costs of \$4,485 GST inclusive that Ms Wang incurred had to be apportioned between three respondents.

[43] That apportionment exercise meant that the maximum potential costs that could be imposed on the First Respondent should be one third of Ms Wang's actual total legal costs. Therefore Happy Eating Limited faced a maximum potential costs liability of \$1,495 GST inclusive, being one third of the notional starting tariff of \$4,485 GST inclusive, being the actual legal costs Ms Wang incurred.

Should the notional starting tariff be adjusted to reflect the particular circumstance of this matter?

Should the notional starting tariff be increased?

[44] The Authority was not aware of any factors that would warrant an increase being made to the notional starting tariff of \$1,495 GST inclusive, for the purposes of assessing how much Happy Eating should contribute towards Ms Wang's actual legal costs.

[45] The parties did not identify any and the Authority was not made aware of any *Calderbank* offers that had been made by the parties in this matter.

Should the notional starting tariff be reduced?

[46] The Authority considered that there were a number of factors that required the notional starting tariff, of \$1,495 GST inclusive, to be reduced.

[47] These included Ms Wang's inclusion of privileged material that breached mediation confidentiality in the Statement of Problem and associated documentation she provided to the Authority. That inappropriate inclusion of privileged material required an Authority investigation which ruled that at least some of the disputed material was inadmissible and needed to be removed/redacted by Ms Wang.⁸

[48] The Authority also noted in its substantive determination that the Respondents had raised credible objections to the accuracy of the Google records Ms Wang had provided, and that they had submitted that Ms Wang had edited the Google records to show different times from those originally generated.⁹

[49] The Authority noted that Ms Wang did not respond to that allegation in her written submissions and had not provided any other material to rebut the submissions the Respondents had made about the accuracy (or rather inaccuracy) of the Google records she had provided. The Authority's conclusion about that evidence was that it was "*unable to exclude the possibility that these records may have been edited*".¹⁰ That finding alluded to potential wrongdoing by Ms Wang.

[50] Likewise, the handwritten records in a notebook that was produced by Ms Wang during the substantive investigation contained "*a discernible difference in the pattern of recording*" when compared to the Google app records.¹¹ The Authority therefore did not consider that to be a reliable record, which implied that Ms Wang was not considered to be a truthful witness.¹²

⁸ Above n1.

⁹ Above n2 at [27].

¹⁰ Above n2 at [28].

¹¹ Above n2 at [24].

¹² Above n2 at [25].

[51] Ms Wang also submitted audio recordings that the Authority did not derive benefit from.¹³

[52] The inclusion of privileged material that breached mediation confidentiality, the need for the Authority to conduct an investigation into admissibility issues, the submission of inaccurate Google records that appeared to have been improperly edited, the submission of unreliable handwritten records, the provision of a lengthy unhelpful transcripts of unnecessary audio recordings were all factors that warrant a reduction being made to the notional starting tariff.

[53] The Authority finds that all these matters unnecessarily and unreasonably increased the length of the substantive investigation meeting, and thereby Ms Wang's actual legal costs.¹⁴ Given that all of these were matters within Ms Wang's exclusive control and were indicative of an inefficient and ineffective way of pursuing her claims, it was not appropriate for the Frist Respondent to suffer adverse costs consequences as a result of Ms Wang's blameworthy conduct.

[54] Another factor that needed to be reflected in a reduction being made to the notional starting tariff was Ms Wang's very limited success. Although she had claimed over \$154,000 in total, she only recovered a total of \$4,000. Out of the ten claims Ms Wang made that had required a substantive determination, she had succeeded on only one of her claims.

Adjustment made to notional starting tariff

[55] For the above reasons, the costs contribution Happy Eating Limited should be required to make to Ms Wang's actual legal costs needed to be reduced to ten percent of the notional starting tariff for assessing costs, namely \$149.50 GST inclusive.

What disbursements should Ms Wang be awarded?

[56] Ms Wang is entitled to recover \$71.56 from Happy Eating Limited to reimburse her filing fee.

[57] However, her claim of \$420 for the translation fee was not accepted. The Authority found her audio recordings unhelpful, Mr Kim speaks Mandarin so he could have done those

¹³ Above n2 at [36] and [38].

translations himself at no cost. The Authority also considered the extent of translation of the audio recordings that occurred seemed excessive and unnecessary.

[58] The Authority noted in the substantive determination that the recordings were not of assistance and that when questioned during the investigation meeting Ms Wang identified only three short passages out of all the recording transcripts she had provided.

[59] It would have been easy for Mr Kim to have provided that information to the Authority, without the need for incurring the costs associated with Ms Wang's engagement of a translator to translate all of the audio recordings, that Member Nuttall considered had not been helpful.

Outcome

[60] Within 28 days of the date of this determination, Happy Eating Limited is ordered to pay Ms Wang \$221.06, being of \$149.50 GST legal costs inclusive plus \$71.56 to reimburse her filing fee.

Rachel Larmer
Member of the Employment Relations Authority