

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2023] NZERA 440
3189359

BETWEEN

MIKAYLA ZHANG
Applicant

AND

TE WHATU ORA – HEALTH
NEW ZEALAND
Respondent

Member of Authority: Marija Urlich

Representatives: Mark Donovan, counsel for the Applicant
Tim Oldfield, counsel for the Respondent

Investigation Meeting: On the papers

Determination: 15 August 2023

COSTS DETERMINATION OF THE AUTHORITY

[1] The Authority issued a determination on 10 July 2023 which found Ms Zhang had been unjustifiably disadvantaged in her employment and made an award of compensatory damages in her favour.¹ This determination followed one issued on 21 December 2022 in which Ms Zhang's claim for interim injunctive relief was declined.² Costs in both determinations were reserved. In the 10 July 2023 determination a timetable was set for memoranda to be filed if the parties were unable to resolve the issue of costs themselves.³ The parties have not been able to resolve costs between them and have filed memoranda within the timetable.

Ms Zhang's claim for costs

[2] Ms Zhang seeks a costs award of \$2,250 as a contribution to costs incurred in the substantive matter. She also seeks to recover a disbursement of \$71.55, being the

¹ *Mikayla Zhang v Health New Zealand – Te Whatu Ora* [2023] NZERA 363.

² *Mikayla Zhang v Health New Zealand – Te Whatu Ora* [2022] NZERA 687.

³ N1 at [68] and [69].

filing fee. Invoices Ms Zhang has provided show she has incurred legal costs of \$11,850 plus GST in respect of the substantive matter. She submits the award sought is warranted given:

- the investigation meeting for the substantive matter occupied a full day;
- she had a large measure of success in the substantive matter and costs should follow the event; and
- she was unsuccessful in the interim matter which was dealt with on the papers and did not require an in-person investigation meeting.

Te Whatu Ora's response

[3] TWO says costs should lie where they fall because:

- TWO successfully defended Ms Zhang's interim injunction application and she was partially successful in the substantive determination;
- mixed success can influence an award of costs; and
- TWO incurred actual legal costs in defending Ms Zhang's interim injunction application in excess of the costs claim she had made.

Costs principles

[4] The Authority has power under clause 15 of Schedule 2 of the Act to award costs. This power is discretionary and must be used in a principled manner. Principles guiding the Authority's approach to costs include:

- The statutory jurisdiction to award costs is consistent with the Authority's equity and good conscience jurisdiction.
- Equity and good conscience is to be considered on a case by case basis.
- Costs are not to be used as a punishment or as an expression of disapproval for an unsuccessful party's conduct, although conduct which increased costs unnecessarily can be taken into account in inflating or reducing an award.
- Costs generally follow the event.
- Awards will be modest.
- Frequently costs are judged against a notional daily tariff.

Costs analysis

[5] Ms Zhang was the successful party in the substantive matter. It is usual that costs follow the event and that the unsuccessful party will be required to make a contribution towards the successful party's costs. It is accepted Ms Zhang has incurred actual costs in respect of this matter. She should receive a contribution to costs incurred.

[6] In assessing an appropriate award of costs the notional daily tariff is a starting point.⁴ The investigation meeting for this matter took one day. The applicable daily tariff is \$4,500.00 for the first day and is therefore the starting point.

[7] The next step in the assessment is to consider whether there are factors which warrant an increase or decrease in the tariff. There are factors which warrant a decrease namely the unsuccessful interim injunction proceedings. Looking at the totality of proceedings and the measure of success Ms Zhang has enjoyed this could not be said to be a nil all draw, a scenario which might warrant a costs lie where they fall approach. In addition to her personal grievance being upheld, for which she has been awarded remedies, the vindication Ms Zhang received as a consequence is properly recognised as a tangible element in the assessment of costs in the round.

[8] What then is an appropriate decrease in the daily tariff considering a reasonable contribution to costs reasonably incurred? Weighing all the relevant factors including Ms Zhang's unsuccessful injunction application a reasonable contribute to costs reasonably incurred is \$2,250.00. The filing fee disbursement is not allowed being an expense incurred by the unsuccessful interim application.

Outcome

[9] Within 21 days of today's date Health New Zealand Te Whatu Ora is ordered to pay Mikayla Zhang \$2,250.00 without deduction being a contribution to costs reasonably incurred.

Marija Urlich
Member of the Employment Relations Authority

⁴ Practise Note 2 Costs in the Employment Relations Authority, 29 April 2022.