

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2023] NZERA 703
3178001

BETWEEN FIE XIE, HONGWEI WANG
and ZHUGUO XI

Applicants

AND DYLAN SOLUTIONS
LIMITED

Respondent

Member of Authority: Alastair Dumbleton

Representatives: Karen Keat, advocate for the Applicants
Peter Verschaffelt, advocate for the Respondent

Costs submissions received: 27 October 2023 from Applicants

Determination: 24 November 2023

COSTS DETERMINATION OF THE AUTHORITY

[1] In its determination dated 30 October 2023¹ the Authority found the three applicants had been employed by the respondent Dylan Solutions Ltd (DSL) and had been underpaid their entitlements to annual holiday pay and public holiday pay.

[2] To resolve their employment relationship problem, under the Employment Relations Act 2000 (the ER Act) and the Holidays Act 2003 (the HA) the Authority ordered DSL to pay in total \$16,299 to the applicants.

¹ [2023] NZERA 635

[3] In relation to costs, the Authority noted that Ms Keat, who had represented the applicants, had already provided to the Authority, on 27 October 2023, a copy of a tax invoice for \$2,116.55 charged for her advocacy services.

[4] Treating that as an application for costs, the Authority directed that any reply was to be made by DSL within 14 days of the determination.

[5] Nothing has been received from DSL, which had been represented by Mr Verschaffelt at the investigation meeting.

[6] As the determination recorded², the applicants were first employed in New Zealand by Shalom Scaffolds and Renovations Ltd (SS&RL), a company having close connections with DSL. For efficiency, the applicants' claims against SS&RL and DSL were heard together in the same investigation meeting, at which Mr Verschaffelt represented both respondents.

[7] The applicants' costs of attending part of that meeting have now been compensated for by an award of the Authority made on 10 November 2023³. As SS&RL had earlier been put into liquidation, the costs were awarded against Marilyn Taufa, a person the Authority found had been involved in a breach by SS&RL of employment standards.

Principles of costs awards in Authority investigations

[8] The Authority has the power to award costs under Clause 15 of Schedule 2 of the ER Act.

[9] The law to be applied in determining costs was reviewed by the Employment Court in *PBO Limited (formerly Rush Security Ltd) v Da Cruz*⁴.

[10] In summary the Court held⁵, the Authority has a discretion in awarding costs and fixing the amount of those. Costs will normally be awarded to the party most favoured in the result of an Authority investigation, and the amount of costs will usually be modest.

² at paras [1] and [2]

³ *Fie Xie and five others v Marilyn Taufa* [2023] NZERA 251

⁴ [2005] ERNZ 808

⁵ Above at [44]

[11] Costs are not to be awarded as punishment or to express disapproval of a party's conduct. The purpose is to compensate a party who or which has incurred expense in applying to the Authority to have it investigate and determine claims, or incurred expense in responding to such claims.

[12] It is open to the Authority to question whether all or any costs incurred by a party were necessary or reasonable.

[13] The nature of the particular investigation meeting can influence costs. Attempts by parties to resolve matters themselves by compromise, including the making of without prejudice offers may be considered.

[14] The Authority has a discretion to award costs based on a daily tariff.

[15] In taking a tariff-based approach, adjustments up or down can be made where necessary, to reflect the conduct of parties, the preparation required in a particularly complex matter, or any other significant features of the individual investigation meeting.

[16] Currently the Authority's tariff, which is publicised and revised periodically, is \$4,500 for the first day of an investigation meeting and \$3,500 for each subsequent day.

Should costs be awarded?

[17] The Authority made orders entirely in favour of the applicants and there is no reason why they should not be awarded some compensation for their actual costs.

[18] Costs should be awarded on the basis of the time taken for the investigation meeting held on 4 October 2022. This was approximately half a day; the other half being used for the investigation of the claims against Marilyn Taufa.

Order for costs and disbursements

[19] When an investigation meeting is no longer than half a day, *pro rata* the daily tariff is \$2,250. As this exceeds the amount of \$2,116.55 the applicants were invoiced by Ms Keat, and because an award is not to exceed actual costs, the amount to be paid

by DSL is \$2,116.55. This includes the Authority filing fee of \$71.55 and office expenses (including printing, photocopying and courier fees) of \$95.

[20] DSL is ordered to pay the applicants \$2,116.55 costs, fees and expenses.

[21] The order is made under clause 15 of Schedule 2 of the ER Act.

[22] Payment is to be made within 14 days of the date of this determination.

Alastair Dumbleton

Member of the Employment Relations Authority