

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2024] NZERA 111
3200519

BETWEEN JINGYI SUN
 Applicant

AND TE WHATU ORA - HEALTH
 NEW ZEALAND
 Respondent

Member of Authority: Alex Leulu

Representatives: May Moncur, advocate for the Applicant
 Rebecca Rendle & Sara-Jane Lloyd, counsel for the
 Respondent

Submissions: 22 February 2024 from the Applicant
 1 and 23 February 2024 from the Respondent

Determination: 26 February 2024

COSTS DETERMINATION OF THE AUTHORITY

[1] On 18 January 2024 the Authority dismissed Jingyi Sun’s claims against Te Whatu Ora - Health New Zealand (TWO) for unjustified disadvantage and unjustified dismissal.¹

[2] As part of its determination, the Authority reserved its decision on costs. A timetable was also set for memoranda to be filed if the parties were unable to resolve the issue of costs themselves.

[3] On 1 February TWO filed and served a memorandum asking the Authority to make a further determination for an award of costs against Ms Sun. Ms Sun filed and served her costs memorandum in response to TWO on 22 February. It should be noted, Ms Sun had filed her memorandum outside the specified timetable. Leave is granted

¹ *Sun v Te Whatu Ora* [2024] NZERA 24.

for her memorandum to be considered as part of this costs determination. TWO's response to Ms Sun's memorandum was also considered.

Costs principles

[4] Clause 15 of Schedule 2 of the Employment Relations Act 2000 (the Act) gives the Authority discretion to order any party to a matter to pay to another party such costs and expenses as the Authority thinks reasonable.

[5] The unsuccessful party will usually have to contribute to the costs of the successful party, as well as meeting their own costs. A daily tariff applied by the Authority sets a starting point from which relevant factors and principles may guide an upward or downward adjustment of the amount of costs awarded.² The current tariff for costs is \$4,500 for the first day of any matter and \$3,500 for any proceeding days.

[6] Relevant principles governing costs in the Authority include consideration of whether the conduct of the parties increased costs unnecessarily, warranting an adjustment up or down, without compromising the Authority's otherwise modest approach to costs.³

[7] Costs should not be used to punish a party or express disapproval of an unsuccessful party's conduct.

Should costs be awarded?

[8] The investigation meeting for this matter proceeded over two complete days. TWO sought an order of a contribution of costs against Ms Sun for a total of \$9,750. This amount took into account the Authority's notional daily tariff, being \$4,500 for the first day of the investigation meeting and \$3,500 for the second day.

[9] TWO also asked the Authority to award an addition amount of \$1,750 for its written closing submissions which were lodged with the Authority after the investigation meeting.

[10] In support of its costs application, TWO said it had incurred actual legal costs significantly in excess of \$9,750 in opposing Ms Sun's claims. I accept TWO has

² *PBO Ltd (formerly Rush Security Ltd) v Da Cruz* [2005] 1 ERNZ 808.

³ See www.era.govt.nz/determinations/awarding-costs-remedies.

incurred actual costs exceeding the sum claimed. It submitted that Ms Sun's claims were entirely without merit and put TWO to unnecessary cost.

[11] In response to TWO's arguments, Ms Sun's representative said any significant cost claim against Ms Sun could lead to undue hardship and would be akin to further punishment following the dismissal of her claim. Her representative also said:

- (a) As a low-income worker, Ms Sun has already endured substantial financial hardship over the past 1.5 years, exacerbated by the dismissal of her claim. The imposition of additional financial burden through an order for costs would only exacerbate her already challenging circumstances.
- (b) Ms Sun's mental health had been significantly impacted and she was on anti-depression medication.
- (c) Subjecting Ms Sun to further financial strain would be disproportionate.

[12] In light of these considerations, Ms Sun had asked the Authority to adopt a compassionate approach and to make an order for costs to lie where they fall.

[13] TWO opposed Ms Sun's position because Ms Sun had not filed any evidence to support her views expressed in the memorandum. TWO also said there was no basis to adjust the daily tariff on the grounds of financial hardship.

Outcome

[14] TWO was the successful party and costs should follow the event. It is entitled to a contribution to its costs. There are no compelling reasons to award costs outside the notional daily tariff. In applying the tariff for a two-day investigation meeting, the appropriate award of costs was \$8,000.

[15] Considering all the available information, there were no compelling reasons for an adjustment to this amount. Although I acknowledge Ms Sun's reservations in respect of a costs order against her, no medical or financial evidence had been filed by Ms Sun to support her position.

[16] Accordingly, Ms Sun is ordered to pay \$8,000 in costs to TWO within 21 days of the date of this determination.

Alex Leulu
Member of the Employment Relations Authority