

Attention is drawn to orders
prohibiting publication of
certain information in this
determination

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2024] NZERA 217
3226759

BETWEEN	MM Applicant
AND	ZR HOME LIMITED First Respondent
AND	TZU-TONG MA Second Respondent

Member of Authority:	Nicola Craig
Representatives:	May Moncur, advocate for the applicant Jack Wu, advocate for the first respondent Helen McDermott, counsel for the second respondent
Investigation Meeting:	On the papers
Submissions received:	10 April 2024 from the applicant No costs submissions received from the first respondent 15 March and 11 April 2024 from the second respondent
Date of determination:	16 April 2024

COSTS DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] In April 2023 a migrant worker referred to as MM lodged in the Authority an application regarding his employer ZR Home Limited (ZR or the company) and immigration advisor Tzu-Tong Ma (also known as Jane). The worker's identification as MM is taken from its use in Immigration Advisors Complaints and Disciplinary Tribunal (IACDT or the Tribunal) decisions, referred to below.

[2] Ms Ma is married to the director of ZR. She was identified in the statement of problem as the advisor who arranged with MM to come to New Zealand and work for ZR. MM claimed that he paid an unlawful premium for his employment to Ms Ma. She objected to being a party to this proceeding, but accepted MM had paid her 85,000 RMB (Chinese Yuan, approximately NZ\$20,100) as a fee for her immigration services.

[3] In September 2023 Ms Ma lodged an application to strike her out as a party.

[4] MM had made a complaint regarding Ms Ma's immigration services. The IACDT found that Ms Ma had breached the Licensed Immigration Advisors Code of Conduct 2014 and suppressed publication of MM's name.¹ A subsequent sanctions decision ordered Ms Ma to pay MM NZ\$19,061, being the RMB 85,000 'fee' less NZ\$488.95 which the Tribunal found was all she was entitled to charge him.²

[5] MM withdraw his Authority claim against Ms Ma on the day the Tribunal's sanctions decision was issued, referring specifically to the Tribunal's repayment order.

[6] Ms Ma seeks costs in the Authority against MM. The parties were encouraged to resolve the costs matter but were unable to do so. Submissions for Ms Ma were lodged on 15 March 2024. MM opposed the imposition of any costs against him in submissions of 10 April 2024. Some additional comments for Ms Ma were provided the following day.

Non-publication order

[7] The IACDT ordered that no information identifying the complainant (MM) is to be published other than to Immigration NZ.³

[8] The same MM identification has been adopted in the Authority and it is proper that non-publication is ordered in the Authority to reflect the order in the Tribunal's decision.⁴

[9] The Authority orders that no information identifying MM is to be published other than is set out in the Tribunal decisions and Authority's determination/s.

¹ *MM v Tzu-Tong Jane Ma* [2024] NZIACDT 07.

² *MM v Ms Ma* [2024] NZIACDT 10.

³ *MM v Ms Ma* [2024] NZIACDT 07 at [85].

⁴ The Authority's power to make non-publication orders in the Employment Relations Act 2000, Sch 2, cl 10.

Ms Ma's costs claim

[10] Ms Ma seeks indemnity costs of \$7,820. Invoices are provided in support although they include initial advice to Ms Ma regarding MM's personal grievance claim rather than just costs directly related to the proceeding.

[11] Ms Ma seeks costs on the grounds that:

- (a) There has never been an employment relationship between herself and MM;
- (b) A personal grievance is between an employer and an employee and so does not apply to her and MM;
- (c) Resolutions sought in the statement of problem cannot succeed against her as she is not in an employment relationship with MM; and
- (d) The Authority is not the appropriate forum to hear a contractual dispute between parties (which is not an employment relationship problem).

[12] Ms Ma, through her representative, notified MM and his representative from as early as April 2023 in response to a personal grievance letter, that she had been incorrectly included as a party. The same point was made repeatedly in her statement in reply.

MM's submissions in response

[13] MM seeks to have no costs imposed on him. He is a migrant worker, said to have been subject to unfair treatment and exploitation (although his claim has not been decided in the Authority).

[14] Costs are seen as being unjust, unfair, and disproportionate, with MM said to have already suffered significant hardship and financial loss due to Ms Ma's actions.

Costs discussion and conclusion

[15] The Authority's discretionary power to order costs is found in clause 15 of Schedule 2 of the Employment Relations Act 2000 (the Act).

[16] The principles which govern the Authority's discretion are described by the full Employment Court in *PBO Limited (formerly Rush Security Limited) v Da Cruz*.⁵ The discretion is exercised in accordance with principle and not arbitrarily, considering equity and good conscience. Generally, costs follow the event. They are not to be used as a punishment or as an expression of disapproval for an unsuccessful party's conduct. However, conduct which increased costs unnecessarily can be taken into account in inflating or reducing an award.

[17] Ms Ma certainly gave warning that she intended to seek costs and applied to be struck out as a party to the proceeding.

[18] The first question is whether there is any basis for an award to Ms Ma.

[19] Ms Ma was not MM's employer but there are a number of situations where someone who is not an employer can properly be subject to a claim in the Authority. These included those argued to be aiding and abetting a breach of an employment agreement or involved in employment standards breaches.⁶

[20] Ms Ma does not come within those categories. She was however, said by MM to be the recipient of a premium. The Wages Protection Act 1983 prohibits the seeking or receipt of a premium for employment.⁷ The Authority on occasion orders the return of a premium to a worker. Ms Ma was said to have received a premium and, if established, could have been required to repay it. Ms Ma accepts money was paid by MM to her but says it was for a different purpose - immigration fees.

[21] MM had an arguable claim regarding Ms Ma in the Authority. The application to strike Ms Ma out was unlikely to have succeeded, on the basis of there being an arguable case.

[22] Ms Ma argues that the Authority was not the appropriate forum to hear a contractual dispute between parties (to an immigration advisory contract). Clearly that is not the Authority's primary purpose, which is resolving employment relationship problems. But the Authority is able to make orders requiring the return of premiums to workers who have had to pay them, regardless of whether or not those payments have

⁵ *PBO Limited (formerly Rush Security Limited) v Da Cruz* [2005] 1 ERNZ 808, confirmed in *Fagotti v Acme & Co Limited* [2015] NZEmpC 135.

⁶ The Act, ss 134(2) and 142W.

⁷ Wages Protection Act 1983, s 12A.

gone via an immigration advisor. Thus, I cannot conclude that the Authority was the incorrect forum for MM's claim with Ms Ma.

[23] In conclusion MM's Authority claim regarding Ms Ma was arguable. Subsequent to the Tribunal's order that she return the vast majority of the payment to MM, there probably seemed little purpose in continuing the claim against Ms Ma. At that point it was appropriately withdrawn. In these circumstances, it is not just for costs to be awarded against MM.

[24] Even if costs were appropriate there are some difficulties with Ms Ma's application.

[25] The tests for an award of indemnity costs are high, requiring exceptional conduct.⁸ There is nothing of that nature here.

[26] If costs were otherwise assessed, they are most unlikely to have reached the level of \$7,000. The starting point for the Authority's assessment of the amount of costs is usually the daily tariff. This sets \$4,500 for the first day of an investigation meeting and \$3,500 for each subsequent day.

[27] For a matter that has not been to an investigation meeting, even if decided on the papers, any award would usually be less than the \$4,500 daily tariff.

[28] This matter did not result in a determination of liability as the claim against Ms Ma was withdrawn before even the first case management conference was held. As a result, the preparatory work required prior to the investigation meeting, particularly witness statements, seems unlikely to have undertaken. It may be that no award was appropriate, given the early stage the proceeding had reached, or if one was made, it would be considerably less than the first day's tariff of \$4,500.

[29] In conclusion Ms Ma has not established an entitlement to costs in the Authority. Costs between MM and Ms Ma are to lie where they fall.

⁸ *Bradbury v Westpac Banking Corp* [2009] NZCA 234 at [28].

Nicola Craig

Member of the Employment Relations Authority