

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2024] NZERA 253
3177189

BETWEEN XI (ROBERT) CHEN
Applicant

AND BREAD OF LIFE CHRISTIAN
CHURCH IN AUCKLAND
Respondent

Member of Authority: Rachel Larmer

Representatives: Simon Greening and Kylie Hudson, counsel for the
Applicant
Garry Pollak, counsel for Three Opposing Trustees of
the Respondent Trust Board

Investigation: On the papers

Submissions received: 18 April 2024
1 May 2024 from Three Opposing Trustees of the
Respondent Trust Board

Date of Determination: 2 May 2024

COSTS DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

- [1] The applicant, Mr Xi Chen, sought an award of costs in his favour.
- [2] The Authority has issued two determinations in this matter:
- (a) *Chen v Brad of Life Christian Church in Auckland* dated 9 June 2023;¹
 - (b) *Chen v Bread of Life Christian Church in Auckland* dated 5 April 2024.²
- [3] Mr Chen successfully established that he had been unjustifiably dismissed from his role as a fulltime Principal Pastor of the Bread of Life Christian Church in Auckland,

¹ [2023] NZERA 298.

² [2024] NZERA 24.

which is a registered charitable trust with an incorporated Trust Board (the Board). He was awarded lost remuneration and permanent reinstatement.

[4] The Board is the governing body of the Bread of Life Christian Church in Auckland (the Church). The Church is part of the global Bread of Life Church network, established by the Bread of Life Church in Taipei (the Mother Church).

[5] The Board consists of six trustees: Xin (Connie) Huang, Julia Buhagiar, Jianan (Nancy) Zhang, Jiedan (Dan) Li, Yang (Lucy) Liu, and the applicant Xi (Robert) Chen. The Trust is governed by a Trust Deed.

[6] Three of the trustees, Jiedan Li, Yang Liu, and Mr Chen, support Mr Chen's claims and are together referred to as "the supporting trustees". The remaining trustees, Xin Huang, Julia Buhagiar, and Jianan Zhang oppose Mr Chen's claims, and are together referred to as "the opposing trustees".

[7] The opposing trustees oppose any costs award in Mr Chen's favour. Alternatively, they say any costs should be as per the usual notional daily tariff, which they submitted should be reduced by a third.

The Authority's investigation

[8] Costs were dealt with on the papers. Mr Chen and the three opposing trustees lodged costs submissions.

Legal position

[9] 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, the discretion must be exercised on a principled basis.

[10] Costs may not be used to punish a party but conduct that has unreasonably increased the other party's costs may be reflected in the amount of costs awarded.

[11] The Authority usually adopts a 'notional daily tariff' based approach to costs. The current tariff is \$4,500 for the first day of an investigation meeting and the \$3,500 for each subsequent day. The notional starting tariff is then adjusted to reflect the particular circumstances of each case.

[12] When assessing costs in this matter the Authority has had regard to the ‘costs assessment’ principles identified by the full Employment Court in *PBO Ltd (formerly Rush Security Ltd) v De Cruz*, which were affirmed by the full Employment Court and *Fagotti v Acme & Co Ltd*.³

Issues

[13] The following issues are to be determined:

- (a) Should the Applicant be awarded costs?
- (b) What is the notional starting tariff for assessing costs?
- (c) What (if any) adjustments should be made to the notional starting tariff?
- (d) What costs and disbursements should be awarded?

Should the Applicant be awarded costs?

[14] Costs follow the event. Mr Chen succeeded with all his claims. There is no reason to depart from the usual principle that a successful party is entitled to a contribution towards their actual legal costs.

What is the notional starting tariff for assessing costs?

[15] The Authority issued a preliminary determination on 9 June 2023.⁴ This concluded that Mr Chen was an employee, and the parties were in an employment relationship. The Authority therefore had jurisdiction over Mr Chen’s claims.

[16] Mr Chen was also reinstated on an interim basis to his role as a salaried Principal Pastor on the same terms and conditions that were set out in his employment agreement dated 2 September 2019. Accordingly, Mr Chen was successful on both matters that were the subject of the preliminary determination.

[17] The preliminary determination involved the equivalent of a one day investigation meeting. The jurisdiction issue involved a half-day and the interim reinstatement application involved a half-day.

³ *PBO Ltd v Da Cruz* [2005] ERNZ 808; and *Fagotti v Acme Co Ltd* [2015] NZEmpC 135.

⁴ Above n1.

[18] The notional starting tariff for this ‘on the papers’ preliminary determination is \$4,500, being the starting tariff for a one-day investigation meeting.

[19] The substantive investigation into Mr Chen’s unjustified dismissal claim involved a four-day in-person investigation meeting. The notional starting point for assessing costs in that matter is therefore \$15,000, being (\$4,500 for the first day and \$3,500 for each of the subsequent three days of investigation meeting time).

[20] The notional starting tariff for assessing costs for all matters involving these parties is therefore \$19,500 (being \$4,500 for the preliminary determination plus \$15,000 for the substantive determination).

Should the notional starting tariff be adjusted?

Decrease to notional starting tariff?

[21] The opposing trustees submitted that the notional starting tariff should be decreased by a third. Their reason for that reduction was based on their view that their actions were appropriate, even though the Authority has found they were not.

[22] The opposing trustees again attempted to paint Mr Chen in a poor light, allegations the Authority had rejected after having fully investigated them. The opposing trustees make further criticisms of Mr Chen, which the Authority has not set out in this costs determination, as they are without merit and are irrelevant to an assessment of costs.

[23] The Authority wants to make it clear that Mr Chen did not engage in any blameworthy conduct that has unreasonably or unnecessarily increased his or the opposing trustees’ costs. Mr Chen pursued his claims in a responsible, appropriate and moderate way. He has conducted these proceedings in an economic but also professional manner.

[24] There are no factors that warrant a reduction being made to the notional starting tariff.

Increase to notional starting tariff?

[25] Mr Chen sought an unspecified increase to the notional starting tariff on the basis the opposing trustees had unnecessarily increased his actual legal costs. That submission was accepted.

[26] The opposing trustees conducted these proceedings an inefficient and unfocused manner. This included:

- (a) Lodging evidence that did not address the claims that the Authority was required to determine;
- (b) Providing evidence that was irrelevant, contradictory and conflicting with the position they were trying to advance;
- (c) Pursuing arguments that were not legally viable and which were not even supported by the evidence their own witnesses gave. The fixed term employment agreement issue is an example of that.

[27] The manner in which the opposing trustees have conducted themselves resulted in the first investigation meeting that had been set down for April 2023 having to be adjourned, to give them an opportunity to provide evidence on the specific issues that the Authority would be determining.

[28] This matter also required four case management conferences, which is more than usual.

[29] The opposing trustees were warned during the case management conference held on 14 April 2023 that the manner in which they were conducting these proceedings appeared to be unnecessarily increasing costs, which could result in adverse costs consequences. The warning about adverse costs consequences was also recorded in the Directions of the Authority dated 17 April 2023.

[30] It is appropriate to increase the notional starting tariff by \$3,000 to reflect that the opposing trustees' conduct unreasonably and unnecessarily increased Mr Chen's actual legal costs. He ought not to have to bear the burden of that, particularly when the opposing trustees were put on notice of adverse costs consequences associated with their desire to pursue arguments that were unsupported by the law or evidence.

What costs and disbursements should be awarded?

[31] Mr Chen incurred actual legal costs of \$22,597, so he cannot recover more than that. The uplift made to the notional starting tariff brings it to \$22,500 so it does not exceed his actual legal costs.

[32] After considering what adjustments needed to be made to the notional starting tariff to reflect the particular circumstances of this case, the Authority arrived at the amount of \$22,500 costs, being \$19,500 as the notional starting tariff plus \$3,000 uplift to the tariff to reflect the particular circumstances of this case. It was also not disproportionate to the level of costs awarded in other comparable cases.

[33] The Authority then stood back to consider whether an award of costs of that amount was reasonable and proportionate for what was effectively a five-day investigation, and was satisfied it was.

[34] Accordingly, the respondent is ordered to contribute \$22,500 towards Mr Chen's actual legal costs and to reimburse him \$71.55 for his filing fee.

[35] The Authority records that this costs liability has been incurred directly as a result of the opposing trustees' actions, firstly in unjustifiably dismissing Mr Chen and secondly in the way they have conducted these proceedings. By contrast, the supporting trustees have adopted the legally correct approach to matters involving Mr Chen.

[36] The fact these three opposing trustees have caused the respondent to incur these legal costs along with the liability for lost remuneration that resulted from Mr Chen's unjustified dismissal, contrary to the wishes of the three other supporting trustees, is an example of the current dysfunction that is affecting the Trust Board's ability to operate effectively. The Church is encouraged to address this dysfunction as soon as possible.

Outcome

[37] Within 28 days of the date of this determination, the respondent is ordered to pay Mr Chen \$22,571.55 towards his costs and disbursements.

Rachel Larmer
Member of the Employment Relations Authority