

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2024] NZERA 259
3244399

BETWEEN	YUNBIN NIU Applicant
AND	GWD LIMITED First Respondent
AND	XIAOWEN (SHARON) SHI Second Respondent

Member of Authority: Jeremy Lynch

Representatives: May Moncur, advocate for the Applicant
Amy De-La Cruz, advocate for the First Respondent
DeAnne Brabant, counsel for the Second Respondent

Submissions Received: 16 April 2024 from the Applicant
No submissions received from the First Respondent
8 and 17 April 2024 from the Respondent

Date of Determination: 3 May 2024

COSTS DETERMINATION OF THE AUTHORITY

[1] This determination resolves a claim for costs in relation to an application which has not yet progressed to an investigation meeting.

Background

[2] Yunbin Niu lodged a statement of problem on 8 August 2023, claiming unjustified dismissal, and sought an order for the recovery of an illegal premium under s 12A of the Wages Protection Act 1983 (Wages Protection Act), together with the recovery of a penalty against both respondents under s 13 of the Wages Protection Act.

[3] Xiaowen Shi is the Director of New Zealand Talent Limited, which had been engaged by GWD Limited to assist with the recruitment of Mr Niu. New Zealand Talent Limited has not been named as a respondent in this proceeding.

[4] Although not immediately clear from Mr Niu's statement of problem, it does not appear to be disputed that he was employed by GWD, and not Ms Shi in her personal capacity.

[5] Ms Shi did not file a statement in reply. Instead, she lodged an application to strike out the claim against her. This was accompanied by an affidavit in support, which comprised some 142 pages. Ms Shi submits that there is no employment relationship between her and Mr Niu, and disputes that any premium was paid in respect of Mr Niu's employment.

[6] In addition, Ms Shi submits that no penalty under s 13 of the Wages Protection Act can be recovered against her in her personal capacity, because such an application may only be brought by a labour inspector, not by an employee.

[7] The Authority held a case management conference (CMC) by telephone with the parties on 25 March 2024. During the CMC, Mr Niu's advocate accepted that there was no jurisdiction under the Wages Protection Act for Mr Niu to recover a penalty against Ms Shi, and advised that Mr Niu wished to withdraw his claims against Ms Shi.

[8] After the CMC, Mr Niu's advocate confirmed in writing to the Authority that Mr Niu wished to withdraw his claims against Ms Shi.

[9] The parties were asked to try and resolve any issues as to costs amongst themselves. Unfortunately, they have not been able to do so, and Ms Shi has applied for costs to be awarded.

Ms Shi's claim for costs

[10] Ms Shi applies for full indemnity costs in the sum of \$25,211.45 (including GST and disbursements), or in the alternative an award of uplifted costs because of "having to defend an application that was filed without evidence and jurisdiction".

[11] Ms Shi says that indemnity or uplifted costs should be awarded for the following reasons:

- She was required to attend mediation.
- She had to prepare for and attend a CMC.
- She was put to the time and expense of preparing and lodging an application to strike out Mr Niu's claims against her.
- She has been put to the time and cost of preparing a 142 page affidavit in support of her application to strike out.
- She has been put to the time and expense of preparing and lodging a memorandum containing a proposal dealing with the strike-out application.
- Mr Niu's position was unmeritorious and was motivated by improper considerations.
- Ms Shi also says that Mr Niu was on notice from 24 August 2023 that there is no jurisdictional basis for Mr Nui to bring a claim for a penalty under s 13 of the Wages Protection Act, and his claims against Ms Shi should have been withdrawn back in August 2023, not in March 2024, some seven months later.
- Ms Shi says that Mr Niu has acted in wilful disregard of known facts or clearly established law, and has prolonged the matter by advancing groundless contentions.

Mr Niu's response

[12] On behalf of Mr Niu it is submitted that:

- Imposing costs on him would be unjust and disproportionate.
- It would contravene natural justice to burden him with additional costs.
- The Authority should let costs lie where they fall.

Costs and principles

[13] The Authority has power under clause 15 of schedule 2 of the Employment Relations Act 2000 (the Act) to award costs. This power is discretionary, and must be

used in a principled manner.¹ 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 for disapproval for an unsuccessful party's conduct, although conduct which increases 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.²

Costs analysis

[14] Ms Shi's objective was for the application to be struck out on the basis that a claim for a penalty against her could only be brought by a labour inspector. Mr Niu withdrew his claim against Ms Shi at the CMC, and as a result, she no longer faces a penalty claim that she must defend. In that way, Ms Shi has achieved her objective. She has had a measure of success, and is therefore entitled to a consideration of costs.

[15] From the point at which Ms Shi accepted service of Mr Niu's statement of problem in August 2023, the only steps Ms Shi was required to undertake were to attend mediation, lodge a statement in reply, and attend the CMC.

[16] Ms Shi could have lodged a simple statement in reply, containing her application to strike out. However, Ms Shi instead chose to lodge a strike-out application, together with a comprehensive affidavit in support. Neither of these were required by the Authority.

[17] Ms Shi has provided copies of the invoices from her representative which set out the various attendances between August 2023 and March 2024. The combined total

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

² For further information about the factors considered in assessing costs, see: [Practice Direction of the Employment Relations Authority \(era.govt.nz\)](https://www.era.govt.nz/practice-direction-of-the-employment-relations-authority)

of these invoices is a substantial sum, particularly given the matter has not progressed to an investigation.

[18] The invoices disclose that Ms Shi is seeking costs in relation to attendance at mediation. Only in very rare and limited circumstances would the Authority consider awarding mediation costs. The circumstances of this matter do not justify an award of mediation costs.

[19] In addition, the invoices provided disclose significant attendances for research into various legal issues. Had Mr Niu's claim against Ms Shi progressed to an investigation meeting, such legal research may well have been of benefit. However, as noted above, no investigation meeting has occurred. The legal research is therefore not strictly necessary.

[20] Similarly, although the Authority has been assisted by Ms Shi's memoranda, strike-out application, and fulsome affidavit in support, none of these steps were required by the Authority.

[21] Ms Shi's invoices disclose a number of attendances which were not strictly necessary. I do not consider it reasonable to require Mr Niu to meet Ms Shi's legal costs in relation to attendances which were not strictly necessary.

[22] Given the nature of the attendances, it is not appropriate to award full indemnity costs. I decline to exercise my discretion to award full indemnity costs.

[23] In *Eden v Rutherford & Bond Toyota Limited* the Court held:³

... In circumstances where a matter is withdrawn before being heard, the proximity of the withdrawal to the scheduled hearing, and all the circumstances in which the withdrawal was made, may be relevant including, in the latter case, supporting an award for full indemnity costs.

[24] Mr Niu withdrew all his claims against Ms Shi at the CMC held on 25 March 2024. At that point Mr Niu's application was still at a relatively nascent stage. No investigation meeting date had been set, and the parties had not been directed to prepare and lodge written witness statements.

[25] In the alternative to her claim for indemnity costs, Ms Shi seeks an uplift of the daily tariff. Frequently, the Authority determines costs against a notional daily tariff.

³ *Eden v Rutherford & Bond Toyota Limited* [2010] NZEmpC 43 at [17].

For investigation meetings shorter than a full day, the daily tariff is often reduced proportionally. In this matter, no investigation meeting has occurred. Therefore, it is not necessary to make a proportional adjustment to the daily tariff.

[26] I take into account the principle that the Authority should not use costs as a punishment or as an expression of disapproval of the unsuccessful party's conduct. In determining the quantum of costs payable, the Authority may take into account conduct which has increased costs unnecessarily. There is nothing in the conduct of Mr Nui which has had the effect of increasing costs unnecessarily, and there is no evidence that he has been motivated by improper purposes.

[27] However, Ms Shi has had to defend a claim that was subsequently withdrawn, after she had incurred representation costs. It is reasonable for Ms Shi to receive a contribution to her costs.

[28] In the circumstances and taking into account awards of costs in similar cases, a reasonable contribution to costs reasonably incurred by Ms Shi is \$1,000.00.

Outcome

[29] Within 28 days of today's date, Yunbin Niu is ordered to pay to Xiaowen (Sharon) Shi \$1,000.00 without deduction, being a contribution to her legal costs.

Jeremy Lynch
Member of the Employment Relations Authority