

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2024] NZERA 489
3235339

BETWEEN	ZE HOU Applicant
AND	HD CONTRACTOR LIMITED First Respondent
	CHENG CHENG FOONG Second Respondent
	YANGZHENG GUO Third Respondent

Member of Authority: Peter Fuiava

Representatives: Applicant in person
Simon (Qing Yao) Song, counsel for the Respondents

Submissions received: 19 July 2024 from the Respondents

Determination: 16 August 2024

COSTS DETERMINATION OF THE AUTHORITY

[1] By determination dated 9 July 2024,¹ I dismissed Ze Hou's claims of unjustified disadvantage, wage arrears and unjustified dismissal against the respondents who, having successfully defended matters, are entitled to an award of costs. However, the parties have not been able to reach agreement concerning costs and, consequently, a determination is required.

How has the Authority proceeded?

[2] Mr Hou did not respond to the respondents' costs submissions which were lodged with the Authority on 19 July and served on him by email on 22 July 2024. In my determination, he was given 14 days from the date of service to respond but to date, he has not done so.

¹ *Hou v HD Contractor Limited & ors* [2024] NZERA 409.

[3] On 1 August 2024, Mr Hou was directed to have his costs submissions lodged with the Authority by 5 August. Later that same day on 1 August 2024, he advised by email that he was taking his mother back to China to see a doctor and was catching his flight in two hours' time. He stated that he had a lot of information that he would provide once he returned to New Zealand but he did not mention when that would be.

[4] Mr Hou was granted an extension to 12 August 2024 and a further copy of the respondents' costs submissions were emailed to him. However, as of drafting this costs determination, he has neither lodged his submissions nor contacted the Authority.

What is the respondents' position regarding costs

[5] Mr Song submits that the starting point for costs is \$8,000 which is based on the Authority's notional daily tariff for a two-day investigation meeting (\$4,500 for the first day and \$3,500 for the second day). He seeks an uplift adjustment in costs because Mr Hou declined a fair and reasonable Calderbank offer, his conduct during the litigation unnecessarily prolonged the case and increased costs, and the case was complex and required significant legal work and preparation.

[6] Alternatively, Mr Song seeks indemnity costs on the grounds that Mr Hou refused a reasonable settlement offer and introduced unsubstantiated claims late in the proceedings that unnecessarily prolonged the investigation meeting. Indemnity costs are generally awarded for egregious behaviour which I find was not the case with Mr Hou who had to represent himself when he could no longer afford his former lawyer's legal fees.

[7] Mr Song provided a schedule (supported by tax invoices) of the respondents' actual costs which consisted of \$31,359.55 in legal fees, \$3,335.50 in attending mediation, and disbursements of \$663.56 comprising \$91.20 in parking expenses for the investigation meeting and office service charges of \$572.36.

What is the Authority's approach to costs?

[8] The Authority has the power under sch 2 cl 15 of the Employment Relations Act 2000 to award costs. However, the discretion to order a party to pay costs to another party must be exercised in accordance with principle. Those principles are well settled

and are outlined in its practice note which is publicly available.² Further information is also available in its Practice Direction.³

[9] Informing the Authority's approach on costs is relevant caselaw such as *PBO v Da Cruz* in which the Employment Court observed that, since its inception, the Authority has held to some basic tenets concerning costs which relevantly include:⁴

- Costs generally follow the event (i.e. the unsuccessful party will normally be required to contribute to the costs of the successful party).
- Calderbank offers may be taken into account when setting costs.
- That awards will be modest.

How much costs should be awarded against Mr Hou?

[10] There are difficulties with the respondents' arguments for an uplift in costs. What has been described as a Calderbank offer was in fact a verbal settlement offer that was made during mediation. Because absolute confidentiality applies to what occurs within the four walls of mediation, the details of the verbal offer remain privileged. However, a Calderbank offer is a communication in writing that is made between legal representatives on a without prejudice basis the terms of which are not disclosed to the court except on the question of costs.

[11] There is no evidence before me of a written Calderbank offer to Mr Hou that I can consider in setting costs. As to the claim that he prolonged the investigation meeting, while Mr Hou did introduce new evidence in the form of a secretly recorded conversation, the playing of that recording did not result in significant and undue delay. The investigation meeting was scheduled for three-and-a-half days but was concluded in one-and-a-half days. While a lower starting point of \$5,750 ($\$2,250 + 3,500 = \$5,750$) for an investigation of that duration could be argued for, the hearing was closer to a two-day investigation meeting.

[12] The respondents successful defence of Mr Hou's claims reflects two things. First, it appears that he was not well advised at the outset by his previous legal representatives as there was a clear lack of corroborative evidence for his case to

² www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1.

³ www.era.govt.nz/assets/Uploads/practice-direction-of-the-employment-relations-authority.pdf.

⁴ n 2 at [44].

succeed. Second, while the respondents were well represented by Mr Song, the Authority is statutorily designed to be an investigative, non-technical, low level and readily accessible forum. Cost awards in the Authority are modest for good reason because if substantial cost awards were made against unsuccessful litigants, this would have a chilling effect on applicants approaching the Authority for redress.

[13] It is both reasonable and consistent with the Authority's approach to costs that Mr Hou reimburse the respondents for disbursements and expenses incurred. Costs for attending mediation is not something that can be claimed for particularly as mediation is the primary problem-solving mechanism in this jurisdiction.

Outcome and order

[14] For the reasons given above, the Authority orders **Ze Hou to pay the respondents \$8,663.56 as a contribution towards their representative's actual costs no later than Friday 13 September 2024.**

Peter Fuiava
Member of the Employment Relations Authority