

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI
TE WHANGANUI-Ā-TARA ROHE**

[2024] NZERA 575
3259539 and 3259560

BETWEEN	JUN LI WANG First Applicant
AND	LILI WANG Second Applicant
AND	TWIN RIVERS MOTEL 2020 LIMITED Respondent

Member of Authority: Natasha Szeto

Representatives: Mr Wang for the Applicants
Jills Angus Burney, counsel for the Respondent

Submissions received: 12 June 2024 and 2 July 2024 from the Respondent
16 July and 15 September 2024 from the Applicants

Date: 30 September 2024

COSTS DETERMINATION OF THE AUTHORITY

[1] Mr Jun Li Wang and Mrs Li Li Wang lodged Statements of Problem in the Authority making multiple claims against their former employer Twin Rivers Motel 2020 Limited (Twin Rivers) on 29 and 30 October 2023.

[2] The Authority set down an investigation meeting for two days in Hamilton starting on 7 May 2024. The Authority was assisted by a Chinese (mandarin) interpreter for Mr and Mrs Wang. Less than half a day into Mr Wang's evidence, both representatives asked for the Authority's investigation to be paused for resolution

discussions. These were ultimately unsuccessful at resolving matters between them. Late in the afternoon and on instructions from his clients, Mr and Mrs Wang's then representative Mr Van Lawrence requested an adjournment for the Applicants to obtain alternative representation. Twin Rivers objected to the application on the basis that it was ready to proceed. After hearing from both parties, I determined Mr and Mrs Wang needed the opportunity to obtain alternative representation and I granted their adjournment application on that basis. Later that night, Mr Van Lawrence withdrew his representation in writing as he had indicated he would.

[3] On 8 May 2024 I formally granted Mr and Mrs Wang's application to adjourn and directed Mr Wang to advise the Authority of the name and contact details of their new representative by 15 May 2024. Following this, I advised the parties I would hold another Case Management Conference to set a date to resume the investigation meeting.

[4] On 15 May 2024, Mr Wang wrote to the Authority to withdraw his case. On 16 May 2024 in response to a question from the Authority, Mr Wang confirmed he was withdrawing both his own and his wife's claims.

[5] There was no agreement between the parties as to costs. This determination resolves the issue of costs.

Submissions

[6] Twin Rivers applies for costs on the basis that the withdrawal of the matter without its consent gave rise to an "inevitable" claim for costs. It describes the investigation as being stalled and then abandoned and asks for costs to be awarded on a 2B scale basis. It says the conduct of the case has unnecessarily increased its costs, requiring "extensive disclosure", three Case Management Conferences, numerous applications and compliance memoranda, and the preparation of seven respondent witnesses. Twin Rivers says its actual costs incurred have exceeded \$30,000.00 plus disbursements and it ought to receive a significant contribution to this. Twin Rivers also says there is justification for an uplift in costs on the basis of a *Calderbank* offer it made to Mr and Mrs Wang on 31 October 2023 for \$12,000.00 in compensation and \$1,500.00 as a contribution to costs, which was unreasonably declined. Finally, Twin Rivers says it holds no concerns about Mr and Mrs Wang's ability to pay costs given requirements imposed by Immigration New Zealand as to their resources and earning potential.

[7] Mr and Mrs Wang have communicated with the Authority about Twin Rivers' application for costs, but have not lodged or filed submissions responding directly to the points raised by Twin Rivers. Mr and Mrs Wang submit they withdrew their cases "out of goodwill" and it would be deeply unfair to impose costs on them as this would amount to turning their case into one "where the victim compensates the perpetrator". They say Twin Rivers' claim should not be supported, and they will take further legal action if "unfair decisions [are] imposed on [their] family". Mr and Mrs Wang say the Authority should dismiss Twin Rivers' claim for costs.

[8] In a Minute dated 10 September, I extended the deadline for Mr and Mrs Wang to provide further submissions and/or information in response to Twin Rivers' costs application because they had not responded to the amount of costs sought by Twin Rivers, the *Calderbank* offer that was made, or the disbursements claimed, or provided any information about their financial situation. In response to my Minute, Mr Wang says he has been unemployed since July 2023. Mrs Wang has been unable to work due to emotional stress. Mr Wang says the family is currently living off their savings. They have expensive rent and living expenses including tuition fees and medical expenses for a critically ill parent in China. Mr Wang says substantial costs associated with the treatment and care of this parent will inevitably add to their financial burden.

Approach to costs

[9] The Authority has clear statutory power to order such costs and expenses to be paid as the Authority thinks reasonable.¹ Costs are awarded at the Authority's discretion.² The principle that costs follow the event is well-recognised by the Authority and courts.³ There is no basis for the Authority to depart from this approach and apply the 2B scale costs sought by Twin Rivers.

[10] I am satisfied both parties were aware of their potential liability for costs. In my Notice of Directions (15 December 2023), I referred to the Authority's power to award costs to a successful party under clause 15 of schedule 2 of the Employment Relations Act 2000 (the Act). The parties were advised of the Authority's tariff based approach in awarding such costs which has been approved by the Employment Court.

¹ Employment Relations Act 2000, Schedule 2, clause 15.

² *NZ Automobile Association Inc v McKay* [1996] 2 ERNZ 622.

³ *Victoria University of Wellington v Alton-Lee* [2001] ERNZ 305 (CA) at [48].

They were advised they could expect the Authority to apply this approach and were advised of the current tariffs, which for a one-day investigation meeting is \$4,500.00.⁴

[11] The principles and the approach adopted by the Authority in which an award of costs is made are settled and set out in *PBO Limited (formerly Rush Security Limited) v Da Cruz*⁵ as confirmed in *Fagotti v Acme and Co Limited*⁶. It is a principle set out in *Da Cruz* that costs are not to be used as a punishment or an expression of disapproval of the unsuccessful party's conduct. The financial situation of the party paying costs can be a relevant factor to take into account. Awards made should be modest, and consistent with the Authority's equity and good conscience jurisdiction.

Analysis

[12] Mr and Mrs Wang voluntarily withdrew the matters they had brought to the Authority. As the successful party, Twin Rivers is entitled to a contribution to its costs actually and reasonably incurred. Twin Rivers says the starting point for assessing costs should be \$8,000.00, on the basis of the tariff for a one-day investigation meeting, plus an additional \$3,500.00 as a "notional amount for fair and reasonable costs including two unsuccessful mediations" up to October 2023. The tariffs set by the Authority incorporate preparation time, and are applied by reference to time spent in the investigation meeting. On that basis, the appropriate starting point for an investigation meeting that took almost a full day, accepting that some of the day was spent in resolution discussions, is \$4,500.00.

[13] I must then consider whether any factors justify an increase in costs. It is a well-settled principle that costs are not intended to punish or express disapproval at an unsuccessful party's conduct. But where an unsuccessful party has acted unreasonably, thereby also unnecessarily increasing costs, an uplift can be considered. A robust approach is to be adopted in relation to *Calderbank* offers. The Employment Court has noted that such an approach is "consistent with the public interest in encouraging the acceptance of reasonable settlement offers and avoiding unnecessary litigation".⁷

⁴ For further information about the factors considered in assessing costs see: www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1

⁵ [2005] 1 ERNZ 808.

⁶ [2015] NZEmpC 135 at 114.

⁷ *Booth v Big Kahuna Holdings Limited* [2015] NZEmpC 4.

[14] I have seen the *Calderbank* offer Twin Rivers made to Mr and Mrs Wang, and I am satisfied it was a reasonable offer made well in advance of the investigation meeting. Acceptance of the *Calderbank* would have put Mr and Mrs Wang in a significantly better position than they are now in following their voluntary withdrawal of their matters. An uplift to the tariff is appropriate to recognise the unexplained rejection of a reasonable *Calderbank* offer and I consider an uplift of 10 per cent (\$450.00) to be a moderate and appropriate amount.

[15] In relation to disbursements, Twin Rivers claims a total of \$2,110.90 incorporating legal typing and printing, accommodation, and per kilometre mileage at government rates. These disbursement claims are supported by invoices. I consider it is reasonable to reimburse Twin Rivers for the scanning, printing and binding of the common bundles provided to assist the Authority's investigation. This amounts to a further \$342.70.

[16] I decline to order payment of any disbursements relating to Twin Rivers' travel costs. The place of employment was Taumaranui and both parties agreed to the matter being heard in Hamilton. Twin Rivers chose to be represented by counsel based in the Wairarapa, and I do not consider it is reasonable for Mr and Mrs Wang to bear the cost of their travel expenses.

[17] Stepping back to look at matters overall and considering parity with other cases, an award of \$5,292.70 as a contribution to costs, which includes an uplift to the tariff based on a reasonable *Calderbank* offer, and the disbursement costs relating to preparation of common bundles represents a modest and appropriate costs award in the circumstances.

[18] I then need to consider whether there should be a decrease to the overall amount based on the financial situation of the party paying costs. The information that Mr and Mrs Wang have provided about their financial situation persuades me that a small reduction is appropriate to recognise the current strain on their financial circumstances relating to supporting a critically ill parent, and I reduce the costs to \$5,000.00.

[19] Finally, Twin Rivers has raised an issue about whether costs should be ordered against both Applicants or solely against Mr Wang, given his claim was more significant than Mrs Wang's. However the way that both matters were conducted before the Authority suggests that it is unhelpful to distinguish between them. I

consider it appropriate to order that costs be paid on a joint and several basis. The parties are given leave to return to the Authority if they require further direction about the division of liability for costs as between Mr and Mrs Wang.

Orders

[20] For the reasons set out above, I order Jun Li Wang and Li Li Wang on a joint and several basis, to pay Twin Rivers Motel 2020 Limited within 28 days of the date of this determination the sum of \$5,000.00 as a contribution to its costs.

Natasha Szeto
Member of the Employment Relations Authority