

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2024] NZERA 672
3144963

BETWEEN	JUNSU KIM Applicant
AND	CROATIAN TILERS LIMITED (IN LIQUIDATION) First Respondent
AND	IVAN SALIC Second Respondent

Member of Authority:	Sarah Blick
Representatives:	Dave Cain and Alex Kersjes, advocates for the applicant Ivan and Ivy Salic for the first respondent Ivan Salic in person
Investigation Meeting:	On the papers
Information and submissions received:	13 September and 31 October 2024 from the applicant None from the respondents
Determination:	13 November 2024

COSTS DETERMINATION OF THE AUTHORITY

[1] On 16 August 2024 the Authority issued a determination in this matter in which Croatian Tilers Limited (CTL) was ordered to pay \$29,980 as personal grievance remedies, as well as \$5,378.40 in arrears of wages and holiday pay plus interest on that amount.¹ I also imposed a penalty of \$7,000 on CTL, of which \$1,000 was payable to Mr Kim. Leave was also granted to recover the arrears and interest amounts from CTL's director and shareholder Ivan Salic, to the extent CTL could not pay them.

¹ *Kim v Croatian Tilers Limited and Anor* [2024] NZERA 488.

[2] The parties were given an opportunity resolve any issue of costs between them, which has not been possible. Mr Kim has applied for costs.

The Authority's process

[3] I am satisfied Mr Kim's application for costs was served on the respondents on 13 September 2024. In my determination the respondents were given 14 days from the date of service of an application for costs to respond. Neither respondent acknowledged the costs application nor lodged a response within the timetable set.

[4] On 3 October 2024, by special shareholder resolution Mr Salic appointed liquidators for CTL. The liquidators' first report for CTL says they had been advised the reason for CTL's failure was due to it ceasing to trade and not having enough assets to satisfy its liabilities. CTL had been registered since 2001. Mr Salic remains the director and shareholder of another company which provides similar services to CTL.

[5] When asked by the Authority whether they consented to this proceeding continuing against CTL for the purpose of determining costs, the liquidators declined consent.²

[6] Mr Kim's representatives were given the opportunity to comment on costs in light of CTL's liquidation, which they have. Mr Salic has not responded to any of the Authority's email correspondence regarding costs. Costs are now determined based on the information before me.

Mr Kim's submissions

[7] Mr Kim points out that as the successful party he is entitled to an award to costs. He further says the investigation meeting itself took a full day, attracting the starting point of the daily tariff at \$4,500.

[8] In support of an increase to costs, Mr Kim relies on an offer made on a Calderbank basis on 28 June 2022, of \$18,682 to CTL. He notes the amount awarded by the Authority was comfortably more than the Calderbank offer provided for and accordingly an uplift, as was made clear within the offer, should be applied.

² Companies Act 1993, section 248.

[9] Mr Kim submits costs should be further uplifted on the basis the respondents actions or inactions frustrated the investigation process and resulted in additional costs to him. He points out that two adjournments at the request of CTL were granted. While these were requested on the basis of health concerns, it is said Mr Kim incurred further costs from the delays which should not be his to bear. He points to further information and evidence having been provided in a manner that has frustrated the process, although it is not clear what this refers to. An uplift is sought not to punish the respondents but to avoid any further disadvantage to Mr Kim.

[10] Mr Kim's representatives have supplied a tax invoice identifying costs relating to this matter totalling \$15,923.54, which includes disbursements of \$221.56. They say no travel or pre-mediation costs are included in that amount. Mr Kim submits a cost award of \$10,000 plus disbursements would be fair and reasonable in all the circumstances.

[11] When asked if Mr Kim had any additional submissions to make on costs following the advice from the liquidators, Mr Kim's representative responded:

- (a) Mr Salic has liquidated CTL and moved operations to Stone Living Limited, another company of which he is the sole director and shareholder. The same services are being provided and all of the same contact numbers are being used. He accepts that is not an issue for the Authority, but it is relevant in terms of costs and intent. Mr Salic "repeatedly" stated he would liquidate CTL rather than pay any determination, and he has made good on that threat.
- (b) Mr Salic has not paid the arrears of wages, and a bailiff has been required to enforce the same.
- (c) Mr Salic has been found liable for wages to Mr Kim and is liable for costs.
- (d) A central principle of any costs consideration is equity and good conscience, and Mr Salic should be found jointly and severally liable for any cost award of this matter.

Costs principles

[12] The Authority has the power under clause 15 of Schedule 2 of the Employment Relations Act 2000 to award costs. This power is discretionary and must be used in a principled manner. 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 of disapproval for an unsuccessful party's conduct, although conduct which increased 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.

Discussion

[13] As CTL's liquidators do not consent to the continuation of the proceedings for the purposes of determining costs, the Authority is not able to award costs against CTL. Costs can still be determined in relation to Mr Salic personally, however. It is appropriate to assess the respondents' joint liability for costs in order to determine if a costs award should be against Mr Salic.

[14] Mr Kim was the successful party and would be entitled to receive a contribution to costs incurred.

[15] In assessing an appropriate award of costs the notional daily tariff of \$4,500 is the starting point. A full day investigation meeting was held with written submissions received at a later date. In my view the starting point should be \$4,500.

[16] The next step in the assessment is to consider whether there are factors which warrant an increase or decrease in the tariff.

[17] I have seen the Calderbank offer Mr Kim made to CTL, which was sent to Mr Salic. I am satisfied the Calderbank offer was a reasonable offer made in sufficient time before the investigation meeting to provide a reasonable time for response. It stated the consequences of non-acceptance. The amounts sought in the Calderbank were less than the amount the Authority ultimately awarded by a significant margin. Acceptance of the offer would have put CTL in a significantly better position. It should

be taken into account. An uplift to the tariff is appropriate to recognise the non-acceptance of offer and I consider an uplift of \$1,500 to be an appropriate amount.

[18] CTL failed to comply with the Authority's timetabling directions on a number of occasions, sporadically engaged with the Authority, delayed the setting down of case management conferences, and sought two adjournments of the investigation meeting, having provided very limited information in support of them and at late stages.

[19] An amended statement of problem was lodged by Mr Kim after the investigation meeting, seeking leave to recover arrears of wages and holiday with interest from Mr Salic in light of evidence he gave at the meeting that he intended to liquidate CTL. That application proved to be well-founded and leave was granted such that Mr Salic is liable for monies CTL cannot pay.

[20] I accept the respondents' conduct during the Authority's investigation increased Mr Kim's costs unnecessarily and warrants an uplift of \$2,000. This assessment results in an adjusted provisional amount of \$8,000.

[21] Mr Kim is entitled to recover the cost of the Authority application fee and the costs incurred in serving the statement of problem on CTL, via Mr Salic.

[22] I do not propose to make an assessment of how costs would have been apportioned between the respondents, had I been able to award costs against CTL. Guided by equity and good conscience, liability for costs and expenses should rest on Mr Salic as the remaining party. If Mr Salic wishes to seek to apportion the amounts between him and CTL, that is a matter for him to pursue with CTL's liquidators.

Outcome

[23] Ivan Salic must pay Junsu Kim within 14 days of the date of this determination:

- (a) \$8,000 in costs; and
- (b) \$221.56 (Authority application fee and disbursements).

Sarah Blick
Member of the Employment Relations Authority