

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2025] NZERA 130
3256299

BETWEEN	SHIBO CHEN Applicant
AND	CONSTRUST LIMITED First Respondent
AND	YUHANG (DEREK) DAI Second Respondent

Member of Authority:	Rachel Larmer
Representatives:	Mins Shih Chieh Chang, advocate for the Applicant Zhenzhen Chen, counsel for the Respondents
Investigation Meeting:	18 and 19 September 2024 in Auckland
Submissions and Other Information Received:	14 February 2025 from the Applicant No submissions from the Respondents
Date of Determination:	4 March 2025

COSTS DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] On 17 January 2025 the Authority issued a substantive determination in favour of the applicant, Mr Shibo (Bob) Chen, which held that the second respondent, Mr Yuhang (Derek) Dai, was his employer and owed him wage arrears and remedies for an unjustified dismissal.¹ No employment relationship was established between Mr Chen and the second respondent, Construst Limited (Construst).

¹ *Chen v Construst Limited & Dai* [2025] NZERA 20.

[2] The parties were encouraged to resolve costs by agreement, but that has not occurred. Mr Chen has lodged costs submissions in which he sought an award of \$11,500.00.

[3] The respondents did not lodge costs submissions.

Legal position

[4] The Authority derives its power to award costs from clause 15 of Schedule 2 of the Employment Relations Act 2000 (the Act). Costs are discretionary, with the discretion to be exercised by the Authority on a principled basis. Costs must not be used to punish a party, or to express disapproval of a party's conduct, unless that conduct had increased the other party's actual legal costs unnecessarily.

[5] Conduct by one party that has unreasonably increased the other party's actual legal costs may be reflected in the amount of costs awarded.²

[6] The Authority usually adopts a notional daily tariff based approach to costs. The current tariff is \$4,500.00 for the first day of an investigation meeting and \$3,500.00 for each subsequent day. The notional starting tariff is then adjusted to reflect the particular circumstances of each case.

[7] When assessing costs in this matter the Authority has had regard to the costs assessment principles identified by the Employment Court in *PBO Limited (formerly Rush Security Limited) v Da Cruz* and *Fagotti v Acme & Co. Limited*.³

Issues

[8] The following issues are to be determined:

- (a) Should Mr Chen be awarded costs?
- (b) What costs and disbursements did Mr Chen actually incur?
- (c) What is the notional starting tariff for assessing costs in this matter?
- (d) Should the notional starting tariff for assessing costs in this matter be adjusted?
- (e) What costs and disbursements should Mr Chen be awarded?

² *PBO Limited (formerly Rush Security Limited) v Da Cruz* [2005] ERNZ 808.

³ *PBO* above n2, and *Fagotti v Acme & Co. Limited* [2015] NZEmpC 135.

Should Mr Chen be awarded costs?

[9] Mr Chen was wholly successful in his claims against Mr Dai but unsuccessful in his claims against Construst. There is no reason to depart from the principle that a successful party is entitled to a contribution towards their actual legal costs.

[10] Mr Chen is therefore able to recover costs from Mr Dai, but not from Construst.

What costs and disbursements did Mr Chen actually incur?

[11] Mr Chen incurred actual legal costs of \$15,962.00 including GST. He therefore cannot be awarded more costs than he has actually incurred.

What is the notional starting point for assessing costs?

[12] This matter involved a two day in-person investigation meeting, so the notional starting point for assessing costs was \$8,000 being \$4,500.00 for the first day plus \$3,500.00 for the second day of the investigation meeting.

[13] Mr Chen's claim that the matter should be treated as if it had involved a three-day investigation meeting, because he lodged these costs submissions, was not accepted. The notional starting tariff has been set to include costs.

Should the notional starting tariff be adjusted?

[14] The parties did not identify any factors they said should result in the notional starting tariff being decreased, and the Authority was not aware of any. Accordingly, there were no factors that should result in the notional starting tariff being decreased.

[15] Mr Chen submitted that the notional starting tariff should be increased to reflect that Mr Dai unreasonably rejected a "without prejudice except as to costs" (*Calderbank*) settlement offer made on 2 August 2024 which was genuine and realistic.

[16] The *Calderbank* settlement offer pointed out that Mr Chen would be successful with his claims so, to mitigate each party incurring legal costs, he put forward a settlement offer that was significantly less than what he was awarded by the Authority. The details of this settlement offer are not recorded in this determination, in case this determination was challenged.

[17] The settlement offer rightly pointed out that the matter would involve a two-day investigation meeting with the starting point for costs for that being \$8,000.00.

Mr Chen said in his settlement offer that it would be prudent for the parties to avoid incurring the costs associated with preparing for and attending a two-day investigation meeting and for the costs associated with preparing written submissions. At that point the respondents had not lodged their evidence.

[18] The Calderbank offer remained open for a week, until 9 August 2024, at which time it was stated to expire. The settlement offer provided for a payment of distress compensation to Mr Chen and for a contribution to his actual legal costs, upon production of a GST invoice.

[19] This was a prudent and serious settlement offer which would have involved all parties avoiding the legal costs they incurred for this investigation meeting.

[20] The Authority had also put Mr Dai on notice of “the doctrine of the undisclosed principal” in the Directions of the Authority (DoA) dated 9 April 2024, which was issued after the case management conference (CMC) which had been held the previous day. This doctrine was discussed during the CMC, so the DoA recorded that. Mr Dai should have known that Mr Chen’s claims against him were very strong, based on Mr Dai’s own evidence.

[21] Although the respondents were legally entitled to put Mr Chen to the formal proof of each of his claims, doing so unreasonably increased his actual costs in light of the clear problems Mr Dai faced based on his own evidence.

[22] The Calderbank offer was timely because it was made more than six months before the investigation meeting. The offer was also made after Mr Chen had lodged his evidence, so the respondents were well placed to do a realistic risk assessment of his claims. His offer should have been accepted.

[23] The Authority should adopt a “steely approach” to the rejection of a reasonable settlement offer. It was therefore appropriate to increase the notional daily tariff by \$3,500.00, which was the equivalent of a third day of investigation meeting time, to reflect that all parties would have been better off if Mr Dai had accepted the settlement offer.

[24] Mr Chen also pointed out that the respondents had not actively participated in the Authority’s process by not responding to Authority communications, not attending the case management conference, being unresponsive to Mediation Services’ request to

confirm their availability to attend directed mediation, and they had submitted their witness statements outside of the timetable.

[25] While the respondents in some respects did not meet the timetable directions and were difficult to communicate with, they did ultimately participate in the investigation meeting by providing witness statements, attending the investigation meeting and lodging submissions.

[26] It was, however, appropriate to award a slight uplift to reflect that the respondents' non-engagement with the Authority did have an impact on Mr Chen's actual legal costs, because additional communications were required with the respondents which were copied to Mr Chen's advocate, which therefore increased the time spent on his file and therefore Mr Chen's actual costs. A \$500.00 uplift is sufficient to reflect that.

[27] Accordingly, as a result of both of these factors the notional daily tariff should be uplifted by \$4,000.00, meaning it went from a notional starting tariff of \$8,000.00 to \$12,000.00.

What costs and disbursements has Mr Chen been awarded?

[28] Mr Chen is entitled to recover legal costs from Mr Dai, who was the unsuccessful party. There was no employment relationship between Mr Chen and the first respondent, Construst Limited, so no costs award is made in respect of that entity.

[29] Mr Dai is ordered to pay Mr Chen a contribution towards his actual legal costs of \$12,000.00 plus GST. Mr Dai is also ordered to reimburse Mr Chen \$71.55 for his filing fee.

Outcome

[30] Within 28 days of the date of this determination Mr Dai is ordered to pay Mr Chen \$13,871.55 consisting of \$13,800.00 (being \$12,000.00 plus GST) towards his actual legal costs plus \$71.55 to reimburse him for his filing fee.

Rachel Larmer
Member of the Employment Relations Authority