

**IN THE EMPLOYMENT COURT OF NEW ZEALAND
AUCKLAND**

**I TE KŌTI TAKE MAHI O AOTEAROA
TĀMAKI MAKĀURAU**

**[2025] NZEmpC 47
EMPC 8/2025**

IN THE MATTER OF a challenge to a determination of the
Employment Relations Authority

BETWEEN NYF LIMITED
First Plaintiff

AND YUNFEI NIE
Second Plaintiff

AND XIANPING XUE (AS THE PERSONAL
REPRESENTATIVE OF THE ESTATE OF
BOWEN ZHANG)
Defendant

Hearing: On the papers

Appearances: M Lyttelton, advocate for plaintiffs
P Young, advocate for defendant

Judgment: 17 March 2025

JUDGMENT OF JUDGE M S KING

[1] This judgment resolves a de novo challenge to a costs determination of the Authority.¹

Preliminary issue

[2] After these proceedings were filed, the defendant, Bowen Zhang, died. The Court acknowledges his family's loss at this time. It was agreed that Mr Zhang's widow, Xianping Xue, would be the personal representative of Mr Zhang's estate and,

¹ *Zhang v Nie* [2024] NZERA 760 (Member Craig).

to allow the proceedings to continue, would be substituted for Mr Zhang as the named defendant. I order accordingly.²

Background

[3] This challenge is connected to substantive proceedings heard by the Authority between Mr Zhang and the two plaintiffs, Yunfei Nie and NYF Ltd.³ Mr Nie is the director of NYF.⁴ There was a dispute about whether Mr Zhang was employed by Mr Nie or NYF. The Authority found that Mr Zhang was employed by NYF but that he was not dismissed.⁵ Further, it found that Mr Zhang was unjustifiably disadvantaged when NYF failed to provide him with full-time work in accordance with their employment agreement.⁶ The Authority ordered NYF to pay Mr Zhang \$838.12 (gross) in lost wages and \$1,000 in other compensation.⁷

[4] Subsequently, the Authority issued its costs determination.⁸ It accepted that tariff costs would come to \$8,000 for a two day hearing but noted that both days finished before the Authority's usual closing time.⁹ It determined that costs should not be reduced as a result of any offers made between the parties to settle the proceedings.¹⁰ It accepted that the proceedings had become unduly complex but stated that both parties were responsible in part for that.¹¹ Although it accepted that Mr Nie had been successful in defending his position, Mr Nie was not awarded costs because of his close relationship with NYF.¹² More generally, the Authority accepted that although it is not normally desirable for costs to outweigh the amount in issue in litigation, Mr Zhang had no other basis to pursue his claim than by engaging in litigation.¹³ Ultimately, it awarded Mr Zhang a sum of \$5,000 in costs along with the Authority's filing fee of \$71.55.¹⁴

² High Court Rules 2016, r 4.50.

³ *Zhang v Nie* [2024] NZERA 638 (Member Craig).

⁴ At [78].

⁵ At [72] and [100].

⁶ At [103].

⁷ At [109].

⁸ *Zhang v Nie*, above n 1.

⁹ At [8] and [22].

¹⁰ At [20].

¹¹ At [23]–[24].

¹² At [26].

¹³ At [15] and [25].

¹⁴ At [27]–[29].

[5] The plaintiffs have challenged the Authority's costs determination.

Legal principles

[6] The Authority has power to award costs.¹⁵ When the Court sets costs for the Authority, it stands in the shoes of the Authority and applies the principles which apply in the Authority rather than those which apply in the Court.¹⁶ Awards are guided by the Authority's Practice Direction on costs, and the Authority has a daily tariff which is \$4,500 for the first day of any investigation and \$3,500 for subsequent days.¹⁷

Submissions

[7] The plaintiffs submitted that the costs award made by the Authority should be reduced as it says there is no evidence that Mr Zhang paid fees to his representative in light of a contingency fee arrangement. In particular, it was submitted that Mr Young's fee arrangement with Mr Zhang was that Mr Zhang would pay him 50 per cent of any award and costs awarded by the Authority. It was also submitted that the Authority wrongly disregarded the settlement offers, that Mr Zhang was only partially successful, that Mr Zhang's claim was overly complicated, and that Mr Nie is entitled to costs.

[8] The defendant does not address the plaintiff's submissions in relation to the contingency fee arrangement. He acknowledged that Mr Zhang did not accept a settlement offer of \$6,000 but notes that the settlement offer was reduced to \$1,000 after Mr Zhang counter-offered with an offer to settle for \$10,000. Further, he suggests that the Authority's substantive award of compensation should be increased to \$50,000, which the Court clearly does not have jurisdiction to do, so I do not consider the issue further. He also seeks a further \$7,560 in costs.

[9] In response, the plaintiffs submitted that the Authority's substantive award cannot now be increased and that there is no basis for increasing the Authority's cost award.

¹⁵ Employment Relations Act 2000, sch 2 cl 15.

¹⁶ *PBO Ltd (formerly Rush Security Ltd) v Da Cruz* [2005] ERNZ 808 (EmpC) at [19].

¹⁷ Employment Relations Authority "Practice Direction of the Employment Relations Authority" (February 2024) <www.era.govt.nz> at 5.

Analysis

[10] The parties agree that costs for these proceedings using the Authority's tariff would come to \$8,000.

[11] The first issue raised by the parties' submissions relates to whether Mr Zhang was the successful party in the Authority. I consider that he was the successful party as remedies were awarded in his favour against NYF.¹⁸ However, I accept that as he was not entirely successful, it is necessary to make a reduction; I consider that issue further below.

[12] In respect of the settlement offers, I note that although Mr Zhang was originally offered \$6,000, that offer was reduced a week later to \$1,000 after he counter-offered \$10,000. The original offer was made at a meeting between Mr Zhang and Mr Nie. The subsequent offer was made on a without-prejudice-save-as-to-costs basis. I do not consider that any reduction is required in relation to these offers.

[13] The first offer was not written and not made on a without-prejudice-save-as-to-costs basis, which gives rise to serious questions about whether it can be considered for the purposes of costs. Further, neither party filed affidavit evidence in relation to it, so the only information available to the Court about the offer was the allegations contained in the submissions filed for the parties, which included allegations by Mr Young that Mr Nie had threatened Mr Zhang when the offer was made. As Mr Zhang is now dead, the Court is not in a position to obtain further testable evidence on the point. Therefore, in light of the sparse information available, I am not satisfied that the offer was reasonable in the circumstances.¹⁹

[14] The second offer was lower than the sums awarded by the Authority and did not make any allowance for the costs already incurred by Mr Zhang in pursuing his claim, so it was not unreasonable for Mr Zhang to accept that offer.

¹⁸ See *Health Waikato Ltd v Elmsly* [2004] 1 ERNZ 172 (CA) at [35]–[40]; and *Coomer v JA McCallum & Son Ltd* [2017] NZEmpC 156, [2017] ERNZ 885 at [37]–[44].

¹⁹ *Robertson v Idea Services Ltd* [2023] NZEmpC 210 at [34].

[15] The plaintiffs suggested that Mr Zhang's claim was overly complicated. However, as noted by the Authority, both parties were responsible for some of that complexity. I do not consider that any reduction is necessary under this heading.

[16] Next, I turn to consider whether Mr Nie is entitled to costs. I accept that he was successful in defending the claim brought against him and that he has separate legal personality from NYF; however, both plaintiffs were represented by the same representative in the Authority, and it was either Mr Nie or his company that was going to be liable. As noted by the Authority, he was the director of NYF and failed to provide an employment agreement to Mr Zhang that would have informed him of the identity of his employer. Therefore, given that the confusion about the identity of the employer arose as a result of Mr Nie's failures, I do not consider that he is entitled to any award of costs.

[17] A copy of the letter of engagement signed by Mr Young and Mr Zhang is before the Court. It states in respect of fees: "This is on a contingency basis, i.e. if you win the case you will pay me half of any awards you receive (including my legal cost). ... You pay the court fee of \$72 and any loss if you fail." It is not unlawful for fees to be charged on a contingency basis.²⁰ However, it is not entirely clear whether the engagement letter allows Mr Young to take 50 per cent of any award plus all of the legal costs or whether it only allows him to take 50 per cent of the award plus 50 per cent of the legal costs.

[18] The plaintiffs' position is that the latter interpretation is correct and that as a result, only half of any award of costs will be received by Mr Young. Mr Young has not engaged with that proposition in his submissions. The plaintiff's position is a reasonable and open interpretation of the engagement letter, and in the absence of submissions from Mr Young on the point, I accept that to be the correct interpretation.

[19] One of the principles relating to the determination of costs is the indemnity principle, which provides that an award of costs should not exceed the costs incurred

²⁰ High Court Rules, r 14.2(2).

by the party claiming costs.²¹ That is to avoid costs becoming a source of profit for successful parties.²²

[20] As Mr Young is entitled to 50 per cent of any substantive award and only 50 per cent of any costs award, then the award of costs should not exceed that sum. In cases where the substantive award is larger than any possible costs award, no adjustment would be necessary. But here that is not the position as the substantive award is low in comparison to the costs claimed.

[21] In the present case, this difficulty can be resolved by first assessing what costs could be awarded and then limiting the amount awarded to 50 per cent of the sum of the substantive award and possible costs award. Of course, there is a risk of some circularity in this approach because the plaintiffs may say that whatever is awarded, Mr Young is only entitled to 50 per cent of that sum, which would give rise to a pointless infinite regression. However, that issue can be resolved by specifying that the sum awarded is to be paid to Mr Zhang's (now Ms Xue's) legal representative, Mr Young, as the contribution to which he is entitled under their engagement letter.

[22] Overall, I consider that the sum of \$5,000 in costs awarded by Authority was reasonable in the circumstances. However, in light of the terms of the engagement letter, that sum needs to be reduced. Once tax was deducted, 50 per cent of the Authority's substantive award came to \$858.16. Therefore, the total costs that can be awarded in the present case is \$3,358.16.

[23] On the other hand, based on text of the engagement letter, I understand that Mr Zhang was responsible to pay the filing fee irrespective of whether he was successful. Therefore, I consider that Ms Xue is also entitled to \$71.55 for that as disbursement.

Costs on challenge

[24] As this was a de novo challenge, I consider that Ms Xue, as the personal representative of Mr Zhang, was the successful party. I consider that she is entitled to

²¹ Rule 14.2(1)(f).

²² David Bullock and Tim Mullins *The Law of Costs in New Zealand* (LexisNexis, Wellington, 2022) at [1.16].

a further nominal sum of costs for one day on a category 1A basis in accordance with the Court's Costs Guideline Scale.²³ Therefore, she is entitled to \$1,590 as a contribution to her costs on this challenge.

Outcome

[25] The Authority's costs determination is set aside, and this decision stands in its place.

[26] NYF is to pay Ms Xue, for the benefit of Mr Zhang's estate, \$5,019.71 within 28 days of the date of this judgment.

Addendum

[27] For completeness, I observe that Mr Young has previously pursued costs against a client where he did not provide legal services of net value.²⁴ In the present proceedings, if he had responded to the plaintiffs' submissions on his fee arrangements, a different conclusion may have been reached. Therefore, Mr Young is cautioned against attempting to recover any additional sum of costs from Ms Xue in addition to those awarded in this decision.

[28] Finally, I encourage Mr Young to obtain legal advice on his engagement letter as to how it could be improved. This is not the first time that it has caused issues in this Court.²⁵

M S King
Judge

Judgment signed at 3 pm on 17 March 2025

²³ "Employment Court of New Zealand Practice Directions" <www.employmentcourt.govt.nz> at No 18.

²⁴ *National Standards Committee I v Young* [2020] NZLCDT 30 at [15], [16] and [40].

²⁵ *Ling v Super Cuisine Group Ltd* [2023] NZEmpC 167 at [10]–[12]. In that case, the fee arrangement was not before the Court, so the result was different.