

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2012] NZERA Christchurch 34
5290976

BETWEEN MI SEON AHN
 Applicant

AND WOO & OK PARTNERSHIP
 Respondent

Member of Authority: Philip Cheyne

Representatives: Andrew McComish, Advocate for Applicant
 Tim McGinn, Counsel for Respondent

Submissions received: 15 February 2011 from Applicant
 7 April 2011 from Respondent

Determination: 23 February 2012

COSTS DETERMINATION OF THE AUTHORITY

[1] In a determination dated 18 January 2011 I upheld some of the applicant's personal grievance and arrears of wages and holiday pay claims. Costs were reserved for each party to lodge and serve a memorandum in accordance with a specified timetable. On 15 February 2011 the Authority received the applicant's memorandum. Adherence to the timetable was disrupted by the 22 February 2011 earthquake. The office of Counsel for the respondent was severely affected by the earthquake which meant he was not able to lodge and serve submissions in reply until 7 April 2011. To the extent necessary I enlarge time to regularise that situation.

[2] In responding to the costs issue counsel raised some matters that required consideration of whether the Authority should reopen its investigation but following hearing from the parties on these various points and for the reasons expressed in my determination dated 31 October 2011 I declined to do so. That left costs as the only issue for determination, which I now deal with.

[3] I am told that Mrs Ahn's costs and disbursements total \$17,802 (plus GST) but her claim is for \$16,952 (plus GST) after making a small allowance for several issues where Mrs Ahn did not succeed. Indemnity costs are sought. Alternatively the claim is for a daily tariff starting at \$3,500 per day and adjusted upwards to reflect several factors.

[4] For the respondent, counsel accepts that there should be some award in the applicant's favour with the issue being the appropriate amount.

[5] I agree that there is no reason to depart from the usual principle that costs should follow the event. Nor do I see any reason to consider an award of indemnity costs. That claim seems to be based on the applicant's success on various points in dispute in the litigation but that is not a reason to award indemnity costs.

[6] Turning to the respondent's submissions, the first point made by counsel is that the applicant's representative appears to have spent about 93 hours on a matter that took about one and a half days of investigation meeting time. Counsel observes that the statements of evidence by and for the applicant could not have taken much time because of their brevity and that there must have been some unnecessary duplication because of an amended statement of claim that corrected some previously exaggerated claims. I think these points are well made so I do not intend to approach assessing costs on the basis that the actual charges were reasonable in the context of what was required for the purpose of participation in the Authority's investigation process.

[7] Counsel submits that the disbursement claim for \$3,000 (plus GST) for 30 hours work in Korean/English *interpretation of documents and communications and to investigate veracity of such in respect of Personal Grievance* is outrageous and suspect, to say the least. I agree that it is unclear what this work relates to. It also emerged after the original investigation meeting that the principal of the company invoicing for this work was a witness for Mrs Ahn. I agree with counsel that the claimed background assistance to the applicant's representative is a luxury that the Authority should not sanction. I also think that no award should follow given the uncertainty of what work was actually done and whether that was necessary for the

purposes of the Authority's investigation. I should note that, as usual, the Authority provided an interpreter for the investigation meeting.

[8] Counsel submits that \$2,000 is an appropriate daily tariff rather than \$3,000. I disagree. \$3,000 has become effectively the starting point for a daily tariff approach and I will adopt it here.

[9] Counsel submits that there were some claims by the applicant that should not have been raised, which were unsuccessful and which unnecessarily added to costs for both parties. Early on I signalled that the applicant's claim to payment of the hourly rate specified in the agreement but on an after tax basis was not likely to succeed given the wording of the employment agreement. Nevertheless the applicant persisted with the claim. I agree that this artificially inflated the applicant's claims and it may have reduced the opportunity for compromise and resolution. There are several similar points made by counsel which I will not repeat here but with which I agree. However, I know nothing of any settlement negotiations which must have been conducted (if at all) on a without prejudice basis. Nor have I been made aware of any calderbank offers. I think that the appropriate way to accommodate the points made by counsel is to reduce the costs to reflect the unnecessary time taken by the applicant as a result of these points. Counsel urges me to reduce the claim by one third but I think a reduction of 20% better reflects the wasted time.

[10] The final point made by counsel concerns the respondent's ability to pay. However, I have no evidence about the respondent's overall financial position so it is not a point that can be taken any further.

[11] The only other point that merits comment is that the applicant and the respondent have incurred some costs in dealing with the ancillary issues raised by counsel in his costs submissions. The Authority should have been made aware of the true connection of the company principal to the applicant's claims at the time of the investigation meeting. I will allow the respondent \$250.00 as a contribution to the extra costs incurred in having to deal with that point.

[12] In summary I will take \$3,000 as a daily tariff starting point for one and a half days, less 20% and less \$250. That leaves \$3,350.00 as the sum payable in costs.

Order

[13] The respondent is to pay the applicant \$3,350.00 in costs.

File material

[14] The Authority

[15] still holds till tapes that were called for as part of the substantive investigation. The period for challenge as of right has lapsed. That material will be returned to the respondent unless within 14 days the applicant establishes good reason for it to be retained by the Authority.

Philip Cheyne
Member of the Employment Relations Authority