

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2025] NZERA 183
3206939

BETWEEN YIPING CHEN
Applicant

AND ARMSTRONG PRESTIGE LIMITED
Respondent

Member of Authority: Antoinette Baker

Representatives: Applicant in person
Laura Briffett, counsel for Respondent

Submissions received: 20 March 2025 from the Applicant
26 March 2025 from the Respondent

Determination: 31 March 2025

COSTS DETERMINATION OF THE AUTHORITY

[1] I issued two determinations in these proceedings between Ms Chen and the respondent, her former employer (AP).

[2] In the first preliminary determination, I found that Ms Chen had not raised various grievances claimed within time and there were no ‘exceptional circumstances’¹ to grant leave for those grievances to continue.² Mr Chen was then able to proceed in substantive proceedings based on one grievance claim and other contractual and statutory claims.

¹ Employment Relations Act 2000 ss114,115.

² *Chen v Armstrong Prestige Limited* [2024] NZERA 91

[3] In the second determination,³ I dismissed Ms Chen's claims in their entirety for reasons set out in that determination.

[4] The parties were asked to resolve costs between themselves. Costs have not been resolved. AP has now asked for an award of costs. Ms Chen has replied. Ms Chen says she lodged an 'out of time' challenge in the Employment Court on 20 March 2025, the day that AP lodged its application in the Authority for costs, but I have nothing before me to show that a stay has been granted. That a party lodges a challenge to an Authority determination does not operate as an automatic stay of proceedings.⁴ I will therefore continue to consider the costs application from AP.

Costs principles

[5] The Authority has the discretionary power to award costs.⁵ A party should receive a reasonable contribution to costs incurred in achieving a successful result. Costs are discretionary, modest, and not a mechanism to punish the other party.

[6] The Authority uses a notional daily tariff adjusting the tariff up or down as appropriate depending on the case. Such an adjustment may take into consideration a liable party's means to pay costs, settlement offers made by either party, additional preparation required if a case is complex, and any conduct of a party that has unnecessarily increased costs.⁶

[7] The current tariff applied for a one-day Authority investigation meeting is \$4,500.00 with subsequent days being \$3,500.00. These amounts are considered a starting point for assessing a reasonable contribution to the legal costs incurred by a successful party preparing for and taking part in an investigation meeting but not including preparation and attendance at mediation.

Starting point for costs in these proceedings

[8] AP has been wholly successful in defending Ms Chen's claims in the substantive investigation process and mostly in the preliminary investigation. Ms Chen submits that if the Authority was to consider costs that none should be awarded because she had limited ability to understand the complexity of the commission payments material that formed part of her

³ *Chen v Armstrong Prestige Limited* [2024] NZERA 95.

⁴ Employment Relations Act 2000, s180.

⁵ Employment Relations Act 2000, Schedule 2, cl 15.

⁶ www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1

claim, that she had limited legal training, that I should consider the ‘disproportionate burden’ any award for costs would impose on a “self-represented individual who pursued her claims in good faith, some of which were substantively validated by the respondent’s actions during the proceeding.”

[9] As a starting point, self-representation may be considered a factor however I have already made comment about this in my substantive determination. I am not satisfied this fact alone supports not awarding costs even at the usual tariff. To the extent that a ‘burden’ is submitted I have no evidence of Ms Chen’s financial position. I have already noted Ms Chen was unsuccessful in all of her substantive claims. Accordingly, I accept that costs as a starting point are to be awarded to the respondent based on the current Authority tariff.

Costs at the tariff

[10] The investigation meeting for the preliminary matter was recorded by the Authority as 2 hours and 45 minutes which AP submits attracts a contribution of \$2,250.00.

[11] AP was almost wholly successful in defending Ms Chen’s application to have personal grievances raised in relation to her employment except, as AP submits, a ‘discreet matter’ being a grievance connected with her allegations of continued under paid or unpaid commission on car sales. This was ultimately not successful in the substantive investigation. As a grievance it was not considered because I found no further commission payments owing beyond the acknowledged findings of AP, which had by then already been paid to Ms Chen. I consider the preliminary matter outcome a successful defence and agree that a half day tariff of \$2,500 for this investigation is a starting point contribution to costs to be ordered.

[12] The substantive investigation meeting took one day finishing at 5.45 pm. I agree given that AP was wholly successful in defending Ms Chen’s claims that this attracts the tariff starting point of \$4,500.00 for the first day.

[13] AP further submits that a further part day should be then added based on the tariff approach. This is because written submissions, were timetabled and this would have taken a part day to be heard. Ms Chen submits she has acted in good faith and did not delay proceedings, but I accept AP’s submission that considerable time was taken in the investigation meeting when I sought to clarify details of what Ms Chen claimed were shortfalls in commission payments. Ms Chen previously had considerable time to have

understood the various audit material AP provided to her over several years when she had sought advice and or various representation. I find her current submission in reply to costs, that her understanding of the commission audit material ‘evolved’ to be inconsistent, with these opportunities and her own confirmed abilities. Ms Chen submits that AP’s production of further information at the investigation meeting caused delays. However, I accept AP’s position that it was responding to the details Ms Chen herself came out with at the investigation meeting regarding commission payments. Accordingly, I accept a further quarter day for submissions should be added based on the tariff. I accept that is the time that it likely would have taken to hear those submissions had there not been a need to allow parties to consider additional material and make written submissions. A quarter day of the second day tariff (\$3,500.00) is added being \$875.00.

[14] Based on the tariff and the above, I find that Ms Chen is liable to a total of \$7,875.00 as a contribution to AP’s costs.

Should there be an uplift to the above award for costs?

Calderbank letters

[15] AP submits that I should recognise two ‘Calderbank’ letters⁷. The Employment Court 4⁸ has observed that while ‘Calderbank’ offers are “front and centre” for the Court when considering costs, the Authority’s discretion is broader and sits within the context of a jurisdiction “intended to be low level, cost effective, readily accessible and non-technical”. That case involved the Court considering as disproportionate an application for costs asking for an uplift of \$20,000.00 to the then one day Authority tariff of \$3,500.00. I do not find direct comparison with the earlier case that the respondent has provided. It was based on a different factual matrix and claim.⁹

[16] The first Calderbank offer was sent to Ms Chen before Ms Chen submitted her amended statement of problem, something I asked her to do in the first phone conference call giving her, as an unrepresented party, an opportunity to better particularise her claims but

⁷ ‘Calderbank’ offers are made by one party, normally the successful party, to settle the claim on terms. The offer is marked ‘without prejudice save as to costs’. The purpose of a Calderbank offer is to not only to attempt to settle a claim but by using the stated words the offering party is reserving the right to bring the offer to the Court’s (or in this case the Authority’s) attention if the claim is not settled.

⁸ *Stevens v Hapag-Lloyd (NZ) Ltd* [2015] ERNZ 224 at [94].

⁹ *O’Connor v Auckland University Students Association* [2014] NZERA Auckland 34.

with strong encouragement for her to seek assistance. The Calderbank offer was also provided before the parties then subsequently prepared for the preliminary matter heard on 26 October 2023. I accept that this letter was sent to Ms Chen on a 'without prejudice except as to costs' basis to resolve as full and final all claims arising out of Ms Chen's employment with AP. Had Ms Chen accepted this offer it would have seen her receive \$6,000.00 recorded as a compensatory tax free payment¹⁰ and, whether or not she accepted the offer a recognised commission shortfall by AP of \$1,734.31 gross. Ms Chen had at that time claimed \$19,000.00 shortfall in her commission payments for selling cars with, I accept, little detail about how she came to those amounts. My substantive Determination dismissed her claims for any commission owed beyond the acknowledged and now paid amount above.

[17] Ms Chen did not accept the first Calderbank offer and then proceeded to lodge and serve an Amended Statement of Problem that significantly extended her claims causing AP to incur further costs because of a need to extrapolate these additional claims. The offer in that light seems to have been reasonable to have accepted. However, Ms Chen equally had the right to make a claim about all the things she claimed including a claim for the hours she alleged that she was working compared to what she was alleges she was paid. I do not find that I should consider an uplift for this letter alone.

[18] The second Calderbank letter was offered after directed mediation, some seven months before the substantive investigation meeting, and before the parties had provided evidence and could reasonably have been expected to have incurred preparation costs. This letter offered to settle all matters with Ms Chen for \$25,000.00, again a tax free payment under s 123(1)(c) of the Act, as a full and final settlement of all matters. Ms Chen did not accept this offer by the time given.

[19] Following the above, evidence was lodged, and I accept that considerably more costs were further incurred by AP. This is supported by invoices provided. AP submits that I consider its submissions for the substantive matter and to take note of the events leading to the 'settlement' of monies to Ms Chen just before the investigation meeting to take one large part of her claims 'off the table'. This was an amount commensurate with the second Calderbank letter that had not been accepted prior to the lodging of evidence and preparation for the investigation meeting. The respondent also draws me to the events that I accept were likely just prior to the investigation meeting that eventuated in this settlement being Ms Chen

¹⁰ Employment Relations Act 2000, s123(1)(c).

approaching both the respondent and an associated entity saying that she would 'go to the media'.

[20] In the above context I find that an uplift for not reasonably accepting the second Calderbank letter supports an uplift of \$4,000.00.

Further uplift for conduct

[21] AP also claims I should take note of various conduct in relation to the way Ms Chen continued with 'unmeritorious' claims, added to instead of simplifying her claims and that across several years did not, despite having the opportunity to be represented more than once engage to resolve what was essentially a complaint about commission payments that she did not particularise until the Investigation Meeting. Ms Chen says she rejects this and that her understanding of the commission payment issues 'evolved.' She blames AP for not providing material to her until much later and or that she did not have the ability to understand it. I prefer the submissions of AP to be more in keeping with Ms Chen's confirmation at the Investigation Meeting that she had not considered the various audit material on commissions sent to her over the time of this lengthy dispute.

[22] I have noted above that Ms Chen received a settlement prior to the Investigation Meeting that partially settled matters without admission of liability in circumstances that were, I accept, initiated by her. I have also noted above that Ms Chen has provided no financial information to support any financial burden of paying costs which may support a payment plan to be considered, something AP submits it would entertain. She was given a clear opportunity to do this in her reply submissions. I therefore do not take any account of financial burden for Ms Chen.

[23] As it stands, the overall uplift to costs sought is \$25,000.00. This is \$17,125.00 above the above calculated tariff, a calculation that has already considered the need for extended time for written submissions and further information due to the way Ms Chen presented further details at the investigation meeting to be responded to. The claim for costs for the preparation of the costs application was also included. I have already awarded an uplift for the second Calderbank letter of \$4,000.00. To award a greater uplift would be out of proportion with this jurisdiction's modest approach to costs.

Summary

[24] Within 21 days from the date of this determination Yiping Chen is to pay AP the sum of \$11,875.00 towards the costs of Armstrong Prestige Limited.

Antoinette Baker
Member of the Employment Relations Authority