

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2019] NZERA 17
3001407

BETWEEN

JINQI GE
Applicant

AND

RENAISSANCE ASSETS
MANAGEMENT LIMITED
Respondent

Member of Authority: Rachel Larmer

Representatives: Applicant in person
John Macdonald and Majka Cherrington, Counsel for
Respondent

Investigation Meeting: On the papers

Submissions Received: 19 September 2018 from Applicant
15 October 2018 from Applicant
30 October 2018 from Respondent

Additional Information: 18 October 2018
02 November 2018
20 November 2018
21 November 2018

Date of Determination: 16 January 2019

COST DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Although the applicant represented himself at the Authority's investigation meeting he incurred legal costs prior to that. As the successful party he was entitled to recover some of his actual costs.

[2] The parties were unable to resolve costs by agreement so the applicant now seeks recovery of his actual costs and disbursements.

Applicant's actual legal costs

[3] The applicant incurred total actual legal costs of \$11,613, incurred with two different legal practices. He also seeks reimbursement of:

- (a) 4,765 CNY (approximately \$1,121 NZD) for his father's airfares from China to New Zealand to attend the Authority's investigation meeting as a witness;
- (b) 3,000 CNY (approximately \$705 NZD) for his father's legal costs of swearing an affidavit in China about the unlawful employment premium he paid on his son's behalf.

Basis for Authority's assessment of costs in this matter

[4] The Authority adopts its usual notional daily tariff based approach to the assessment of costs in this matter. This matter involved four days of investigation meeting time, so the notional starting tariff was \$15,000 (being \$4,500 for the first day and \$3,500 for each subsequent day).

[5] The respondent says that the notional starting tariff should not be applied because the applicant was not represented at the investigation meeting, his actual costs were less than the notional tariff and settlement offers were made prior to the investigation meeting. Although the Authority sought information about these two settlement offers no such information was forthcoming.

[6] The notional starting tariff to be applied when assessing costs in this matter is the actual legal costs the applicant incurred because these were less than the notional starting tariff amount for a four day investigation meeting.

Adjustments that need to be made to the applicant's invoices

[7] Some adjustments need to be made to total amount of legal costs the applicant incurred, as per the amounts he was invoiced, to determine his actual costs for these employment issues. The invoice for \$885.50 dated 02 March 2017 from YT Choi

referred to legal work that included attending mediation. The applicant is not entitled to be reimbursed for his mediation costs.

[8] Despite the Authority seeking further details about the specific work covered in the YT Choi invoice, the responses received were unsatisfactory. That left the Authority in the position of being unable to identify exactly what (if any) legal work had occurred that was not related to preparing for, or attending, mediation.

[9] The Authority has therefore decided to remove the YT Choi invoice from the calculation of the applicant's actual legal costs on the basis it is more likely than not, based on the information currently available to the Authority, legal costs associated with mediation.

[10] That leaves two invoices from Prestige Lawyers dated 26 September 2017 for \$287.50 (which related to the initial consultation) and 06 December 2017 for \$10,440 relating to all other legal work. The December invoice included the legal costs associated with requesting and reviewing the applicant's immigration file from Immigration New Zealand and a \$78.26 disbursement, which I address later.

[11] Prestige Lawyers advised the Authority that the amount it charged the applicant for the immigration work was \$115 (GST inclusive). So the second invoice needs to be reduced to \$10,246.74 to remove the immigration work and the disbursement. The total of both invoices was therefore \$10,534.24 GST inclusive for the legal costs associated with the applicant's Authority claims.

[12] The Authority now needs to consider whether there are any factors that require the notional starting tariff of \$10,534.24 to be adjusted.

Factors that warrant a decrease to the notional daily tariff

[13] The respondent's submission that the notional starting tariff should be decreased to reflect the fact that the applicant attended the four day investigation meeting by himself, without legal representation succeeds. The notional starting tariff is halved to \$5,267.12 to reflect that.

[14] The respondent's submission that the notional starting tariff should be reduced because it made two settlement offers prior to the investigation meeting does not succeed.

[15] The respondent did not disclose the content of these offers so presumably they were less than what the applicant actually received from the Authority. If that was not the case then it was the respondent's responsibility to provide the Authority with the relevant information about that. The respondent's failure to do so means that costs are assessed based on the information currently available to the Authority.

Factors that warrant an increase to the notional starting tariff

[16] The halved notional tariff of \$5,267.12 also needs to be increased to reflect that the manner in which the respondent elected to conduct its case, which the Authority considers unnecessarily increased the applicant's legal costs.

[17] Considerable time and resources were applied to the issue of engaging an independent handwriting expert to provide the Authority with information about the unlawful employment premium note Mr Ge said he was given. This required the Authority to issue directions when the parties did not resolve that issue.

[18] In the end an independent handwriting expert was not engaged by the applicant because the respondent, despite being directed to provide handwriting samples for analysis, failed to do so.

[19] The respondent's explanation that sufficient handwritten documentation was not available was not credible so was, more likely than not, a reflection of the respondent's reluctance to have the unlawful employment premium note assessed by an independent handwriting expert.

[20] Meanwhile getting to that point involved the applicant spending considerable effort and costs in attempting to obtain expert handwriting evidence for the Authority. The applicant should not have to bear the full costs of doing so.

[21] The Authority therefore considers that the halved notional starting tariff of \$5,267.12 should be increased by \$2,500 to reflect that the respondent's conduct of this matter unnecessarily increased the applicant's actual legal costs.

Overview of amount awarded as reasonable contribution toward applicant's actual legal costs

[22] Accordingly, the respondent is ordered to pay the applicant \$7,767.12 towards his actual legal costs. By way of a cross check, the Authority notes that amount is less than half the amount of the notional daily tariff for a four day investigation meeting.

[23] The Authority was satisfied that amount represents a reasonable contribution towards the actual legal costs the applicant incurred, bearing in mind he was not represented at the investigation meeting.

What, if any, disbursements should the applicant be reimbursed for?

[24] In terms of disbursements the Authority is satisfied it is appropriate for the respondent to reimburse the applicant for the \$78.26 disbursement he paid his lawyers for LINZ searches. The applicant's matter involved an unlawful employment premium claim which was unusual enough to justify the applicant's lawyers researching the relevant law.

[25] It is also appropriate for the respondent to reimburse the applicant for the costs associated with his father's travel from China to New Zealand to attend the investigation meeting as a witness. This travel was not linked to any other business, social or personal travel.

[26] It was not until the last day of the investigation meeting that the respondent advised the Authority that it did not wish to question the applicant's father. By that time the applicant's father had already incurred airfares in attending the investigation meeting as the applicant's sole witness.

[27] The applicant is a young man whose first post graduate job was with the respondent. English was his second language and he required a translator during the investigation meeting.

[28] Although the applicant's father attended the Authority investigation in person in order to give his evidence as the witness who paid the unlawful employment premium, no doubt his presence was of support to the applicant who faced two lawyers in addition to his former employer's witnesses.

[29] It is appropriate in such circumstances for the respondent and not the applicant to bear the costs associated with the father's travel disbursements, being 4,765 CNY (approximately \$1,121 NZD).

[30] The respondent should also reimburse the applicant for the actual costs associated with translating documents that he was charged by Auckland Translations Ltd as per its invoice dated 03 May 2017 for CNY 3,000 (approximately \$705 NZD).

[31] The Authority notes that it has adopted the approximate New Zealand dollar amounts given by the respondent in its submissions when converting the CNY amounts incurred into New Zealand dollars for the purposes of fixing costs in this matter.

[32] The applicant is also entitled to be reimbursed \$71.56 for his filing fee.

[33] The respondent is therefore ordered to reimburse the applicant \$1,975.82 for various disbursements that were incurred.

Orders

[34] The Authority orders the respondent, within 28 days of the date of this determination, to pay the applicant \$9,742.94. This consists of \$7,767.12 towards the applicant's actual legal costs plus \$1,975.82 to reimburse disbursements that he incurred.

Rachel Larmer
Member of the Employment Relations Authority