

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

[2012] NZERA Christchurch 272  
5350998

BETWEEN                      SONG GUILIN  
   Applicant  
  
A N D                              KOURA BAY WINES LIMITED  
   (IN RECEIVERSHIP)  
   Respondent

Member of Authority:        M B Loftus  
  
Representatives:              Simon Gaines, Counsel for the Applicant  
   Jeff Hart, Receiver, on behalf of the Respondent  
  
Submissions Received:        1 November 2012 from the Respondent  
   7 December 2012 from the Applicant  
  
Date of Determination:        13 December 2012

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**COSTS DETERMINATION OF THE AUTHORITY**

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[1]     On 29 October 2012 I issued a determination dismissing a wages arrears claim brought by Song Guilin. While he had performed work and not been paid, the outcome was due to the fact he brought the claim against the wrong respondent. The work was performed for another employer in which the director of Koura Bay Wines through whom the work was arranged had an interest. It was also performed on vineyards in which that director had an interest. Costs were reserved.

[2]     At the time Koura Bay was in receivership. The receiver, on behalf of Koura Bay as the successful party, sought an award of costs. He sought costs based on an hourly rate of \$2,875 plus disbursements of \$546.

[3]     These are indemnity costs with the justification for such an award being:

*As Receivers we have statutory obligations to creditors, particularly preferential creditors, to ensure asset realisations are maximised ... We feel in this case that costs have been incurred to the detriment of creditors ... Time spent by the*

*Receivers in responding to this claim would have been avoided had this creditor ceased to pursue an unmeritorious claim with the ERA.*

[4] Toward the end of the investigation meeting the receiver made it clear this approach would be taken as *a message had to be sent*.

[5] The response is:

- a. While a table of costs has been provided, there is no evidence the costs were actually incurred such as invoices etc;
- b. The claim is for indemnity costs and such an award would be contrary to the principle costs are modest;
- c. There is no disentitling conduct on the part of the applicant;
- d. There is no evidence the applicant was advised by the respondent the claim should not proceed to hearing; and
- e. The applicant is of limited means and could not pay the award sought.

[6] Normally the Authority will use a daily tariff approach when addressing such a claim (refer *PBO Ltd (formerly Rush Security Ltd) v Da Cruz* [2005] ERNZ 808). The normal starting point is \$3,500 per day and from there adjustment may be made depending on the circumstances.

[7] The hearing took approximately an hour and a half. That is about a quarter of a day which would, applying the above formula, mean an award in the order of \$875. Koura Bay, however, seeks a greater amount - \$3,421.

[8] For two reasons I conclude an increased award is not warranted. First the argument tendered in support is no longer valid. The argument was assets should be realised for the benefit of creditors. The receivership has now been finalised so the creditors will not benefit from an award. Second, comments made at the hearing indicate there is a punitive element to the claim – that is not permitted by the principles of *PBO Ltd v Da Cruz*.

[9] The next question is whether or not any award should be made. Having considered the arguments tendered on Mr Guilin's behalf I conclude the answer is no.

[10] This is an equitable jurisdiction and an award of costs is discretionary. As already said there is no doubt the work was performed, yet no payment made. Were I now to make an award the beneficiary would be a recipient of the benefit of that work who did not pay. That is not fair or equitable.

[11] In any event I have no doubt from evidence I heard during the investigation that Mr Guilin is, as contended, impecunious. There is no sense in making an order that can not be complied with.

[12] I therefore make no order against Mr Guilin and conclude costs should lie where they fall.

**M B Loftus**  
**Member of the Employment Relations Authority**