

**NOTE: This determination contains an order prohibiting publication of certain information at [13]**

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI  
TE WHANGANUI Ā TARA ROHE**

[2023] NZERA 698  
3172688

BETWEEN	TUAN DAT (MON) NGUYEN Applicant
AND	COMPLETE HOMES PAINTING LIMITED Respondent

Member of Authority: Sarah Kennedy-Martin

Representatives: Paul Mathews, advocate for the Applicant  
Nicolaas Platje, counsel for the Respondents

Submissions received: 9 August 2023 from Applicant  
8 September 2023 from Respondent

Determination: 23 November 2023

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**COSTS DETERMINATION OF THE AUTHORITY**

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[1] In a substantive determination dated 18 July 2023, the Authority found Mr Nguyen's dismissal was unjustified.<sup>1</sup> Complete Homes Painting Limited (CHPL) were ordered to pay Mr Nguyen \$2,288.00 in lost wages and \$15,000.00 compensation. The Authority reserved the issue of costs and set a timetable for exchange of submissions.

[2] The parties were encouraged to resolve the issue of costs between the but have been unable to do so. The Authority received submissions on behalf of both parties.

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<sup>1</sup> *Tuan Dat (Mon) Nguyen v Complete Homes Painting Limited* [2023] NZERA 381.

Mr Nguyen seeks costs of \$4,500.00 plus an uplift of \$1,500.00 in recognition of an earlier Calderbank offer of \$14,000.00 that was declined by CHPL.

[3] CHPL agrees an uplift of \$1,500.00 is appropriate and consents to a total costs award of \$6000.00 but makes an application to pay the total amounts owing (costs and the amounts ordered in the substantive determination), in instalments of \$4,000.00 per month.

### **Costs**

[4] Costs are a matter of discretion. The discretion is to be exercised in accordance with principle and not arbitrarily. The main principle in the exercise of the discretion is that costs follow the event. If a party is successful, they will be entitled to an award of costs. Mr Nguyen was the applicant and was successful in bringing his claims to the Authority.

[5] The Authority's investigation meeting time amounted to one full day. The starting point for costs based on the Authority's daily tariff is \$4,500.00 for the first day. The Authority can from that starting point consider whether there are factors justifying an increase or decrease in costs. This can include whether an effective Calderbank offer was unreasonably refused.<sup>2</sup>

### *Calderbank offer*

[6] When a Calderbank offer is sent by an applicant, unreasonable refusal to accept the offer can result in an application by the offeror for an uplift in a subsequent award for costs at the end of the substantive matter if the offeree loses.

[7] The Calderbank offer was marked "without prejudice save as to costs", clearly set out what the offer was and stated it could be put before the Authority when it considered costs if Mr Nguyen was successful. It was also stated Mr Nguyen would seek an uplift if he was awarded more than the Calderbank offer of \$14,000.00. Mr Nguyen was indeed successful in the Authority and CHPL were ordered to pay Mr Nguyen \$15,000.00 in compensation and lost wages.

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<sup>2</sup> [www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1](http://www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1).

[8] CHPL would have been in a better position had it accepted the offer in April 2022 which was well prior to the investigation meeting and before either party incurred litigation costs. A \$1,500.00 uplift in costs taking the total to \$6,000.00 would therefore be appropriate.

### **Payment plan**

[9] CHPL also seeks a payment plan of \$4000.00 per month until the total balance has been paid. Truong Huyen Cao, Director of CHPL provided a sworn affidavit detailing the financial position of CHPL including its profit and loss statement, balance sheet and bank records to support the application for a payment plan.

[10] To the extent this application is in relation to a payment plan for the orders under the determination dated 18 July 2023, I am only able to make such an order at this stage in relation to the costs award.

[11] However, should the matter be formally before the Authority it would likely order payment by instalment based on the information from CHPL about its financial position and its stated intention with regard to payment to Mr Nguyen.

[12] On that basis the parties are encouraged to discuss and agree on a payment plan for any outstanding monies owing as a result of the earlier determination. Leave is reserved for the parties to return to the Authority if they are unable to reach agreement.

### **Non-publication**

[13] A non-publication order was sought in relation to Ms Cao's affidavit and the commercial information contained in it and the attachments. Taking into account the purpose for which the commercial information about CHPL was provided, I consider there is little public interest in that information being available for publication. That information should also remain confidential between the parties.

[14] I order non-publication of CHPL's commercial and financial information set out in Ms Cao's affidavit and attachments.

## **Orders**

[15] Complete Homes and Painting Limited is ordered to pay Tuan Dat Nguyen an award of costs in the amount of \$6000.00 in two monthly instalments of \$4000.00 and \$2000.00.

Sarah Kennedy-Martin  
Member of the Employment Relations Authority