

IN THE EMPLOYMENT RELATIONS AUTHORITY

AUCKLAND

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

[2020] NZERA 282
3074492

BETWEEN

WENLI WEI
Applicant

AND

SUNLIGHT JMB FUTURE
LIMITED
Respondent

Member of Authority: Eleanor Robinson

Submissions: 20 July 2020 from the Applicant
6 July 2020 from the Respondent

Date of Determination: 21 July 2020

COST DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] In a determination dated 25 June 2020 ([2020] NZERA 253) I found that the Applicant, Mr Wenli Wei, was not owed monies in respect of arrears of wages, unpaid public holiday entitlement, rest and meal breaks, nor that he had been paid below the minimum wage rate by the Respondent, Sunlight JMB Future Limited (Sunlight).

[2] In that determination costs were reserved in the hope that the parties would be able to settle this issue between themselves. Unfortunately they have been unable to do so, and the Respondent has filed a submission in respect of costs.

[3] Mr Fleming, on behalf of the Respondent, cites a total of actual costs to the Respondent of \$9,435.21 (including GST) in respect of a preliminary hearing and a substantive investigation.. This total amount consisted of \$1,702.00 (including GST) in respect of representation provided initially by another representative, and \$7,733.21 incurred

as a result of with Mr Fleming's representation (which amount included GST and a translation fee of \$565.00).

[4] The Respondent is also seeking that a costs award take into account the expense incurred in it having to file a costs memorandum, although it is accepted that the Authority does not usually award costs on costs.

[5] The Respondent is seeking a contribution to costs and disbursements in the sum of \$7,023.94. Supporting invoices have been provided.

Respondent's Submissions

[6] The Respondent submits that in respect of the preliminary matter which was heard 'on the papers' the appropriate starting point is half of the daily tariff for the second or subsequent day which is currently set at \$3,500.00 i.e. \$1,750.00.

[7] The Respondent incurred costs of \$1,023.94 (including GST) which is less than the starting point and submits that it is appropriate that this is the sum awarded to the Respondent in respect of the preliminary investigation.

[8] It is submitted that Mr Wei was unsuccessful in respect of all his claims in respect of the substantive matter and that his conduct contributed unnecessarily to the cost of proceedings by:

- a) Failing to particularise his claims so that the Respondent was obliged to guess their substance and prepare a range of responses;
- b) Filing a claim for unjustified dismissal without first raising a personal grievance ;
- c) Advancing untenable and unmeritorious arguments including assertions without foundation that the employment was for a continuous period of 108 weeks; that he was paid \$8.00 per hour; and repeatedly demanding the production of non-existent records.
- d) Filing his statement of evidence 10 days after the due date;
- e) Providing minimal evidence in that statement;
- f) Failing to put key documents in his control before the Authority;
- g) Attempting to conduct the proceedings by way of emails to Authority Officers rather than through the Authority's usual processes; and
- h) Ignoring Sunlight's attempt to negotiate an agreed outcome in respect of costs.

[9] It is submitted that these factors resulted in additional time spent by counsel for Sunlight in respect of correspondence with the Authority; adjustments to work flow to account for Mr Wei's late filing of evidence; and Sunlight having to present a broader range of evidence than would have been required had Mr Wei particularised his claims.

[10] It is submitted that an uplift above the daily tariff is appropriate to reflect these factors.

Submissions from the Applicant

[11] Mr Wei submits that there was no requirement for Sunlight to incur the costs of legal representation and since it chose to do so, it should be responsible for bearing that expense.

[12] Mr Wei also notes that a challenge has been filed in the Employment Court.

Costs Award

[13] The Authority's power to award costs is at the discretion of the Authority pursuant to clause 15 of Schedule 2 of the Employment Relations Act 2000 (the Act).

[14] Although the Applicant has challenged determination [2020] NZERA 253, in accordance with s 180 of the Act:

The making of an election under section 179 does not operate as a stay of proceedings on the determination of the Authority unless the Court, or the Authority, so orders.

[15] The Authority's practice is not to stay a determination on reserved costs pending the progress of a challenge. I do not consider there are grounds for doing so in this case.

[16] The principles the Authority applies in respect of costs are well-settled and outlined in *PBO Limited (formerly Rush Security Ltd) v Da Cruz*¹. The principles include that costs generally follow the event and that costs will be modest and reasonable.

[17] It is also a principle that costs are not to be used as a punishment or expression of disapproval of the unsuccessful party's conduct.

[18] There was a preliminary matter determined 'on the papers' and a substantive matter which involved just over half a day of investigation time. I accept the costs incurred by

¹*PBO v Da Cruz* [2005] 1 ERNZ 808

Sunlight in respect of the preliminary matter as being appropriate. This means that I consider the starting point for costs is \$1,023.94 plus \$3,000.00, a total of \$4,023.94).

[19] Parties are entitled to either represent themselves, as Mr Wei chose to do, or to have representation. Costs in the Authority are awarded on the basis of legal costs reasonably incurred and are based in the Authority on a daily tariff rate, currently set at \$4,500.00 for the first day of an investigation and \$3,500.00 per second or subsequent day of hearing.

[20] Sunlight is seeking an uplift based primarily in the conduct of Mr Wei during the substantive investigation process.

[21] Whilst Mr Wei was not successful in his claims before the Authority, and I accept that his evidence in support of his claims was minimal and completely unsupported by any evidence, I also observe that Sunlight were unable to provide compliant wage and time records in terms of s 130 of the Act which would have been of great assistance to the Authority in determining Mr Wei's claims.

[22] Taking all considerations as a whole, I think it appropriate that the Applicant make a contribution to the costs of the Respondent in the sum of \$5,000.00.

[23] Mr Wei is ordered to pay Sunlight the sum of \$5,000 costs, pursuant to clause 15 of Schedule 2 of the Act.

Eleanor Robinson

Member of the Employment Relations Authority