

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2012] NZERA Auckland 178
5334690

BETWEEN LI YU
 Applicant

AND THE COMMISSIONER OF
 POLICE
 Respondent



Member of Authority: Alastair Dumbleton

Submissions Received 13 October, 1 and 8 November 2011

Determination: 30 May 2012

COSTS DETERMINATION OF THE AUTHORITY

[1] Costs are sought on behalf of the Commissioner of Police for his wholly successful participation in an Authority investigation. Following a meeting held for that purpose over three days in June and July 2011, the Authority in a determination issued on 30 September 2011 ([2011] NZERA 426) completely rejected claims by Ms Li Yu that she had been unfairly treated by the Commissioner during a course of recruit training required to be undertaken before she could graduate as a Police officer. At the conclusion of that training course, which Ms Yu was repeating, she was not sworn as a constable.

[2] The Authority (Member Yvonne Oldfield) expressly found in its determination that Ms Yu did not have a personal grievance arising from her treatment during training and that the Commissioner had not breached any of her terms and conditions of employment. Further, the Authority found that there had not been any unfairness or breach of good faith by the Commissioner.

[3] Ms Yu remains in an employment relationship with the Commissioner although she is now on unpaid leave while her future with the Police is being resolved.

[4] To represent him during the Authority's investigation the Commissioner retained senior legal counsel Mr Churchman. Total costs incurred for that representation were counsel's fees of \$30,960 and disbursements, including travel and accommodation, of \$5,387.

[5] An award of full costs is sought by the Commissioner on the basis that, early on in the investigation, he had offered to settle Ms Yu's claims by paying a total of \$19,000 on account of lost wages, compensation and costs. Ms Yu rejected that offer.

[6] In response to the application for costs, submissions were made by Ms Yu's advocate Mr Dewar. Overall, he submitted that the case was not an appropriate one for an award of any costs or, if one was to be made, it should be at no greater rate than \$1,000 per day. He submitted that there are no features or circumstances about the case to warrant an award of full costs as sought and that Mr Yu's impecuniosity should be taken into account.

[7] Ms Yu has provided to the Authority a sworn affidavit containing evidence as to her present inability to make anything more than a nominal contribution to the Commissioner's costs. She deposes that she has had no income from her employment with the Police since September 2010, owes her landlord \$8,280 in arrears of rent and owes \$24,178 in legal fees charged for pursuing her claims. She has no assets or significant savings and has been reliant on financial assistance from her family and landlord.

[8] In submissions both Mr Churchman and Mr Dewar have referred to the leading case on costs in the Authority, *PBO Ltd v. Da Cruz* [2005] 1 ERNZ 808. In support of the claim for indemnity costs Mr Churchman has referred to the decision of the Court of Appeal in *Blue Star Print Group (NZ) Ltd v. Mitchell* [2010] NZCA 384, a case where it was re-emphasised that due regard should be had to *Calderbank* offers when fixing costs.

[9] Mr Dewar submitted that the applicant Ms Yu was entitled to raise and pursue her personal grievance even if it did fail. While that may be true, the ready access to the remedy of a personal grievance and an investigation by the Authority is not a

licence to pursue claims without caution or consideration given to the possible outcome and consequences. Taxpayer funded resources of the Authority are made available for investigations, recognising the importance of access to the Authority and so that those without professional representation should not be disadvantaged.

[10] It costs just \$75 for an employee to commence a personal grievance in the Authority leading, as in this case, to several days of investigation meeting time but which may also lead to liability for a contribution to costs of a hundred, and sometimes a thousand, times more than the modest filing fee.

[11] Parties acting responsibly need to keep a sense of proportion and have regard to the reality of the case and the risks involved in pursuing it, including the risk that even if they succeed they may be worse off financially after taking into account the cost of representation.

[12] Mr Churchman makes reference to Mr Dewar's conduct during the investigation meeting as adding unnecessarily to the length and complexity of the proceedings, but I note that the Authority did not make any adverse finding or even comment about Mr Dewar in its determination. I agree however that the reasons given by Mr Dewar for Ms Yu's rejection of the settlement offer do not reflect the real issues investigated by the Authority arising from her personal grievance claim. Her claim investigated by the Authority was not about allegations of cheating in exams made earlier against Ms Yu or culturally offensive conduct towards her.

[13] I consider that the respondent Commissioner should be awarded costs in this case, and markedly more than a nominal sum, but not at the rate of full, or solicitor - client, costs. I also consider that Ms Yu's present inability to pay an award should not lead to her being forgiven forever the responsibility to pay what is properly due for exercising her legal right, given the outcome of this case.

[14] Ms Yu's financial circumstances are likely to change at some stage, particularly after she starts receiving income again from employment or business as I expect eventually she will. I therefore consider that ability to pay should be a matter left to be looked at in the future if any question of enforcement of a costs order made by the Authority arises, such as in compliance proceedings.

[15] I find that the rejection of a very reasonable settlement offer made by the Commissioner at an early stage in the investigation was itself unreasonable on the part

of Ms Yu. That deserves an increase to the daily rate to take it above the so-called tariff.

[16] Starting with that tariff at \$3,000 to \$3,500 per day, I increase it to \$6,000 and spread it across 2½ days to give an award of costs in relation to legal fees of \$15,000. That sum is in my view a reasonable contribution to significantly higher actual costs.

[17] In accordance with usual practice, the respondent is entitled to recover the cost of full disbursements. The investigation meeting was held in Auckland because Ms Yu was employed there and so it was necessary for Police witnesses to travel there. I recognise that Mr Churchman from Wellington is usually retained by the Police and is therefore experienced in the employment relationship problems involving the Commissioner and resolution of those. It was reasonable in those circumstances for Mr Churchman to be retained rather than local Auckland counsel.

Determination

[18] For the above reasons, Ms Li Yu is ordered to pay costs of \$15,000 on account of legal fees and \$5,387 for disbursements. This order is made pursuant to clause 15 of Schedule 2 of the Employment Relations Act 2000.



A Dumbleton

Member of the Employment Relations Authority

(Pursuant to clause 16 of Schedule 2 of the Employment Relations Act 2000)



Employment Relations Authority

Te Ratonga Ahumana Taimahi



30 May 2012

Li Yu
1 F Henry Rose Place
Albany
Auckland

Dear Madam

File Number: 5334690

**Applicant: Li Yu, Respondent: The Commissioner of Police
(Employment Relationship Problem)**

The cost determination issued on 29 November 2011 – [2011] NZERA Auckland 504 has been reissued [2012] NZERA Auckland 178 with the following sentence removed from paragraph [11]:

Where professional representation has been obtained, it should be by an advocate who has sufficient objectivity to be able to advise when a settlement offer has been accepted.

Yours sincerely

A handwritten signature in cursive script that reads "Debbie Marsh".

Debbie Marsh
Support Officer



Employment Relations Authority

Te Ratonga Ahumana Taimahi



30 May 2012

Peter Churchman
Barrister
PO Box 8045
Wellington

Dear Sir

File Number: 5334690

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(Employment Relationship Problem)**

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Yours sincerely

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Debbie Marsh
Support Officer

