

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2015] NZERA Auckland 121
5470787 and 5470783

BETWEEN DONG ZHANG and PING LI
Applicants

A N D GOLDEN MOMENTS
RESTAURANT LIMITED
Respondent

Member of Authority: Anna Fitzgibbon

Representatives: Ming Shue Pang, Counsel for the Applicants
Yong Gao Xiao, Director for the Respondent

Submissions Received: 01 April 2015 from the Respondent
16 April 2015 from the Applicant

Date of Determination: 01 May 2015

COSTS DETERMINATION OF THE AUTHORITY

A. The applicants, Mr Dong Zhang and Ms Ping Li are ordered to contribute \$3,500 towards the respondent’s costs.

The substantive determination

[1] In a determination of the Authority dated 25 March 2015¹ the Authority determined that:

- The unjustified dismissal claims were not raised by the applicants, Mr Zhang and Ms Li within the 90 day statutory time period.
- Mr Zhang and Ms Li failed to establish the existence of “exceptional circumstances” under s.115(a) of the Employment Relations Act 2000.

[2] Mr Xiao for the respondent, Golden Moment Restaurant Limited (Golden Moments) sent a letter to the Authority on 1 April 2015 attaching relevant invoices

¹ [2015] NZERA Auckland 91

and seeking payment of the respondent's entire legal costs of \$10,733.50, (including GST).

[3] A memorandum of costs was filed by Mr Pang on behalf of the applicants, Mr Zhang and Ms Li on 16 April. Mr Pang cites the well-known principle that the starting point for the Authority in considering costs is the notional daily tariff of \$3500 per full day.

[4] Mr Pang further submits that Golden Moments was only legally represented on the first day of the Investigation Meeting regarding the preliminary issue and not the further half day required to complete the investigation. Mr Pang says costs can therefore only be sought in respect of the first day of the investigation meeting at which time Golden Moments was legally represented.

[5] Mr Pang requests the Authority to order that costs lie where they fall and if not to make an order of \$3000 costs which is less than the daily tariff. In support of this contention, Mr Pang says Mr Zhang and Ms Li have a limited ability to pay and that the preliminary hearing was heavily fact based and because of this Mr Zhang and Ms Li did have a prospect of success.

[6] The Authority's power to award costs arises from Schedule 2, clause 15 of the Act. This confers a wide discretion on the Authority to award costs on a principled basis.

[7] The principles guiding the Authority's approach to costs are set out by the Full Employment Court in *PBO Ltd (formerly Rush Security Ltd) v. Da Cruz*². The principles are so well recognised, I do not need to restate them. However, the following principles highlighted in *PBO* are particularly relevant to this case, namely:

- There is a discretion as to whether costs should be awarded and as to the amount.
- Equity and good conscience is to be considered on a case by case basis.
- Costs are not to be used as punishment or an expression of disapproval of the unsuccessful party's conduct, although conduct which increased costs unnecessarily can be taken into account when inflating or reducing an award.

- It is open to the Authority to consider whether all or any of the parties' costs were unnecessary or unreasonable.
- Costs generally follow the event.
- "Without prejudice except as to costs" offers can be taken into account.

[8] The general principle is that costs follow the event, and I see no reason to depart from that in this case. Golden Moments was entirely successful in defending the applicants' claims and should be awarded costs.

[9] Total costs incurred by Golden Moments are claimed to be \$10,773.50 (including GST). It is clear from the invoices provided to the Authority that some of these costs relate to attendances at mediation.

[10] The Employment Court in *Carter Holt Harvey v. Eastern Bays Independent Industrial Workers Union & Ors*³ observed that a notional daily tariff approach, which was to be adjusted in a principled way, was best suited to the Authority's unique jurisdiction. I adopt that approach.

[11] The normal starting point for costs in the Authority is \$3,500 per day see *Fifita (aka Bloomfield) v. Dunedin Casinos Ltd*⁴. This matter involved an investigation meeting of one and a half days. Golden Moments was legally represented on the first day but not on the next half day required to complete the investigation.

[12] From the invoices provided by Golden Moments, it appears legal fees were not charged for the next half day in the Authority to complete the investigation. Clearly this was because Golden Moments was not legally represented on that half day. No legal fees for that half day can be claimed in my view.

[13] Accordingly, I order Mr Zhang and Ms Li to contribute \$3,500 towards the costs of Golden Moments.

Anna Fitzgibbon
Member of the Employment Relations Authority

³ [2011] NZEmpC 13

⁴ [2012] NZERA Christchurch 219