

**IN THE EMPLOYMENT COURT OF NEW ZEALAND
AUCKLAND**

**I TE KŌTI TAKE MAHI O AOTEAROA
TĀMAKI MAKĀURAU**

**[2020] NZEmpC 94
EMPC 267/2019**

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
AND IN THE MATTER	of an application for costs
BETWEEN	INDEPENDENT PROSPERITY LIMITED Plaintiff
AND	QISHAN HUANG Defendant

Hearing: On the papers

Appearances: J Nguy and H Huang, counsel for plaintiff
B Hinchcliff, counsel for defendant

Judgment: 1 July 2020

COSTS JUDGMENT OF JUDGE K G SMITH

[1] On 22 July 2019 the Employment Relations Authority determined that Qishan Huang had been unjustifiably dismissed from her employment with Independent Prosperity Ltd.¹ The Authority ordered the company to pay Ms Huang \$13,846.15 gross for lost remuneration under s 128(3) of the Employment Relations Act 2000 (the Act) and \$30,000 compensation.

[2] Independent Prosperity had unlawfully required Ms Huang to repay a portion of her wages to it and had not paid wages to her that were due and owing. The

¹ *Huang v Independent Prosperity Ltd* [2019] NZERA 433 (Member Fitzgibbon).

Authority ordered the company to reimburse Ms Huang for the wages she had repaid, amounting to \$22,108, and a further \$13,461.53 for 14 weeks of unpaid wages owed to her. It was also ordered to pay her holiday pay of \$4,548.07. In a subsequent determination the Authority ordered the company to pay costs to Ms Huang of \$10,750.²

[3] Independent Prosperity challenged both determinations and elected a full rehearing of them.³ The company disputed all of the Authority's findings and pleaded that it was not indebted to Ms Huang. The challenges were scheduled to be heard in February 2020. Three working days before the hearing was to begin Independent Prosperity discontinued the proceeding, acknowledging that by doing so it would be liable to pay costs to Ms Huang. Unfortunately, the parties were unable to reach agreement about them. What is in dispute is the defendant's method of calculating costs using the Court's Guideline Scale.⁴

[4] Under sch 3 cl 19 of the Act the Court has a broad discretion to award costs. As is frequently noted in costs decisions, that discretion must be exercised on a principled basis and in the interests of justice. The Court's Guideline Scale is designed to support the objective that costs should be predictable, expeditiously determined, and consistent. In exercising the discretion reg 68 of the Employment Court Regulations 2000 provides the Court with the ability to take into account conduct that has contained or increased costs.

[5] Mr Hinchcliff, counsel for Ms Huang, applied for costs on a 2B basis, encompassing Independent Prosperity's unsuccessful application for a stay of execution of the Authority's determinations and for the substantive proceeding. The application divided the costs claimed into two separate tables, one each for the interlocutory application and the substantive proceeding.

[6] For the stay application the costs claimed amounted to \$12,566.05, calculated by allowing 4.9 days at \$2,230 per day, with an uplift because Ms Huang is not

² *Huang v Independent Prosperity Ltd* [2019] NZERA 542 (Member Fitzgibbon).

³ Employment Relations Act 2000, s 179(1); commonly called a de novo challenge.

⁴ "Employment Court of New Zealand Practice Directions" <www.employmentcourt.govt.nz> No 16.

registered for GST. The costs claimed for the substantive proceeding was \$46,930.35, arrived at by applying a daily rate of \$2,230 to a claimed allocation of 18.3 days with an uplift to reflect Ms Huang's GST status. The combined claim for both phases of the proceeding was, therefore, \$59,496.40.

[7] Mr Hinchcliff's memorandum sought a further uplift for two reasons. The first reason was that settlement offers were made and rejected. The argument was that, if they had they been accepted, the expense Ms Huang incurred would have been avoided. The first offer was made in August 2018 and the proposal to settle was for a payment to her of \$20,000. The offer was rejected the following day and Independent Prosperity claimed that she owed money to it. A second offer was made on 20 September 2018 for a much-reduced amount when Ms Huang offered to settle for \$12,500, paid pursuant to s 123(1)(c)(i) of the Act. That offer was also promptly rejected.

[8] The second reason relied on for a further uplift was an assertion that the plaintiff's claim was vexatious and frivolous.

[9] In addition to claiming costs Ms Huang sought to recover as a disbursement the fee she paid to retain an expert. The amount claimed was \$2,700 and is accepted by Independent Prosperity as recoverable from it.

[10] Mr Hinchcliff's memorandum advised that the amount invoiced to Ms Huang for this proceeding was just over \$80,000, presumably including GST. Disclosing the total amount invoiced to her was to show that the costs incurred exceeded the amount claimed and may have been intended to support an overall uplift in costs. I accept that Ms Huang has incurred fees in excess of the amount claimed, although the amount of them is very surprising given the uncomplicated nature of the proceeding and the limited steps that have been required to be taken for her. That subject, however, is not a matter for this decision.

[11] Independent Prosperity accepted that Ms Huang was entitled to costs and that they should be determined using the Guideline Scale. Its counsel, Mr Huang, agreed that 2B should apply for most steps in the proceeding, but argued that there were some

where 2A was more appropriate. The balance of the disagreement boils down to an argument that some steps claimed on Ms Huang's behalf were duplicated, misapplied, or unnecessary so that the claim was inflated. Independent Prosperity submitted the correct amount to award by properly applying the Guideline Scale was \$22,812.55, including GST. That sum was arrived at by removing those steps the company said were inappropriate, allowing for two steps to be recalculated on a Category 2A basis, and by applying the correct daily rate of \$2,390. It resisted any uplift in costs.

[12] Mr Hinchcliff accepted some of the criticisms of the original calculation made in Mr Huang's submissions but not all of them. What remained in issue were three steps claimed for the stay application and 11 steps claimed for the substantive proceeding.

The stay

[13] Ms Huang's costs claim, as it related to the stay application, included allocations for steps 11, 13, and 34 from the Guideline Scale; that is, preparation for a first directions conference, an appearance at a first directions conference and obtaining judgment without an appearance. Each of those steps was said to be appropriate and, on an adjusted basis taking into account the correct daily rate, the amount to be ordered before any uplift was \$5,975.

[14] Independent Prosperity agreed in principle that costs should be awarded for step 11, but argued that this part of the claim involved an unacceptable duplication. That was because there was only one directions conference and a separate claim was made for that relating to the substantive proceeding. The same reason was given by Independent Prosperity to disallow the claim for step 13.

[15] In reply Mr Hinchcliff argued that an award for both steps was reasonable, given that the stay application was a subject of the directions conference. I disagree. There was only one directions conference and it dealt with all procedural matters. A subsequent telephone conference is dealt with as part of the substantive claim. Steps 11 and 13 have been claimed for both the stay application and the substantive

proceeding so that allowing for both would result in a double-recovery. Those claims are disallowed.

[16] Step 34 is for obtaining judgment without an appearance. Independent Prosperity's objection is that the defendant has misunderstood what the step provides for and it did not apply to this situation. Mr Hinchcliff's response was that the step was still reasonable to allow because judgment was, in fact, obtained without an appearance. I disagree. The stay was dealt with on the papers and did not require any action to be taken by the defendant to obtain a judgment. This step is disallowed.

[17] The amount potentially available for costs of the stay is, therefore, \$3,824 before any other considerations are assessed.

The substantive proceeding

[18] Mr Hinchcliff accepted that adjustments were required to correct the initial use of the wrong daily rate, and for those steps that should be omitted. His adjusted calculation for the substantive proceeding was for \$38,957, before considering any uplift.

[19] Despite those corrections the disagreement about this claim continued. The disputed steps relating to the substantive proceeding are those at 12, 19, 23, 45, 27 and 30 of the Guideline Scale. Step 12 is for filing memoranda for the first or subsequent directions conferences. Ms Huang's application included ten separate claims for step 12. The first one was for filing a joint memorandum relating to the directions conference. The second one was for preparing for the second telephone conference, that was confined to dealing with expert evidence. Four refer to preparation relating to minutes issued by the Court in December 2019 and February 2020. The seventh to ninth claims were for filing memoranda regarding expert witnesses and the tenth one was a late application by Ms Huang's for her expert witness to give evidence by AVL.

[20] Independent Prosperity disputed these steps because it says the method used unjustifiably multiplied attendances and, in any event, many of them are properly

captured by step 36 which is also claimed and not disputed; that is for the preparation and filing of the defendant's briefs of evidence.

[21] I agree that many of the claims for step 12 should not be allowed, because the method used divided up the actual attendances required resulting in a distortion of the nature and extent of the work for which the step allocates costs. Ms Huang is entitled to make a claim for filing the joint memorandum, preparation for a second directions conference, and for the memorandum in November 2019 regarding her expert witness. She is also entitled to claim for the steps associated with filing a joint memorandum regarding expert evidence, in January 2020, and for the application made for her witness to give evidence by AVL.

[22] There is no justification for claiming separate allocations for step 12 for the minutes issued in December 2019 and February 2020, or for the second memorandum regarding an expert witness. The minutes were merely received by Ms Huang's counsel. To include a claim for their receipt would duplicate the other costs claims made by her for preparation for the conference and attendance at it. Likewise, the claim for filing a second memorandum regarding the expert witness, in December 2019, is disallowed because it duplicates the memorandum filed in November 2019. The upshot is that five of the claims at step 12 are justified and the other five are disallowed.

[23] The next disputed step is at 19; answering interrogatories. Independent Prosperity disputed an allocation for that step, because the proceeding did not involve any notice to answer interrogatories such as might be administered under r 8.34 of the High Court Rules 2016.⁵ The company says that Ms Huang has incorrectly treated an informal request for copies of documents with signatures on them, for examination by an expert witness, as administering interrogatories.

[24] Mr Hinchcliff considered the step to be applicable because it involved a response to a request for information. A request was made and answered but it was not a step taken to deal with administering or answering interrogatories. The work

⁵ Applicable by virtue of the Employment Court Regulations 2000, reg 6.

undertaken to supply the documents is captured under the general heading of preparing for a hearing, at step 39, that has been claimed and is not disputed. This step is disallowed.

[25] The next disputed claim is for step 23. This step is for preparing a list of documents for disclosure. The challenge to this claim is that there was no disclosure application because all documents to be relied on had already been disclosed in the Authority and were held by the parties.

[26] Mr Hinchcliff's response was that the list of documents for use in the common bundle, compiled by the plaintiff, was inadequate and needed to be corrected. I consider that this correction is more appropriately addressed under step 38 (defendant's preparation of issues, agreed facts and common bundle) and to allow it for step 23 would be a double-recovery. It is disallowed.

[27] Step 27 is disputed; it is for inspection of documents. The claim was made on the basis that Mr Hinchcliff had to inspect documents relating to the plaintiff's interlocutory application, the common bundle, and those documents to be referred to expert witnesses. This step is intended to reflect inspection of documents arising from disclosure but that step was not required. This claim is misplaced, and this step is disallowed.

[28] The next disputed step is 45 (which Mr Huang linked with step 23). Step 45 is for the defendant's preparation of a list of issues, agreed facts, authorities and a common bundle. The basis of this objection is that step 45 is duplicated in Ms Huang's application because it incorporated a further claim for step 38; that is for the defendant's preparation of a list of issues, agreed facts, authorities and a common bundle. The difference between them is that step 38 relates to trial preparation and appearance for a challenge whereas step 45 is trial preparation and appearance for other proceedings. There is a duplication. Since step 38 is being claimed and is not disputed it follows that step 45 must be disallowed.

[29] The last disputed step is for the preparation of written submissions, at step 30. Independent Prosperity argued that Ms Huang was not required to prepare a written

opening. Central to its argument was that the claim appears in part of the Guideline Scale set aside for interlocutory applications and there is no separate step allocated for written submissions in the substantive proceeding. The company submitted that it is appropriate to reflect this work at step 39, as part of preparation for the hearing.

[30] Mr Hinchcliff's response was to provide a copy of the submissions he had prepared in anticipation of the hearing. For reasons that were not explained, he advised that those submissions were emailed to another barrister, once they were prepared. Presumably that was for peer review. The submissions were said to have taken days to prepare. His point was that the expense could have been saved if the case had been discontinued at an earlier time.

[31] I agree with Mr Hinchcliff that the extremely late decision to discontinue the proceeding should not prevent Ms Huang from recovering costs recognising the substantial expense to which she was committed in preparing submissions. I do not consider that there is any duplication between this claim and step 39 and it is allowed.⁶

[32] Before considering the total of potential costs at this stage of the analysis, it is necessary to record that I do not accept Mr Huang's submission that some steps should only be allowed on a 2A basis. The steps he referred to were those at 38 and 39, for the defendant's preparation of issues, authorities, a common bundle and for hearing preparation. The only reason offered for this proposed adjustment was that the proceeding was discontinued. Presumably the inference intended from this submission was that preparation was either unnecessary or truncated. If that was the inference, I disagree. The discontinuance was far too late to have a material effect on Ms Huang's preparation and, therefore, its associated costs.

[33] The adjustments to this claim mean that the amount to potentially award for the substantive proceeding is \$24,617 which, together with the stay application, leads to a total of \$28,441 before considering any uplift.

⁶ Steps 38 "Defendant's preparation of list of issues, agreed facts, authorities and common bundle" and 39 "Preparation for hearing".

An uplift?

[34] The first claimed uplift was to recognise that Ms Huang has paid the GST component on the professional fees she has incurred. I am satisfied that an uplift on this basis is justified. Applying the uplift to the combined total of \$28,441 produced \$32,707.15. I would round this sum to \$32,700.

[35] I am also satisfied that there ought to be an uplift to recognise the settlement offers made by Ms Huang. They were made before the Authority investigation meeting, but there has been no suggestion that they ceased to be relevant because of that. The offers were generous and, had either of them been accepted, the substantial expense of the litigation would not have been incurred. Mr Hinchcliff did not seek a specific sum for this uplift. Standing back, I consider the offers justify an uplift of \$10,000.

[36] The next issue to consider is the claim that the plaintiff's proceeding was vexatious and frivolous warranting a further uplift. It would not be appropriate to adjust costs in response to the unsupported claim that the proceeding was wholly without merit. To reach such a conclusion would involve hearing evidence. In the absence of evidence all that can be said reliably is that there may be any number of reasons why the proceeding was discontinued. It would be unsafe to assume that the decision was purely because the plaintiff realised its claim would inevitably fail because it was frivolous or vexatious.

[37] Finally, I agree that it was appropriate for an application to be made for costs to be determined. The amount claimed was \$1,500. The disagreement went further than a dispute over the way Ms Huang's costs application sought to apply steps in the Guideline Scale. An application was, therefore, inevitable and she is entitled to recover the costs for preparing it.

Outcome

[38] Independent Prosperity is ordered to pay Ms Huang costs of:

- (a) \$42,700 for the proceeding;

- (b) Disbursements to reimburse her for the costs of an expert witness in the sum of \$2,700; and
- (c) Costs for preparing this application for costs of \$1,500.

K G Smith
Judge

Judgment signed at 11 am on 1 July 2020