

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 211B/10
5092431 and 5099244

BETWEEN AKBAR SINGH AND
 BISHAN SINGH
 Applicants

AND J R HOSPITALITY LIMITED
 (IN LIQUIDATION)
 First Respondent

 C G HOSPITALITY LIMITED
 Second Respondent

 BOLLIWOOD LIMITED
 Third Respondent

 J J HOSPITALITY LIMITED
 (PREVIOUSLY VEDANA
 LIMITED)
 Fourth Respondent

Member of Authority: Robin Arthur

Representatives: Bruce Murray for Applicants
 Karen Jones for Second, Third and Fourth Respondents
 and, until 22 June 2010, for First Respondent
 Geoff Bevan for First Respondent from 22 June 2010

Submissions: 13 August 2010 from Applicant.
 None from Respondents.

Determination: 30 August 2010

COSTS DETERMINATION OF THE AUTHORITY

[1] By determination AA 211A/10 (15 July 2010) the Authority ordered payments of wages and holiday pay, with interest, to Akbar Singh and Bishan Singh for work done as cooks in the Indian restaurant of their former employer. Penalties were imposed for breaches of their terms of employment and statutory rights and an order made for those amounts to be paid to the two cooks.

[2] The amounts ordered were paid to Akbar Singh and Bishan Singh from a

security sum held by the Authority under terms of previous determinations: AA65/08 (28 February 2008), AA65A/08 (6 March 2008), and AA211/10 (5 May 2010).

[3] Costs in the four day investigation meeting held on this matter (31 May - 3 June 2010) were reserved with the parties encouraged to resolve costs between themselves. They were unable to do so and the applicants now seek an order for costs. A timetable was set for reply memoranda from the respondents but Mr Bevan, acting for the liquidator of J R Hospitality Limited (in liquidation), advised he had instructions to take no steps in the proceeding while Ms Jones, who acted for the respondents during the Authority's investigation meeting, advised she had received no instructions to lodge a costs memorandum.

[4] Akbar Singh and Bishan Singh seek an order for costs of \$25,000 plus filing and hearing fees, totalling \$25,740.

[5] This has been a long and demanding case – for the parties, their counsel and the Authority. Applicants' counsel lodged their applications in September 2007 but the Authority investigation was postponed on 28 February 2008 to await the outcome of a criminal trial of the respondents' director Rupinder Singh Chahil. Mr Chahil was charged with kidnapping Akbar Singh and Bishan Singh. It proved to be another two years and three months before the investigation meeting could be held.

[6] Despite its difficult history I consider this matter is one where the Authority's discretion to award costs can properly be exercised on the basis of a notional daily rate adjusted up or down to take account of the relevant principles and the particular circumstances of the case.¹

[7] The starting point is a notional daily rate of \$3000 which is due to the applicants as a costs award on the basis that costs follow the event. That 'event' was the overall success of Akbar Singh and Bishan Singh in their wage claim.

[8] The following factors, as submitted by the applicants, warrant an upward adjustment of that daily rate, on the basis that increased costs were reasonably incurred:

¹ *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808.

- (i) Akbar Singh and Bishan Singh were foreign nationals of very limited means, who spoke little English and required substantial assistance in preparing their case with the assistance of translators; and
- (ii) The limited time and wage documentation provided by the employer required considerable time to analyse and then prepare the witness statements and submissions required in the Authority's investigation; and
- (iii) Arrangements for postponing and recommencing the investigation required a higher than usual amount of time in preparation for, and attendances at, case management conferences (eight in total); and
- (iv) The four-day investigation meeting included significant time in examination and cross-examination of the witnesses, which required additional preparation time.

[9] A further upward adjustment of the notional daily rate is warranted to take account of without prejudice settlement proposals, made by the applicants in 2008 and 2009 and which (as they submit) were "*remarkably close to the result of the determination*". The last, made on November 2009, was for a total sum of \$70,000 while the two men were ultimately awarded a total of \$75,355. Both parties would have saved considerably if those offers had been accepted.

[10] There are no factors which I consider would require a downward adjustment of the notional daily rate.

[11] Accordingly I consider a daily rate of \$5000 should apply in the particular circumstances of this case. That rate applies to the four days of the investigation meeting and includes the preparation time and preliminary matters for which attendances were required.

[12] To that total of \$20,000 as a contribution to the reasonably incurred costs of the applicants must be added expenses incurred of \$740 – being \$70 each in fees for lodging their applications and \$600 of investigation meeting fees charged under the Employment Relations Authority Regulations 2000.

Who should pay this costs order?

[13] The Authority's power to award costs includes a discretion to apportion costs and expenses between the parties: clause 15(2) of Schedule 2 of the Employment Relations Act 2000.

[14] Authority determination AA211A/10 found the respondents jointly and severally liable "*for whatever obligations remained to the two cooks*". Since the investigation meeting, but prior to that determination being issued, the first respondent went into liquidation. The fourth respondent was struck off the company register in January 2010. Although the Registrar of Companies has begun the process for their removal, the second and third respondents remain registered legal entities as of the date of this determination. Accordingly the order for costs applies, jointly and severally, to the second and third respondents.

Order for costs

[15] The respondents are to pay to the applicants the sum of \$20,740 in costs.

[16] Part of that order for costs is to be met from the remainder of the security sum held for the Authority by the Department of Labour in an interest bearing trust account. Around \$13,145 is presently in that account. It is to be paid directly, with any additional interest accrued meanwhile, to the trust account of Vallant Hooker & Partners, barristers and solicitors, for the benefit of Akbar Singh and Bishan Singh.

Robin Arthur
Member of the Employment Relations Authority