IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2013] NZERA Auckland 493
5389652

BETWEEN	LABOUR INSPECTOR (MINISTRY OF BUSINESS, INNOVATION & EMPLOYMENT) Applicant
AND	CIVIC CITY LIMITED t/a CIVIC CONVENIENCE First Respondent
AND	RUM LIMITED t/a SYMONDS LIQUOR Second Respondent
AND	123J LIMITED t/a SKY LIQUOR Third Respondent

Member of Authority:	Alastair Dumbleton
Submissions Received	11 and 25 September, and 1 October 2013
Determination:	31 October 2013

COSTS DETERMINATION OF THE AUTHORITY

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[1] In its determination of 28 August 2013 – [2013] NZERA Auckland 385 – the Authority widely upheld claims the applicant Labour Inspector had brought against the above-named respondents on behalf of 11 workers. The three companies were ordered to pay a total of $96,574 as minimum wages and holiday pay owed to their former employees, and total penalties of $115,000 for breaches of the Minimum Wage Act 1983, the Holidays Act 2003 and the Employment Relations Act 2000,

[2] Orders for costs have been sought by the Inspector against the companies, which through counsel have replied to that application.

[3] In their submissions counsel for the parties have referred to the applicable principles, which are set out by the Employment Court in *PBO Ltd v. Da Cruz* [2005] 1 ERNZ 808 and not repeated here. The Employment Relations Act has given the Authority a discretion as to whether costs should be awarded and, if so, in what amount. Usually the successful party will be entitled to a reasonable contribution from the unsuccessful party to its actual costs. In determining costs each case should be considered in the light of its own circumstances. Those may lead the Authority to raise or lower the award of costs above or below its daily tariff, which currently is being applied at $3,500 per day.

[4] As noted in the determination, the investigation meeting required eight days.

[5] The parties differ as to how costs should be determined in relation to three matters in particular;

- Non-participation in the investigation meeting of 3 of the 11 complainant employees on whose behalf the claims were brought;

- The Inspector's two counsel being in-house salaried employees of the Ministry; and

- Costs arising from the adjournment granted the Inspector in late 2012.

[6] In the circumstances I consider no account should be taken of the first matter. This case was not a proceeding between two private parties but an action brought by a statutory officer charged with enforcing legislation for the protection of workers. It is an express object of the Employment Relations Act to address the inherent inequality of power in employment relationships, which has been done partly by providing a Labour Inspectorate. Employers including the respondents must bear some of the cost where, as in this case, the Inspector has acted reasonably and in good faith throughout in pursuing complaints made by employees.

[7] Penalties were recovered for breaches in relation to the employment of the 3 non-participating employees, and all 11 employees were awarded part of the amounts recovered.

[8] It is not reasonable to expect the Inspector to have compelled the three non-participants to attend the investigation meeting and give evidence, after they had

apparently changed their minds about doing so. It was also a major factor in this case that the 11 complainants did not have residence in New Zealand but were visitors, here to study. The advantage the respondents took of that circumstance led to the complaints and to the claims being brought by the Inspector. On the Authority's finding the workers had breached a condition of their student visas, but nevertheless they were entitled by law to be paid properly for all work they had done. Fears as to consequences for their future immigration status may also be a reason why some complainants may not have wanted to participate in the investigation meeting, if worried that doing so might draw the attention of the authorities.

[9] As to the second matter, the fact that counsel for the Inspector Ms Blick and Ms Denmead are employed by the Ministry does not preclude an award of costs. From a taxpayer point of view it is likely to be more economic for the Ministry to retain in-house counsel rather than instruct private counsel, and the time of Ministry counsel is likely to have been more profitably used on other matters if the respondents' conduct towards the complainant employees had not made this case necessary. As a matter of public policy some recompense should be made to the Ministry, funded as it is by the state.

[10] In relation to the third matter, I am satisfied some allowance should be made in favour of the respondents for wasted costs resulting from the adjournment of the investigation meeting at the request of the Inspector. Having legal representation was a matter for the Inspector, but in making that decision she ought to have given instructions to counsel much earlier, so that the timetable already set for the meeting would not be disrupted. I accept that as a result the respondents' counsel Mr Faltaus needed time to refresh himself and his witnesses about the case, because of the delay between the end of 2012 and early 2013 when the investigation finally began.

Assessment of amount

[11] The Inspector is entitled to a reasonable contribution to actual costs incurred. It is a fundamental principle that a party should not be awarded more costs than those actually incurred by it. I accept it may be difficult for the Inspector to specify what exactly those costs were from using the Ministry's in-house counsel, but without that information there is a risk that simply applying the daily tariff of $3,500 to eight days will produce an amount higher than those actual costs. An award made with that result would unfairly enrich the successful party.

[12] The information given to me is that the notional hourly charge out rate for Ministry litigation solicitors is $100 for solicitors and $115 for senior solicitors, the levels of Ms Blick and Ms Denmead respectively. Generously assessing total notional reasonable costs using those figures ($215 applied to 8 meeting days and 8 days preparation, at 8 hours in each case) gives $27,520. By comparison, at daily tariff the amount for 8 days is $28,000.

[13] The assessed figure of $27,500 may be regarded as generous because two counsel would not seem to have been necessary for all eight days preparation time I have factored in. Allowing preparation by one solicitor for eight days and one senior solicitor for two days only, the assessment reduces to $22,000. I make no allowance for the possibility that both solicitors were not required for all eight days of the investigation meeting itself. The amount of $22,000 ought to be reduced by $3,500 for wasted costs occasioned by the adjournment the Inspector required, leaving $18,500 which I consider will provide a reasonable contribution to actual costs.

[14] The method of assessment I have used leaves no basis for uplifting the daily rate above $3,500, or for decreasing it.

[15] I accept $1,328 the amount claimed for disbursements as close to the actual figure and award that sum in total.

Determination

[16] I consider in the circumstances that the Authority's discretion should be exercised by awarding costs of $18,500 and disbursements of $1,328. The respondents jointly and severally are ordered to pay those amounts in total to the applicant, pursuant to clause 15 of Schedule 2 of the Employment Relations Act 2000.

A Dumbleton
Member of the Employment Relations Authority