

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2017] NZERA Auckland 223
3002511

BETWEEN A LABOUR INSPECTOR OF
 THE MINISTRY OF
 BUSINESS, INNOVATION
 AND EMPLOYMENT
 Applicant

A N D DIRECT AUTO IMPORTERS
 (NZ) LIMITED
 Respondent

Member of Authority: Anna Fitzgibbon

Representatives: Sarah Blick, Counsel for Applicant
 Ray Harris, Advocate for Respondent

Submissions Received: 17 July 2017 from Applicant
 19 July 2017 from Respondent

Date of Determination: 28 July 2017

**COSTS DETERMINATION OF THE
EMPLOYMENT RELATIONS AUTHORITY**

A. Direct Auto Importers (NZ) Limited (DAIL) is ordered to contribute \$3,851.56 towards the costs and expenses of the Labour Inspector.

The substantive determination

[1] In a written determination of the Authority dated 4 July 2017¹, the Authority determined that DAIL had breached various provisions of the Employment Relations Act 2000 (ERA), the Holidays Act 2003 (HA) and the Minimum Wage Act 1983

¹ [2017] NZERA Auckland 195

(MWA) and that it was liable for penalties in respect of such breaches and also for wages and holiday pay owing in respect of affected employees.

The Authority's power to award costs

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

[3] The full Employment Court decision in *PBO Ltd (formerly Rush Security Ltd) v. Da Cruz*² sets out the principles that apply to costs in the Authority. The principles include:

- (a) There is a discretion as to whether costs should be awarded and as to the amount;
- (b) Equity and good conscience is to be considered on a case-by-case basis;
- (c) 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;
- (d) It is open to the Authority to consider whether all or any of the parties' costs were unnecessary or unreasonable;
- (e) Costs generally follow the event;
- (f) "Without prejudice except as to costs" offers can be taken into account.

[4] Both counsel referred me to this Employment Court decision in their respective submissions as to costs.

[5] The Employment Court in *Carter Holt Harvey Ltd 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

² [2005] 1 ERNZ 808 para.[44]

³ [2011] NZEmpC 13

Authority's unique jurisdiction. This approach has been affirmed by the Employment Court more recently in *Fagotti v. Acme & Co Ltd*⁴. I adopt that approach.

[6] Counsel for the Labour Inspector filed a memorandum as to costs on 17 July 2017 and the representative for DAIL filed a memorandum in response on 19 July 2017.

[7] Counsel for the Labour Inspector is in-house counsel and seeks costs against DAIL on the basis of the Authority's daily tariff. The daily tariff for costs in the Authority increased from \$3,500 to \$4,500 for the first day of an investigation meeting in respect of all matters filed in the Authority from 1 August 2016⁵. This matter was filed in the Authority in January 2017 and therefore the new costs regime applies.

[8] Counsel for the Labour Inspector referred the Authority to a number of its decisions in which the notional daily tariff was applied in respect of costs sought by the Labour Inspectorate when represented by in-house counsel. DAIL's representative, Mr Harris, does not object to this principle. In *GL Freeman Holdings Ltd v Belley*⁶, the Court held that it was well-established that reasonable costs may be awarded as a contribution to the costs of in-house counsel, often by adopting⁷:

... a realistic and reasonable notional hourly rate, so that the entity for whom the lawyer works does not obtain any profit from an award of costs.

[9] Counsel for the Labour Inspector argues that this is a case in which it would be appropriate for the Authority to award the daily tariff.

[10] The investigation of this matter and the matter involving Cheap Deals on Wheels Limited (Cheap Deals), the respondent in another matter (3002512), were heard contemporaneously and took two full days in the Authority.

[11] Counsel for the Labour Inspector seeks costs at the notional daily tariff of \$3,750 in respect of DAIL as that matter took longer than Cheap Deals. In addition, counsel seeks the filing fee of \$71.56, travel expenses of \$15 and a meal allowance of

⁴ [2015] NZEmpC 135

⁵ Practice Note 2, Costs in the Employment Relations Authority

⁶ [2016] NZEmpC 44

⁷ Ibid at para[21]

\$15. The total sought by counsel for the Labour Inspector in respect of DAIL amounts to \$3,851.56.

[12] The representative for DAIL submits that a costs award should not seek to punish a party. Reference is made to the difficult financial circumstances that DAIL is now in as a result of the publicity of the Authority's substantive determination. The publicity, it is submitted, has resulted in funding problems and has put into jeopardy the employment of a number of employees.

[13] DAIL has failed to produce any evidence of financial hardship in support of this submission made on its behalf. This makes it very difficult for the Authority to undertake a proper assessment of DAIL's financial position when considering whether or not costs should be awarded, and if so the quantum.

[14] It is not appropriate for the Authority to impose hardship upon an unsuccessful party to proceedings. However, I note the observations of Judge Inglis in *Tomo v. Checkmate Precision Cutting Tools Ltd*⁸:

There may be circumstances in which a reduced, or no, costs order is appropriate. However, the fact that a costs award would impose undue financial hardship on an unsuccessful litigant is not, in my view, decisive. Even accepting that in this jurisdiction an unsuccessful party's current financial position is relevant to an assessment of costs, like other considerations it must be weighed in the exercise of the Court's discretion. The interests of both parties, in broader public policy considerations, must also be taken into account.

[15] In support of his submission that there should be a reduction in any award of costs, the representative for DAIL says DAIL attempted to mitigate losses by not defending some of the claims against it. This action reduced the investigation time in the Authority and accordingly costs.

[16] Counsel for the Labour Inspector submits that the Labour Inspectorate has been put to a great deal of expense in bringing claims against DAIL and was entirely successful.

[17] Weighing the considerations set out by each of the representatives in their memoranda as to costs, I find that the Labour Inspector, as the successful party, is entitled to some award. This is a case in which it is appropriate for the Authority to use its discretion when considering a costs award.

⁸ [2015] NZEmpC 2 at para.[22]

[18] The investigation involving DAIL occupied at least a full day in the Authority. As the investigations of DAIL and Cheap Deals were heard contemporaneously, I take the view that the notional daily rate for the 2 days should be spread between the matters. The notional daily rate for the first day is \$4,500 and \$3,500 for the second day. Therefore, the total for 2 days amounts to \$8000. Counsel for the Labour Inspector seeks \$3,750 in costs which together with expenses amounts to \$3,851.56 including costs of filing, travel and a meal allowance.

[19] DAIL is ordered to pay the Labour Inspector the sum of \$3,851.56 in costs pursuant to clause 15 of Schedule 2 of the ERA. DAIL is to make payment to the Labour Inspector of costs within 21 days of the date of this determination.

Anna Fitzgibbon
Member of the Employment Relations Authority