

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2019] NZERA 27
3021734

BETWEEN A LABOUR INSPECTOR
 Applicant

AND INDY SUPA STORE LIMITED
 First Respondent

AND KAVITA MAYURKUMAR TAILOR
 Second Respondent

AND MAYURKUMAR MANILAL TAILOR
 Third Respondent

Member of Authority: Helen Doyle

Representatives: Ella Tait, Counsel for the Applicant
 Bernie Chow, Counsel for the Respondent

Submissions Received: 3 December 2018 from the Applicant
 24 December 2018 from the Respondent

Date of Determination: 22 January 2019

COST DETERMINATION OF THE AUTHORITY

- A. The First, Second and Third Respondents are ordered to reimburse the Applicant for \$784.88 being disbursements and witness fees as set out below:**
- (a) Reimbursement of the filing fee of \$71.56.**
 - (b) Reimbursement of hearing fees for day two and three of the investigation meeting in the sum of \$613.32.**

(c) **Witness fees for three witnesses in the combined sum of \$100.**

B. There is no order for costs.

The substantive determination

[1] The Authority in its determination dated 12 November 2018 found in favour of the applicant and awarded substantial arrears and penalties against the respondents. Costs were reserved and a timetable for an exchange of submissions set.

[2] Both parties have now lodged submissions.

The applicant's submissions

[3] Ms Tait is an in-house senior solicitor for the applicant. She seeks an award on the basis of the notional daily tariff¹ for a three day investigation meeting in the sum of \$11,500 together with disbursements and witness fees.

[4] She refers to employment cases where the use of in-house counsel has been recognised as giving rise to a “real cost.”²

[5] Ms Tait submits that her employer, the Ministry of Business, Innovation and Employment (MBIE), has adopted for senior solicitors a charge-out rate of \$160 per hour taking into account the average salary of a solicitor and a portion of overhead costs. She submits that, in accordance with the time record report attached to submissions, the time recorded on the basis of that hourly rate would be \$23,246.40. Ms Tait submits that an award based on the daily tariff amounts to reimbursement of only a proportion of the actual legal costs.

¹ Awards for costs in the Authority on the basis of a notional daily tariff applied flexibly recognised and approved by full Court of Employment Court in *PBO Ltd (formerly Rush Security Ltd) v Da Cruz* [2005] ERNZ 808 [44-46] and *Fagotti v Acme & Co Ltd* [2015] NZEmpC 135.

²*Murphy & Routhan t/a Enzo's Pizza v Van Beek* [1998] 3 ERNZ 726, *Smith v Air New Zealand EmpC* Auckland AC 17/01 19 March 2001 at [8] and *Labour Inspector v Civic City Ltd & Ors* [2013] NZERA Auckland 493

The respondent's submissions

[6] Mr Chow on behalf of the respondents submits that they are not in a financial position to pay the amounts awarded in the determination of 12 November 2018 but have submitted a proposal for a weekly payment plan for the arrears and penalties on 10 December 2018. Attached to the submissions was a copy of the second and third respondents' estimated cash flow, summary of estimated personal expenses and information from the bank for balances from the first, and second and third respondent's bank accounts.

[7] Mr Chow submits that the additional financial impact from the imposition of costs would result in voluntary liquidation and bankruptcies. This is in circumstances he submits where the livelihood of the respondents depends on the continuation of the dairy operations which will enable payments to be made for arrears and penalties.

Determination

[8] The applicant was the successful party and in the ordinary course of events costs would follow and be awarded to the applicant. The costs sought for a three day investigation during which every aspect of the applicant's claim was challenged are reasonable and in accordance with the usual awards made by the Authority.

[9] Mr Chow has attached a copy of an estimation of cash flow from December 2018 to November 2019 for the dairy. He has also attached a summary of estimated personal expenses of the second and third respondent for the same period and the bank account balances. They paint a bleak picture.

[10] There is a degree of unknown in this matter about any equities in properties however these are owned by a family trust and the personal expenses for the second and third respondents reflect payment for rent.

[11] I find that the respondents' financial circumstances are a relevant consideration in the exercise of the discretion as to costs. The significant awards made by the Authority for arrears and penalties are proposed to be paid by way of an instalment plan. I find that to further increase the liabilities of the respondents by an award of costs would run the risk of

the ability to meet those payments being reduced, if not extinguished, if the respondents took steps along the lines indicted by Mr Chow. That would be of little assistance in this case.

[12] In all the circumstances I find that a fair and just determination as to costs would be to limit any reimbursement to the applicant to disbursements.

[13] There is a claim in the sum of \$71.56 for reimbursement of the filing fee and witness fees for three witnesses under the Witness and Interpreters Fees Regulations 1974 in the sum of \$100.³ The Authority approves reimbursement of those amounts.

[14] I have checked with the Authority Officer who was dealing with this matter and he advises hearing fees are to be invoiced to the applicant this week. Those are the hearing fees for day two and three of the investigation. Each half day after the first day of investigation in the Authority incurs a hearing fee of \$153.33. The hearing fees to be invoiced to the Labour Inspectorate are in the sum of \$613.32 being \$153.33 multiplied by four half days. I find it is appropriate to include that amount in the disbursements to be reimbursed, although it has not been claimed, rather than have Ms Tait return to the Authority for reimbursement.

[15] I order Indy Supa Store Limited and Kavita and Mayurkumar Tailor to pay to the Labour Inspectorate disbursements in the sum of \$684.88 and witness expenses in the sum of \$100.

Helen Doyle
Member of the Employment Relations Authority

³ Relevant regulations under the Criminal Procedure Act 2011