

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2022] NZERA 548
3145083

BETWEEN

A LABOUR INSPECTOR
Applicant

AND

CAISTEAL AN IME LIMITED
Respondent

Member of Authority: Philip Cheyne

Representatives: Alistair Miller, counsel for the Applicant
Darren Angus, advocate for the Respondent

Submissions Received: 12 October 2022 for the Applicant
18 October 2022 for the Respondent

Date of Determination: 26 October 2022

COSTS DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] By my earlier determination, the Labour Inspector succeeded with her claim for a compliance order and for the imposition of a penalty.¹ Costs were reserved. I now have submissions from both parties.

[2] This determination resolves the issue of costs.

The claim

[3] The Labour Inspector seeks costs of \$1,125.00 plus disbursements of \$664.99.

¹ *A Labour Inspector v Caisteal An Ime Limited* [2022] NZERA 485.

[4] Costs are sought at the Authority's daily tariff, based on a quarter of a day taken for the investigation meeting.

[5] The disbursements are \$71.56 for the lodgement fee and \$593.43 for counsel's flights and accommodation for the appearance.

Resolving the claim

[6] The Labour Inspector instructed counsel and was successful, so on ordinary principles would be entitled to costs. Caisteal An Ime Limited (CAIL) submits that costs should lay where they fall, but that would be inconsistent with the ordinary principle.

[7] Costs in the Authority are often assessed by applying the daily tariff. There is no reason to take a different approach in this case, if costs are to be awarded.

[8] The Labour Inspector was represented by in-house counsel. I presume that Christchurch based in-house counsel was not available, so counsel travelled from out of town. The standard principle is that any additional costs as a result of engaging out-of-town are not recoverable in an award of costs. There is no reason to depart from that approach here.

[9] An amount to cover the lodgement fee paid by a successful applicant is commonly part of an award of costs. I apply that approach here.

[10] CAIL says that the Labour Inspector incurred no representation costs, as she was represented by in-house counsel who is employed by the Ministry of Business Innovation and Employment.

[11] I am referred to *McGuire v Secretary for Justice*.² The Supreme Court considered a claim for costs by a successful litigant in person who was a lawyer. In doing so, the Court canvassed rules about costs for successful litigants in person, those litigants who are lawyers and for parties represented by employed lawyers. At [88] the Court confirmed that any reform to the law should be otherwise than by the

² *McGuire v Secretary for Justice* [2018] NZSC 116.

Courts. The employed lawyer rule was still to be applied. The rule allowed costs for an employed lawyer.

[12] I am referred to *Joint Action Funding v Eichelbaum*.³ It was overruled by *McGuire*.

[13] I am also referred to *Commission of Inland Revenue v New Orleans Hotel*.⁴ It is an example of the application of *Joint Action Funding*, now overruled by *McGuire*.

[14] CAIL says that the “current costs model” is “based on” the High Court Rules and the District Court Rules. I disagree. The Authority’s power to award costs is expressed at clause 15 of Schedule 2 to the Employment Relations Act 2000. The cases mentioned by CAIL do not address this statutory power. It is unexceptional in the employment jurisdiction to order “costs and expenses” in favour of a successful party who is represented by an employed solicitor. There is no reason here to depart from that practice. The practice is consistent with the Supreme Court’s decision in *McGuire* affirming the continued application of the employed solicitor rule.

[15] CAIL says that the applicant is self-represented. That mischaracterises the situation. The Labour Inspector is employed by Ministry of Business, Innovation and Employment and was represented by a lawyer employed by Ministry of Business, Innovation and Employment (MBIE). I have not been provided with an invoice to cover the costs of Mr Miller’s work, but I doubt that an invoice would have been generated. That does not detract from the reality that MBIE incurred costs for Mr Miller’s work, costs that come within “costs and expenses” for the purposes of clause 15 of Schedule 2.

[16] CAIL draws my attention to its election to challenge the earlier determination of the Authority and its application for a stay. The standard approach for the Authority is to determine costs based on its determination, regardless of a challenge. There is no reason to depart from that approach here.

³ *Joint Action Funding v Eichelbaum* [2017] NZCA 249

⁴ *Commission of Inland Revenue v New Orleans Hotel (2011) Ltd* [2018] NZHC 971.

[17] CAIL says that counsel would have undertaken “no work” to prepare the case, as he did not represent the applicant until January 2022. I disagree. Mr Miller must have reviewed the file, then prepared for and participated in the case management conference and the investigation meeting. This is representative work that is relevant for present purposes.

Summary and Order

[18] The Labour Inspector as the successful party is entitled to costs and expenses based on the daily tariff for a quarter of a day and the lodgement fee.

[19] Caisteal An Ime Limited is to pay the Labour Inspector costs and expenses of \$1,196.56.

Philip Cheyne
Member of the Employment Relations Authority