

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE**

[2023] NZERA 111
3099854

| | |
|---------|---|
| BETWEEN | A LABOUR INSPECTOR Applicant |
| AND | HAPPYTIME BBQ RESTAURANT LIMITED First Respondent |
| AND | AYANG SONG Second Respondent |

Member of Authority: Alastair Dumbleton

Representatives: Martin Denyer, counsel for the Applicant
Ayang Song, advocate for First Respondent and
Second Respondent in person

Costs submissions
received: 7 February 2023 from Applicant

Determination: 7 March 2023

COSTS DETERMINATION OF THE AUTHORITY

[1] The Authority investigated and determined an application brought by a Labour Inspector against an employer, Happytime BBQ Restaurant Ltd, to recover underpayments of minimum wages and holiday pay due to an employee Chenming Sun. The Inspector also applied to recover \$16,563 sought and received from Mr Sun, unlawfully, as a condition of his obtaining employment.

[2] Mr Sun was employed in a restaurant operated by the first respondent, a company owned and operated by Ayang Song, the second respondent.

[3] The Authority determined that Mr Sun was entitled to recover a total of \$65,503, including the amount of the premium he had paid to get his job. The first respondent was ordered to pay that sum plus interest to the Labour Inspector for the use of Mr Sun.

[4] The Authority also determined that Ayang Song would become liable to pay any amount up to the total, if the first respondent failed to pay for any reason.

[5] The Labour Inspector claimed penalties against the employer for multiple breaches of statutory employment standards, and penalties against its owner and director Ms Song for being a person involved in those breaches. The employer was ordered to pay penalties of \$102,000 and Ms Song was ordered to pay \$51,000. A total of \$10,000 of the penalties was awarded to the employee Mr Sun and the balance was payable to the Crown.

[6] In its determination the Authority reserved the question of costs and expenses sought by the Labour Inspector for application to be made in writing and responded to by the employer and Ms Song.

[7] An application has been made but it has not been responded to.

[8] Counsel for the Labour Inspector submits that \$4,500 is an appropriate award of costs, together with \$71.56 expenses in reimbursement of the fee paid to lodge the application in the Authority.

[9] The way costs applications should be considered and determined by the Authority was ruled upon by the Employment Court in 2005, in *PBO limited (formerly Rush Security Ltd) v Da Cruz*¹.

[10] Costs are not awarded as punishment or to express disapproval of a party's conduct. Their purpose is to compensate a party who or which has incurred expense in applying to the Authority, to have it investigate and determine claims such as those the Labour Inspector brought. The amount of costs will usually be modest and they will usually be awarded to the party which is successful in the outcome of the Authority's investigation.

¹ [2005]ERNZ 808.

[11] The Authority has a discretion to award costs on the basis of a daily tariff, which it fixes from time to time and publicises. Currently the tariff is \$4,500 for the first day and \$3,500 for each following day of an investigation meeting.

[12] The investigation meeting was originally planned to require up to two days but nearer the time and somewhat unexpectedly, the respondents changed their positions and withdrew their earlier opposition to the applications and claims.

[13] This turnaround came too late for the Labour Inspector to avoid the extensive preparation a case of this kind requires. Witnesses including the Inspector and the employee were still required to attend the meeting and present formal proof, although only about half a day was needed.

[14] The Authority agrees that a fair award should allow for a full day to compensate for the amount of unavoidable preparation required by the Inspector for the factually and legally detailed circumstances required to be investigated.

[15] Although the Inspector's counsel was in-house, there are salaries and other overheads to be met in employing legal advisors on that basis instead of paying fees to engage a private practitioner.

[16] The Inspector is therefore to be reimbursed \$4,500 as legal costs and \$71.56 as expenses, pursuant to clause 15 of the Second Schedule to the Employment Relations Act 2000.

[17] As in *A Labour Inspector & Indian Cuisine NZ Ltd (In Liquidation) and Others*², the order for payment of those amounts is made against both Happytime BBQ Restaurant Ltd and Ayang Song. They are both jointly and severally responsible for seeing this order is met in full.

Alastair Dumbleton
Member of the Employment Relations Authority

² [2021] NZERA 72