

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

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

[2023] NZERA 466  
3128536  
3141782

BETWEEN                      A LABOUR INSPECTOR  
Applicant

AND                              NIKHIL HIMALAYA BOTANY  
LIMITED trading as Merchants  
Liquor  
First Respondent

AND                              FURTHER RESPONDENTS  
Listed in Schedule 1

Member of Authority:        Jeremy Lynch

Representatives:             Martin Denyer, counsel for the Applicant  
No appearance for the Respondents

Investigation Meeting:       On the papers

Submissions Received:       12 July 2023 from the Applicant  
21 July 2023 from the Respondents

Date of Determination:       22 August 2023

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**COSTS DETERMINATION OF THE AUTHORITY**

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[1]     A Labour Inspector lodged proceedings in the Authority due to a breach by all 11 Respondents<sup>1</sup> of an improvement notice issued on 6 June 2019.

[2]     A further proceeding was lodged by the Labour Inspector in respect of a breach by the First Respondent, Nikhil Himalaya Botany Limited, of a second improvement notice issued on 4 November 2020.

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<sup>1</sup> Ordinarily the words “Respondent” and “Respondents” would not appear in the main body of a determination. However, they are used here for ease of reference.

[3] The Authority investigated and determined all 12 applications together, on the papers.

[4] The Authority's determination of 14 June 2023 imposed penalties in the sum of \$15,000 against Nikhil Himalaya Botany Limited; and \$8,000 against the other ten Respondents.<sup>2</sup>

### **The claim for costs**

[5] A costs memorandum was lodged by the Labour Inspector on 12 July 2023.

[6] The Labour Inspector seeks a costs award of \$2250 as a contribution to costs incurred in the substantive matter. In addition, a disbursement in the sum of \$858.72 is sought, being the cost of the 12 filing fees associated with the applications lodged.

[7] The Respondents had been represented by counsel in the substantive matter.

[8] On 21 July 2023 the Respondents' counsel lodged a memorandum advising the Authority it had no longer had instructions to act; seeking to be removed from the record; and advising that all of the stores owned by the individual Respondents had been sold, and the Respondents were no longer trading.

[9] A review of the Companies Office website indicates that all 11 Respondent companies remain on the Companies Register.

[10] No further information was received from any of the Respondents.

### **Costs Principles**

[11] The Authority's discretion to award costs is well established. It arises from cl 15 of Schedule 2 to the Employment Relations Act 2000. Principles guiding the Authority's approach to determining costs include:

- the statutory jurisdiction to award costs is consistent with the Authority's equity and good conscience jurisdiction;
- equity and good conscience is to be considered on a case by case basis;

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<sup>2</sup> *A Labour Inspector v Nikhil Himalaya Botany Limited & Ors* [2023] NZERA 309.

- costs are not to be used as a punishment or as an expression of disapproval for an unsuccessful party's conduct, although conduct which increases costs unnecessarily can be taken into account in inflating or reducing an award;
- costs generally follow the event;
- awards of costs will be modest;
- frequently costs are assessed against a notional daily tariff.

### **Costs analysis**

[12] The Labour Inspector was the successful party in the substantive matter. It is usual that costs follow the event and that the unsuccessful party (or parties) will be required to make a contribution towards the successful party's costs.

[13] Although the Labour Inspector's counsel was in-house, there are salaries and other overheads to be met in employing legal advisors. As such, the Labour Inspector should receive a contribution to costs incurred.

[14] In assessing an appropriate award of costs the notional daily tariff is a starting point.<sup>3</sup> The applicable daily tariff is \$4,500 for the first day and is therefore the starting point.

[15] The Labour Inspector seeks an award of costs in the sum of \$2,250, being half of the applicable daily tariff.

[16] The substantive proceeding involved 11 respondents and resolved 12 separate applications. This is a relevant factor. The contribution to costs sought by the Labour Inspector of \$2,250 is reasonable.

[17] It is also reasonable that the Labour Inspector is reimbursed for the costs of the filing fees, being 12 payments of \$71.56.

### **Outcome**

[18] Within 28 days of the date of this determination, the Respondents are ordered to pay the Labour Inspector \$2,250 being a contribution to costs reasonably incurred; together with

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<sup>3</sup> Practise Note 2 'Costs in the Employment Relations Authority', 29 April 2022.

an additional amount of \$858.72 being the cost of the 12 filing fees incurred in relation to the matter.

[19] As in *A Labour Inspector v Indian Cuisine NZ Ltd (in liquidation)*,<sup>4</sup> the orders for payment of these amounts are made against all 11 Respondents. The Respondents are jointly and severally responsible for seeing that these orders are met in full.

[20] How the Respondent parties apportion payment of those costs between themselves is a matter for them.

Jeremy Lynch  
Member of the Employment Relations Authority

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<sup>4</sup> *A Labour Inspector v Indian Cuisine NZ Ltd (in liquidation)* [2021] NZERA 72.

**SCHEDULE 1**

NIKHIL HIMALAYA POINT CHEV LIMITED t/as Merchants Liquor (3128514)

Second Respondent

N H REMUERA LIMITED t/as The Bottle-O Remuera (3128458)

Third Respondent

NIKHIL HIMALAYA LIQUOR MERCHANTS LIMITED t/as The Bottle-O Great North Road (3128537)

Fourth Respondent

NIKHIL HIMALAYA FOREX LIMITED t/as The Bottle-O Royal Oak (3128498)

Fifth Respondent

NIKHIL HIMALAYA LIQUOR LIMITED t/as The Bottle-O Manly (3128497)

Sixth Respondent

NIKHIL HIMALAYA RETAILS LIMITED t/as The Bottle-O Gulf Harbour (3128496)

Seventh Respondent

NIKHIL HIMALAYA PARKLAND LIMITED t/as Merchants Liquor Balmoral (3128494)

Eighth Respondent

NIKHIL HIMALAYA MOUNT ALBERT LIMITED t/as The Bottle-O Mount Albert (3128475)

Ninth Respondent

NIKHIL HIMALAYA TAIHAPE LIMITED t/as The Bottle-O Taihape (3128459)

Tenth Respondent

NIKHIL HIMALAYA LIQUOR OTAKI LIMITED t/as The Bottle-O Otaki (3128434)

Eleventh Respondent