

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
OTAUTAHI ROHE**

[2023] NZERA 581
3120499

BETWEEN A LABOUR INSPECTOR
Applicant

AND ELEMENTS THERAPEUTIC
MASSAGE LIMITED
First Respondent

AND XUAN ZHANG
Second Respondent

AND PING DU
Third Respondent

Member of Authority: David G Beck

Representatives: Greg La Hood, counsel for the Applicant
No appearance for the First and Second Respondents
Alison Douglass, counsel for the Third Respondent

Investigation Meeting: On the papers

Submissions Received: 20 September and 5 October 2023 from the Applicant
4 October 2023 from the third Respondent

Date of Determination: 6 October 2023

COST DETERMINATION OF THE AUTHORITY

The Determination

[1] On 21 August 2023 the Authority issued a second determination¹ dealing with a matter brought by the Labour Inspector seeking clarity on the scope of a remedy granted in the Authority's first determination of 26 August 2022² pertaining to Ping Du.

¹ *A Labour Inspector v Elements Therapeutic Massage Limited and Ors* [2022] NZERA 415.

[2] In the second determination the Authority found that it could not determine the Labour Inspector's issue on:

..... the scope of the Authority's discretion and whether the Labour Inspector merely must establish that all the elements set out in s 142Y(1) have been met to recover wage or holidays arrears from Ping Du. That could only be pursued as a challenge to the determination in the Employment Court or an application for a reopening of the investigation; and thus:

In conclusion. I am not persuaded that I should order that Ping Du's liability for additional remedies beyond that set out in the original determination is necessary.³

[3] The parties were asked to explore resolving costs by agreement but failed to do so.

Submission for the Labour Inspector

[4] Mr La Hood briefly submitted that while unsuccessful, given this was a novel issue in relation to the scope and application of s 142Y of the Employment Relations Act 2000, it would be appropriate to let costs lie where they fall including the fact that the Labour Inspector has now filed a challenge to the second determination in the Employment Court.

Submission for Ping Du

[5] Ms Douglass, while detailing that Ping Du is in receipt of a Legal Aid grant, suggested Ping Du had been successful in defending an attempt to impose liability on him for wage arrears identified for ex-workers of Elements Therapeutic Massage Limited and that he should be able to recover costs in the amount of his legal aid grant.

Costs principles

[6] The Authority's discretion to award costs is well established and arises from Section 15 of Schedule 2 of the Employment Relations Act 2000. The discretion it is accepted is guided by principles set out in *PBO Limited (formerly Rush Security Ltd) v Da Cruz*⁴ including costs are not to be used as a punishment or as a reflection on how either party

² *A Labour Inspector v Elements Therapeutic Massage Limited and Ors* [2023] NZERA 44.

³ *Ibid* at [10] and [11].

⁴ *O Limited (formerly Rush Security Ltd) v Da Cruz* [2005] 1 ERNZ 808.

conducted proceedings and that awards are to be made consistent with the equity and good conscience jurisdiction of the Authority.⁵

Assessment

[7] While a general principle for a successful party is that costs should 'follow the event' I am persuaded that in all the circumstances of this situation it is equitable that costs should appropriately lie where they fall.

Award

[8] I decline to order a costs award .

David G Beck
Member of the Employment Relations Authority

⁵ Section 160(2) Employment Relations Act 2000.