

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2023] NZERA 730
3169622

BETWEEN A LABOUR INSPECTOR
Applicant

AND LAXMI NARAYAN
RESTAURANT LIMITED
First Respondent

AND VIJAY SINGH
Second Respondent

Member of Authority: Helen Doyle

Representatives: Rochelle Hill, counsel for the Applicant
Bernie Chow, advocate for the First and Second
Respondents

Submissions Received: 21 November 2023 and 4 December 2023 from the
Applicant
23 November 2023 from the Respondent

Date of Determination: 7 December 2023

COSTS DETERMINATION OF THE AUTHORITY

The substantive determination

[1] In a determination dated 8 November 2023, the Authority found in favour of the Labour Inspector and ordered payment of minimum wage arrears, holiday and leave arrears, reimbursement of unlawful deductions and interest. Penalties were ordered payable by both Laxmi Narayan Restaurant Limited (Laxmi) and Vijay Singh who was a person involved in the breaches. Mr Singh is liable for payment of the arrears to the extent that Laxmi cannot pay.

[2] Costs were reserved in the determination with the parties encouraged to resolve any issue of costs between them. In the event agreement was not reached then a timetable for an exchange of memoranda was set.¹

[3] The parties were not able to agree costs. Ms Hill lodged a costs memorandum. Mr Chow sent an email in response that the Authority has treated as a submission about costs and Ms Hill responded to Mr Chow's email.

Submissions

Labour Inspector submissions

[4] The Labour Inspector seeks costs from Laxmi and Mr Singh based on the notional daily tariff for a two-day investigation meeting together with the filing fee of \$71.56.

[5] Ms Hill refers in submissions to the Authority's jurisdiction to award costs in clause 15 of the Second Schedule to the Employment Relations Act 2000 (the Act). There is reference to the full Court judgment in *PBO Limited (formerly Rush Security Limited) v Da Cruz* and the basic tenets in that judgment for the Authority to consider in an award of costs.²

[6] The legal resources utilised by the Ministry of Business, Innovation and Employment (MBIE) are set out in submissions as including a perusal of the investigation files, preparation in anticipation of the investigation meeting, attendance at a two-day investigation meeting on 17 and 18 January 2023 and preparation of written submissions and cost submissions.

[7] The Labour Inspector seeks an award of \$8,000 being the equivalent of the daily tariff for two days together with reimbursement of the filing fee being \$71.56.

[8] The Labour Inspector submits Laxmi and Mr Singh can be jointly and severally liable for any costs award, or costs can be apportioned as the Authority sees fit.

¹ *A Labour Inspector v Laxmi Narayan Restaurant Limited and Vijay Singh* [2023] NZERA 660.

² *PBO Limited v Da Cruz* [2005] ERNZ 808 at [44].

Laxmi and Mr Singh submissions

[9] Mr Chow on behalf of Laxmi and Mr Singh asks the Authority to take into consideration in determining costs the financial position of Laxmi and Mr Singh and their respective ability to pay. Mr Chow draws the Authority's attention to financial positions as recorded in closing submissions for the substantive matter and attachments. The attachments include a summary of Laxmi's profit and loss for the year 1 April to 31 January 2023, business current accounts and cashflow loan statements. For Mr Singh bank statements are attached. Mr Chow says in his email the financial position of Laxmi and Mr Singh remains the same without improvement.

[10] The profit and loss summary attached to closing submissions shows a loss for Laxmi for the trading period 1 April 2022 to 31 January 2023. It is noted on the summary that it is based on XERO data without detail review and end of year adjustment for stock and accrual. The bank account statements for the business current account are provided for the period 31 December 2022 to 31 January 2023 and 31 January 2023 to 28 February 2023. Closing balances are in overdraft. Small business cashflow loan statements for 1 April 2021 to 31 March 2023 show balances outstanding.

[11] It is set out in the closing submissions that Mr Singh lives in a rental property with his wife and two young children. The only asset referred to is a 2011 family car. Statements from a joint bank account operated by Mr Singh and his wife show only a small credit for the period 5 January to 3 February 2023 and 3 February to 3 March 2023.

Labour Inspector responds.

[12] Ms Hill responded to Mr Chow's email and asked the Authority to consider passages in closing submissions in reply lodged on behalf of the Labour Inspector in the substantive matter. The nature of the submission in reply in respect of Laxmi is that there have been direct credit transfers made on three occasions to another account with a different suffix from the business account but that no statements have been disclosed for that account. Further that there have been regular automatic payments made to a "Vijay R..." which are unexplained.

[13] In respect of Mr Singh the submission in reply refers to a number of “significant deposits” from what appears to be the account of his wife and there are five payments made to “Vijay AUTO PAYMENT” but no provision of his individual bank account statements to which account he was presumably receiving the payments.

[14] Ms Hill in her closing submission in reply for the substantive matter stated that the bank statements provided were not the full financial positions and that Laxmi and Mr Singh had been selective about which bank accounts have been provided.

Findings and conclusions

[15] The determination of costs involves the exercise of a discretion. That discretion is to be exercised in accordance with principle and not arbitrarily. Costs generally follow the event and frequently are judged against a notional daily rate.

[16] The Labour Inspector was the successful party and is entitled to consideration of a contribution towards costs incurred.

[17] The appropriate starting point for an assessment is the daily tariff for two days investigation with the tariff for the first day \$4,500, and for the second day, \$3,500. The total is \$8000.

[18] The ability of an unsuccessful party to pay can be considered in the exercise of the discretion as to costs. I have considered the financial information carefully.

[19] I conclude some caution is required about whether the information provided is the fullest picture of the financial positions. Notwithstanding the information does support on its face issues for Laxmi and Mr Singh about their respective ability to pay costs. I conclude in the exercise of my discretion that it is appropriate to reduce the daily tariff but not entirely given the Authority cannot confidently conclude all financial information has been disclosed. Updated information was not provided. I reduce the starting point by \$2000. No further reduction or increase to the starting point is required.

[20] Costs are to be apportioned on the basis that 60% is payable by Laxmi and 40% payable by Mr Singh.

Orders made

[21] Laxmi Narayan Restaurant Limited is ordered to pay to the Labour Inspector the sum of \$3,600 being costs.

[22] Vijay Singh is ordered to pay to the Labour Inspector the sum of \$2,400 being costs.

[23] Laxmi Narayan Restaurant Limited and Vijay Singh are ordered to pay to the Labour Inspector the sum of \$71.56 being the filing fee jointly and severally.

Helen Doyle
Member of the Employment Relations Authority