

**NOTE: This determination
contains an order prohibiting
publication of certain
information**

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2023] NZERA 78
3184080 and 3184079

BETWEEN	A LABOUR INSPECTOR Applicant in 3184079 and 3184080
AND	BRAK BURNS LIMITED (FORMERLY BURGERED RESTAURANTS AUCKLAND LIMITED) Respondent in 3184080
AND	F & B REMUERA LIMITED Respondent in 3184079

Member of Authority: Robin Arthur

Representatives: Joshua Barlow, counsel for the Inspector
Murray Osmond, advocate for BRAK Burns Limited
Ray Harris, advocate for F&B Remuera Limited

Submissions: From the applicant on 3 February 2023 and from the
respondents on 17 February 2023

Date: 22 February 2023

COSTS DETERMINATION OF THE AUTHORITY

- A. Within 28 days of the date of this determination BRAK Burns Limited must pay \$1,196.56 to the Labour Inspector for her costs and expenses incurred in matter 3184080.**

B. Within 28 days of the date of this determination F & B Remuera Limited must pay \$1,196.56 to the Labour Inspector for her costs and expenses incurred in matter 3184079.

[1] The Labour Inspector sought an award of costs and expenses for these two matters in which the Authority issued two determinations.

[2] The first determination ordered BRAK Burns Limited (BRAKBL) and F&B Remuera Limited (FBRL) to each comply with a notice to supply records to the Inspector and to pay a penalty of \$5,000 for having failed to supply those records earlier.¹

[3] The second determination declined an application from those two companies for “recall” of the Authority’s first determination.² It did, however, grant an interim order prohibiting publication of the two determinations for 14 days. This period was set to allow BRAKBL and FBRL, if they wished to do so, to file a challenge in the Employment Court to the Authority’s decision not to grant a longer prohibition on publication of the determinations.

[4] BRAKBL and FBRL have now each filed a challenge to the Authority’s determinations and the court has issued an interim non-publication order prohibiting publication of the determinations pending further order of the court.³

[5] Absent a stay being granted by the Authority or the court, the filing of a challenge to a determination by the Authority does not halt any timetable that may have been set for the Authority to determine, if needed, the issue of costs in respect of the matter it dealt with in that determination.⁴ Employment Court practice directions allow for a plaintiff, within a set timeframe, to incorporate a challenge to any costs determination into its challenge to the Authority’s substantive determination.⁵

Order prohibiting publication of this costs determination pending further orders

[6] Consistent with the interim order made by the court prohibiting publication of the two earlier determinations, and to allow for the prospect that the court may extend

¹ *Labour Inspector v BRAK Burns Limited & F&B Remuera Limited* [2023] NZERA 19.

² *Labour Inspector v BRAK Burns Limited & F&B Remuera Limited* [2023] NZERA 30.

³ EMPC 46/2023 and EMPC 47/2023 and Minute to the Parties of Judge J C Holden, 14 February 2023

⁴ Employment Relations Act 2000, s 180.

⁵ www.employmentcourt.govt.nz.

or end that prohibition during the proceedings before it, this costs determination is prohibited from publication pending further orders of the court or the Authority.

Application for costs

[7] A timetable set in the first two determinations allowed for the parties to lodge memoranda on costs if they could not resolve that issue between themselves.

[8] The Inspector's memorandum seeking costs accepted an indication given in the Authority's first determination that because the compliance and penalty matter was determined 'on the papers', costs would be assessed from a starting point of one third of the Authority's notional daily tariff of \$4,500, that is \$1,500. The memorandum proposed that the recall application, which was determined after a telephone conference in which I heard submissions from representatives, be assessed from a starting point of \$750, that is one sixth of the usual daily tariff.

[9] The Inspector also sought reimbursement of the filing fee of \$71.56 paid to lodge her two applications, one against BRAKBL and one against FBRL, which the Authority had investigated jointly.

[10] FBRL's memorandum on costs simply adopted submissions lodged by BRAKBL. The two companies accepted \$1,500 as the starting point for costs in relation to the first determination but said that amount should be "equally divided" between the two respondents to set at individual tariff of \$750 because the pleadings against them were very similar and required less time for individual preparation. In respect of the recall application, they said the Inspector's response and involvement of her counsel through attending a telephone conference to make submissions had required little work and no details of specific costs incurred had been lodged.

[11] The companies' principal submission was, however that costs should lie where they fall because, firstly, the Inspector had not provided sufficient detail about how her costs were incurred and, secondly, they were struggling "under significant economic duress" so would face significant difficulty in paying costs.

Factors in assessing costs

[12] The Authority's jurisdiction to order a party to contribute to costs incurred by another party is exercised by applying well-established basic tenets to the particular

circumstances of the case. Those tenets recognise that a successful party should receive a contribution to its reasonably incurred costs and expenses; costs should generally be modest and may not be used to punish an unsuccessful party; the nature of a case may allow for an order that costs lie where they fall; and the Authority may use a notional ‘daily rate’ or ‘tariff’ as a starting point to assess costs.

[13] Undue rigidity in applying that tariff is avoided by upward or downward adjustments appropriate to the particular case. Those adjustments may take account of settlement offers made by either party, the financial means of a liable party to pay costs, the preparation required in particularly complex matters and whether conduct of any party unnecessarily increased the costs they incurred.

Assessment

[14] The Inspector succeeded in her application for compliance and penalty orders and in opposing recall of the first determination. Costs follow those events. Review of the pleadings, supporting documents, memoranda and other correspondence on the Authority file in these two matters support a conclusion that the amount sought in costs was both modest and reasonable considering the amount of preparation and participation required for the Authority’s on-the-papers investigation of the initial application and for attending a submissions conference on the “recall” application. All parties benefitted from the efficiency gained through the joint investigation of the two matters involving these interrelated companies. The modest level of costs sought, at a tariff-based level only, by the Inspector reflected that efficiency.

[15] The submission that BRAKBL and FBRL would face significant difficulty in paying costs at the modest level contemplated was not supported by any evidence about their present financial circumstances or future prospects. While neither company, as I understood the limited information available to the Authority, was presently trading in the businesses which were the subject of the Inspector’s inquiries, there was no information about what assets or other resources they might be able to be called upon to pay an award of costs. A mere assertion was not enough to establish that excessive or disproportionate hardship would result from an order to pay costs at the tariff level.

Order for costs and expenses

[16] As a result, the companies’ request that costs lie where they fall is refused. Costs are set at a total of \$2,250, comprising \$1,500 for the matters dealt with in the

first determination and \$750 in relation to the second determination. The obligation to pay this amount of costs is to be divided separately and equally between the respondents, that is BRAKBL and FBRL must pay \$1,125 each. They must also each reimburse the Inspector for the fee of \$71.56 paid to lodge her application against each of them.

[17] The amounts due in costs and expenses must be paid within 28 days of the date of this determination.

Robin Arthur
Member of the Employment Relations Authority