

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2024] NZERA 455
3142541

BETWEEN A LABOUR INSPECTOR for
the MINISTRY OF
BUSINESS, INNOVATION
AND EMPLOYMENT
Applicant

AND JDFOODS LIMITED trading
as CHILLI INDIA
RESTAURANT
First Respondent

AND JAYANT KAUSHAL
Second Respondent

AND DEEPTI KAUSHAL
Third Respondent

Member of Authority: Eleanor Robinson

Representatives: Martin Denyer and Lauren Dennehy, counsel for the
Applicant
Arunjeev Singh, counsel for the Respondent

Submissions received: 13 June 2024 from the Applicant
2 July 2024 from the Respondent

Determination: 26 July 2024

COSTS DETERMINATION OF THE AUTHORITY

[1] In a determination dated 16 May 2024 ([2024] NZERA 288) it was determined that there had been multiple breaches of minimum employment standards by the First

Respondent, and that the Second and Third Respondents were persons involved in, and liable for, the breaches.¹

[2] In that determination costs were reserved in the hope that the parties would be able to settle this issue between themselves. Unfortunately they have been unable to do so, and the Applicant is seeking a contribution to costs.

[3] The investigation meeting involved a twelve day investigation meeting.

[4] Mr Denyer on behalf of the Applicant, is seeking a contribution to costs at the notional daily tariff rate in the Authority with the addition of a modest uplift. Disbursements in the sum of \$8,916.57 are also sought.

[5] Mr Singh, on behalf of the Respondents, opposes the application for costs and submits that costs should lie where they fall.

Submissions of the Applicant

[6] In support of the application for an uplift in costs, Mr Denyer submits for the Applicant that the Respondent acted in such a way as to unnecessarily increase costs to the Applicant. It is noted that in determination [2024] NZERA 288 the Member commented upon the Respondents having spent nine days examining the Labour Inspector's witnesses, and observed that he could see little benefit or relevance in the line of questioning which: "added to the time".²

[7] It is submitted that it is apparent from the Authority Member's determination that the Respondents were largely responsible for the length of the proceedings, and on that basis, there should be a modest uplift applied to the daily tariff rate, or at least no discount applied to it.

Disbursements

[8] The disbursements claimed include \$2,221.60 in respect of the translation of evidential documents.

¹ *A Labour Inspector of the Ministry of Business, Innovation and Employment v JD Foods Limited and Jayant Kaushal and Deepti Kaushal* [2024] NZERA 288, Member Loftus.

² Above n 1 at [15].

[9] \$2,862.41 is claimed in respect of printing costs. It is submitted that the Authority directed the parties to prepare their own tabulated, paginated, chronological evidence bundles in both hard and soft copy. It is submitted that the Applicant provided sufficient hard copy bundles for counsel, witnesses, and the Authority and the size of the job necessitated the engagement of external printing services. It is acknowledged by the Applicant that the evidence was voluminous but submitted that the provision of full bundles for all parties was a reasonable expense.

[10] Accommodation costs of \$3,323.00 are claimed for the Labour Inspector, and one other witness, who had to travel to Auckland and give evidence (or potentially give evidence) over multiple days. It is submitted that it was the Respondent's preference for the investigation meeting to be held in Auckland despite the alleged breaches being in respect of a restaurant in Hamilton and having been investigated by Labour Inspectors based in Hamilton.

[11] On that basis it is submitted that it was reasonable for the Applicant witnesses travelling out of Auckland for multiple days of hearing in Auckland, to require accommodation in Auckland.

[12] Witness expenses of \$438.00 are claimed for expense amounts set out by the Authority when issuing witness summonses.

Submissions of the Respondent

[13] Mr Singh submits on behalf of the Respondent that its conduct in defending the claims was not unreasonable and not with any intention to delay the matter.

[14] It is submitted that the position taken by the Respondents was based on facts and circumstances in their favour which were considered by the Authority, but on balance, the Authority accepted the position of the Applicant. It is noted that in the determination the Authority member did not make any comment that the position taken by the Respondent was without any basis. It is therefore submitted that there should be no deviation from the notional daily tariff.

[15] It is submitted that the Respondents had incurred significant legal and travel costs. Further that the First Respondent, JDFoods Limited, is not carrying out business and that the Restaurant was sold before the proceedings began in the Authority. It is

also submitted that the Second and Third Respondents are not in a strong financial position to pay any costs.

[16] The Respondents submit that there is no case for an uplift in costs because the conduct of the Respondents prior to and during the investigation meeting was never unreasonable nor was there any intention to unnecessarily delay the matter.

Costs Award

[17] It is a principle set out in *PBO Limited (formerly Rush Security Ltd) v Da Cruz*³ that costs are modest. Principles also include that costs are reasonable and that they normally follow the event.

[18] Mr Singh for the Respondents states in paragraph [7] of his submissions on costs that the investigation meeting took seven days, and in paragraph [15] that it was an: “8 days hearing”. This is at variance with both determination [2024] NZERA 288 which identifies the twelve dates on which the investigation meeting was held, and the statement in the Applicant’s submissions that the investigation meeting took 12 days.

[19] I consider that the apparent variance in the time involved may be attributable to the fact that some of the twelve dates did not constitute a full hearing day, for example I note that on 8 May 2023 the investigation meeting did not commence until 11 a.m. due to Mr Singh not being available until that time.

[20] It is not possible to discern if that might have applied on other days, but it would nonetheless have been necessary for the parties and/or their witnesses to have been available on all the identified days unless excused from attendance by the Member.

[21] I consider that it is fair to both parties to take 10 days, which based on the notional tariff rate of \$4,500.00 for the first day of hearing and \$3,500.00 for the second and subsequent days, constitutes a costs award of \$36,000.00.

[22] In regard to an uplift in costs, I note the comments of Member Loftus in the determination. However, it appears that the length of the hearing reflects the extent of any examination of the Applicant witnesses undertaken by the Respondent counsel. No additional uplift is therefore awarded.

³ *PBO Limited (formerly Rush Security Ltd) v Da Cruz* [2005] 1 ERNZ 808.

[23] In regard to the submission that the Respondents will have difficulty in meeting any costs award, I observe that JDFoods Limited remains registered on the Companies Office website, and the Second and Third Respondents are joint directors and shareholders. No financial information has been submitted by the Second and Third Respondents to support a claim of financial impecuniosity. I therefore make no reduction on financial grounds.

[24] It is not normal practice in the Authority for disbursements to be awarded in respect of travel costs incurred. However, I take into account the explanation that the investigation was held in Auckland to accommodate the preference of the Respondent.

[25] The disbursements claimed in respect of translation costs and printing appear to be reasonable and properly incurred.

[26] As regards witness expenses, the summonsed witnesses appeared to give evidence. Schedule 2 of the Employment Relations Act 2000 requires payment to be made to a summonsed witness at the rate set out by the Authority. Accordingly, the Labour Inspector having been obliged to make the indicated payments, I accept that these were necessary disbursements properly recoverable from the unsuccessful party.

[27] All disbursement claims are supported by documentation.

[28] **Accordingly, the Respondents are ordered to pay the Labour Inspector the following amounts:**

- **\$36,000.00 towards the Labour Inspector's legal costs, pursuant to clause 15 of Schedule 2 of the Act;**
- **\$8,845.01 in respect of disbursements (consisting of \$2,221.60 for translation costs, \$2,862.41 for printing costs, \$3323.00 for accommodation costs, and \$438.00 witness expenses).**

[29] **The Respondents are also ordered to pay the Labour Inspector the Authority filing fee in the sum of \$71.55.**

Eleanor Robinson
Member of the Employment Relations Authority