IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE

[2024] NZERA 609
3159481

	BETWEEN	A LABOUR INSPECTOR Applicant
	AND	RURAL PRACTICE LIMITED First Respondent
	AND	REZA ABDUL-JABBAR Second Respondent
	AND	SILVIA ABDUL-JABBAR Third Respondent
Member of Authority:	Andrew Dallas	
Representatives:	Amy Webster, counsel for the Applicant Mark Hammond, counsel for the Respondent	
Submissions received:	14 May, 17 June and 12 July 2024 for the Applicant 27 May, 3 July and 10 July 2024 for the Respondents	
Date:	10 October 2024	

COSTS DETERMINATION OF THE AUTHORITY

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[1] In a determination issued earlier this year, the Authority found in favour of the Labour Inspector's contentions of breaches of minimum employment standards by Rural Practice Limited. Reza Abdul-Jabbar and Silvia Abdul-Jabbar were found to be persons involved in those breaches. Recovery of arrears was ordered.[1] Penalties were subsequently ordered payable.[2]

[1] *A Labour Inspector v Rural Practice Limited* [2024] NZERA 66 (Member Dumbleton)
[2] *A Labour Inspector v Rural Practice Limited (No.2)* [2024] NZERA 183 (Member Dumbleton). This determination is currently under challenge.

[2] Costs were reserved with the parties encouraged to resolve any issue of costs between them. The Authority observed when reserving costs that although the investigation meeting lasted nine days, "the length of some of those justify ten days as the overall time taken".[3] The parties were not able to agree costs and the Labour Inspector lodged a costs memorandum in accordance with a timetable subsequently set by the Authority, now as constituted.

[3] In this determination, I do not refer to all the submissions advanced by the representatives, or the other information lodged in the Authority in support of the same. However, I record that I fully considered all this material.

Submissions

The Labour Inspector

[4] The Labour Inspector seeks costs of $39,500, for a ten day investigation meeting and an uplift of $3500, the equivalent of one additional day applying the Authority's tariff. The Labour Inspector submitted the First and Second Respondents (the Respondents) be found jointly and severally liable for costs and expenses.

[5] The Labour Inspector said it was not "completely successful" in advancing its employment relationship problem against the Respondents. However, it submitted it was substantially successful. The Labour Inspector said, being mindful of some personal issues affecting the Respondent during the initial phase of the Authority's investigation, that only a modest uplift to the tariff was sought as a contribution towards additional attendances near the end of proceedings.

[6] Specifically, the Labour Inspector said these were either a reflection of the complexity of the case or conduct which unnecessarily increased costs and included:

a) Responding to the Respondents' interim costs application and request to introduce new video evidence and associated issues relating to the credentials of the interpreter;
b) Responding to the Respondents' introduction of 67 pages of additional information relating to financial means after the Applicant had already filed its reply submissions on penalties;

[3]Above n2 at [163]

c) Drafting extensive written submissions, rather than reconvening the investigation meeting to deliver them orally (the Applicant considers delivering submissions orally would have taken at least a further day in and of itself); and

d) The need to negotiate payment of arrears and seek a consent determination.

Accordingly, the Applicant seeks costs in the amount of $39,500, being the tariff for a ten-day investigation meeting, plus one additional day.

[7] The Labour Inspector submitted that the amount sought is significantly less than actual costs incurred and would constitute a reasonable contribution to the Applicant's costs in the circumstances.

[8] Despite "incurring significant expenses", including translation costs for a witness statement and the preparation of expert evidence, the Labour Inspector sought only reimbursement of the Authority's hearing fees of $2.453.28[4], the Authority's lodgement fee of $71.56 and $137.31 for witness expenses.

[9] The Labour Inspector made clear its application for costs here does not include attendances in relation to the Authority's own motion investigation into possible obstruction of its investigation.[5] Finally, the Labour Inspector observed that the Respondents' financial evidence had already been found to be "incomplete" by the Authority.[6]

The Respondents

[10] The Respondents said there was no basis for the Labour Inspector's claim for an uplift and, indeed, asserted the tariff should only be applied to four days of the investigation meeting. The Respondent said a similar proportional discount should be applied to the Labour Inspector's claim for expenses.

[11] The Respondents also said the Labour Inspector was not successful in all "claims" before the Authority and, in fact, the claim which took a substantial proportion of the investigation meeting, the Labour Inspector failed to prove any loss. The Respondents said this "claim" was centred on the actual work required to manage the Respondents farming operation. The Respondents claimed that two witnesses "called"

[4] Calculated as sixteen half-days payable at a rate of $153.33 per half day.
[5] *A Labour Inspector v Rural Practice Limited* [2024] NZERA 66 at [378] - [380]
[6] Above n 2 at [140]

by the Labour Inspector "who were simply irrelevant to the proper inquiry into the issues before the Authority". The Respondents said a reduction in the tariff was appropriate.

The Respondents' application for costs

[12] The Respondents advanced their own application for costs against the Labour Inspector of $27,000, being the tariff for the "other" six days of the investigation meeting.

[13] The Respondent said Labour Inspector matters are different in character to other employment relationship problems which typically come before the Authority because they are more in "the nature of a regulatory prosecution" and, as such, are driven by the Labour Inspector rather than the Authority. The Respondent submitted that it was for the Labour Inspector to establish the duration of the investigation meeting, with the initial estimate said to be four days, and to direct the evidence to be considered by the Authority and rebutted or otherwise countered by the Respondents. The Respondents said it was not for them to make this assessment. In other words, as the Respondents contended "there was no mutuality in the assessment as to how long the investigation meeting would take". The Respondents said the Labour Inspector "grossly underestimated" the extent of time the investigation meeting would take "to the extreme detriment of the Respondents".

[14] The Respondents submitted that one of the "fundamental problems" arising from the Labour Inspector "grossly underestimating" the time the investigation meeting needed took away the opportunity for the Respondents to make a "commercial assessment as to whether or not to oppose the claims". Indeed, the Respondents submitted had they known at the outset the investigation meeting would take 10 days, the respondents may have made different decisions including possibly settling the matter.

[15] The Respondents said the Labour Inspector's application for costs based on ten days of the Authority's tariff "is grossly unfair" and the most the Labour Inspector should be entitled to is four days of the tariff. The Respondents also referred to the length of time taken to cross-examine the Second Respondent.

The Labour Inspector's response to the Respondents' application for costs

[16] The Labour Inspector said it was for the Authority to determine the length of its investigation[7], the Respondents did not consider the original time estimate of four days unrealistic[8] and a number of variables contributed to the investigation meeting being longer than four days.[9]

[17] The Labour Inspector said even if the matter was originally set down for 10 days, "it is extremely unlikely this would have led to a decision by the Respondents that could have reduced the duration of the [investigation meeting], unless they were willing to accept full liability, i.e. that all the facts as stated by the employees and the Labour Inspector were accurate".

[18] The Labour Inspector submitted the Authority said the Labour Inspector should not be criticised for the investigation meeting's length and cited the following paragraphs from the first substantive determination in support:[10]

> [339] The lack of records or reliable records presented a considerable challenge to the Inspector when she came to assess RPL's level of compliance with the employment standards of the HA, and when she came to quantify her claims to recover unpaid holiday pay. The Inspector had an unenviable task and should not be criticised if her investigation and the subsequent Authority investigation, have taken much longer than is likely to have been the case if proper records had been kept.
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> [340] The Authority must establish the facts for itself and reach its own determination, but it can be assisted by the Inspector's conclusions in her report as well as other evidence. The Authority views the Inspector's work as having been done painstakingly and objectively, without bringing blame or punishment into the difficult search for the facts. Her report shows that she continually revised her calculations where necessary, as more information was obtained from the respondents and the workers.

[19] The Labour Inspector rejected the Respondents general assertion it was not successful and took particular issue with the assertion it had "failed to prove any loss" in relation to the minimum wage claim. The Labour Inspector placed responsibility for this "on the Respondents' shoulders" because they had failed to maintain compliant records but otherwise noted the Authority had found a breach had occurred.[11]

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[7] See, Submissions on behalf of the Labour Inspector, 17 June 2024 at [13] – [16]
[8] Above n 7 at [17] – [23]
[9] Above n 7 at [24] – [35]
[10] Above n 1
[11] Above n 2 at [95]

[20] Finally, the Labour Inspector provided extensive rebuttal submissions to the Respondents' assertions about the relevance of the evidence given by two of the Labour Inspector's witnesses, including that no objection was raised at the time.[12]

Respondents' ability to pay

[21] The ability of an unsuccessful party to pay can be considered in the exercise of the discretion as to costs. This was certainly advanced by the Respondents.[13]

[22] Towards the end of the submission process, the Respondents provided information about a farm debt mediation to take place with their bankers, Rabobank, arising out of a proposal to withdraw funding. The outcome of this mediation process was said to be relevant to their ability to pay any costs award. Indeed, it was submitted "the [Respondents] impecuniosity is at such a level that any award of costs should be significantly reduced from what might otherwise have been ordered".

[23] The Labour Inspector said the proposed withdraw of funding, if it were to occur, did not mean the Respondents lacked means to pay costs in the amount sought. The Labour Inspector provided rateable value information to the Authority based on the properties identified in the Rabobank correspondence. That information suggested value of these properties was "more than $15 million". The Labour Inspector went on to observe that based on other financial information provided suggesting the Respondents had "over $6 million in equity across the properties of related entities".

[24] The Labour Inspector said it was "highly unlikely" that an approximately $40,000 costs award would have any impact on Rabobank's decision-making processes. The Labour Inspector also said regardless of whether funding was continued or withdrawn by Rabobank, there would still be sufficient total funds available across all entities to meet any liabilities, including any costs award.

[25] Finally, the Labour Inspector submitted that the Respondents have made a "choice" not to provide evidence of their full financial position - for example, by providing annual financial accounts. And, accordingly, there should be no discount applied based on an ability to pay, including alleged impecuniosity.

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[12] Above n 7 at [43] – [55]

[13] It is noted, for completeness, that the Authority previously rejected an interim application made for costs by the Respondents on 27 July 2023

Discussion

[26] The determination of costs involves the exercise of a discretion. That discretion is to be exercised in accordance with principle and not arbitrarily. In the Authority, costs generally follow the event but, unlike most other forums, are assessed against a notional daily tariff.[14] The starting point for such a consideration is the daily tariff of $4,500 for the first day and $3,500 for each day thereafter.

[27] The Labour Inspector's application for costs was orthodox and the claim for expenses was modest. As the successful party, and one entitled to seek costs[15], I have no difficulty in entertaining the Labour Inspector's application. However, while the presiding Member suggested the length of Authority's investigation would justify ten days as the overall time taken, the investigation meeting itself was only nine days long, regardless of the length of those days; some likely shorter, other longer.[16] Nine days was the amount of hearing time invoiced to the Labour inspector and this the amount claimed, in turn, as an expense from the Respondents. Consequently, the starting point for consideration of application of the tariff, which is applied in half and full days, is nine days, not ten.

[28] In respect of the Labour Inspector's claim for a one day uplift, having reviewed the matters set out in paragraph [6] above and have regard the Authority's investigation of this employment relationship problem "in the round", I am satisfied that nine days of tariff is a sufficient contribution to the Labour Inspector's costs.[17] Consequently, the Labour Inspector' claim for an uplift is declined.

[29] In respect of the Respondents relatively unorthodox costs application against the Labour Inspector is concerned, the following points are made along the road to ultimately rejecting this.

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[14]However, this depends on the nature of the employment relationship problem, see: www.era.govt.nz/assets/Uploads/practice-direction-of-the-employment-relations-authority.pdf

[15] See the line of judgments and determinations on the ability of in-house representatives to seek to recover costs including *Smith v Air New Zealand Limited* [2001] NZEmpC 31 and *A Labour Inspector v Civic City Ltd* [2013] NZERA Auckland 493

[16] See, para 2 above.

[17] See, above n 1 at [41]-[45] for a detailed overview of the Authority's investigation meeting which dealt with 12 witnesses, 1600 pages of documents and, among other things, an episode of "Country Calendar".

[30] Matters come before the Authority as "employment relationship problems". Yes, within that context there may be discrete aspects of a particular problem which have a particular legal character about them – for example, a personal grievance, seeking of a penalty or recovering wages. However, the structure and language of the Employment Relations Act 2000 are clear and so are the views of the Supreme Court about the same.

[31] In *FMV v TZB*[18], the Supreme Court stated:

> [i]n enacting s 161(1) [of the Employment Relations Act], the legislature specifically chose not to ground the Authority's jurisdiction in the way claims might be pleaded or traditionally categorised. It used a non-technical term, "problem", to ensure legal form did not distract the decision maker from focusing on the factual substance of the difficulty confronting the parties. That is the reason "problem" is not a legal category alongside property, or tort, or equity, but a supervening class that may encompass all of these legal forms as long as the problem relates to or arises from an employment relationship. And that means the character of a problem is not to be found in its legal presentation.[19]

[32] The Supreme Court went on to observe:

> If a "problem" encompasses any kind of difficulty or controversy, when does it relate to or arise out of the employment relationship? In our view, the "essence" test articulated in *Pain Management Systems (NZ) Ltd v McCallum* invites an inappropriately narrow inquiry in light of the broad language of the section. The question is simply one of fact. If the controversy arises during the course of the employment relationship and in a work context, then it will be an employment relationship problem. That is because the expectations arising out of an employment relationship apply only in a work context. This does not necessarily mean only "at work during work hours", though if the problem arises in that context, it will almost certainly be an employment relationship problem. Rather, an assessment of all of the facts is required, not just time and location. We accept this will sometimes be a question of judgement and degree, but given the statutory language, that is unavoidable.[20]

[33] So then, with this context what does a successful employment relationship problem look like before the Authority? It looks like the matter to which this determination relates. The simple facts are the Labour Inspector lodged a statement of problem directed at the Respondents alleging an employment relationship problem. After an investigation, albeit one that lasted longer than the Respondents would have liked, the Authority concluded "yes", there was an employment relationship problem between the parties and remediated it within the context of its functions, powers and jurisdiction. However, as with every employment relationship problem which comes

[18] [2021] NZSC 102
[19] At [92]
[20] At [93]

before it, the Authority did not agree one hundred percent with one party over the other or others (as is the situation here).

[34] In this regard, the presiding Member observed legally (and philosophically):

> The Authority also agrees that the Authority's disposition of the minimum wage claims ***should not be viewed as any kind of success the respondents had***. The Authority found it likely there were breaches in one or more pay periods over the length of employment, but on the evidence was left unable to quantify the amount underpaid, or the scale of the breach. That result flowed largely from RPL's failure to keep proper records. **It would be unjust for the respondents to achieve any advantage from the employer's failure to comply with the employment standards of s 130 of the ER Act and s 81 of the HA**.[21](emphasis added)

[35] It is entirely artificial, and inconsistent with *FMV*, to engage in pedantic nit-picking around the relative weight and success, or otherwise, to be given to particular "claims" or "causes of action" in any costs assessment. The Authority's tariff is based fundamentally on three things: discerning the party with the successful employment relationship problem, ascertaining the notional tariff range, and arriving at a just outcome through the proper exercise of discretion. In other words, consideration according to the substantial merits of the application for costs, without regard to technicalities.

[36] On any, and all, objective bases, the Labour Inspector is entitled to an assessment of costs for having a successful employment relationship problem before the Authority.

[37] Furthermore, in respect of the Respondents' arguments about lack of "mutuality in the assessment as to how long the investigation meeting would take" and the Labour Inspector "grossly underestimated" the time the investigation meeting would take, I just simply accept the Labour Inspector's submissions in rebuttal.

[38] While the Respondents criticise the Labour Inspector for undertaking two days of cross-examination of the Second Respondent, two critical points must be made in respect of this. First, the Authority must allow cross examination.[22] And, second, following thorough examination, the Second Respondent was found to be a person involved in breaches of minimum employment standards.[23] As to the relevance of the

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[21] Above n 2 at [95]
[22] Employment Relations Act 2000, s 160(2)(a)
[23] Above n 1 at [368]

(now) two disputed witnesses, again I just simply accept the Labour Inspector's submissions in rebuttal.

[39] Indeed, yes, a nine day investigation meeting is quite a long one. However, it is worth noting that last year the Authority conducted a longer one involving the Labour Inspectorate. In *A Labour Inspector v JDL Foods Ltd trading as Chilli India Restaurant*[24] the investigation meeting lasted 12 days. In the subsequent determination on costs,[25] the Authority concluded that total hearing time was 10 days, due to some part days[26]. The Authority awarded the Labour Inspector $36,000.00 as a contribution to costs and $8,845.01 as expenses.[27] This matter also morphed into a much longer investigation meeting from that which was scheduled as the Authority grappled with both extensive documentation and obfuscation to understand the extent of those Respondents' misdeeds.

[40] Finally, there is a certain irony about a party complaining about the length of an investigation meeting when its own conduct in respect of the same is being examined by the Authority for possible obstruction. However, as will be seen below, that is a separate issue and has been carved off for resolution on another day.

[41] The Respondents are not entitled to costs. Their application lacks merit.

[42] Ultimately, I am satisfied, having reviewed the two substantive determinations issued in this matter, the Authority's file, the parties' submissions and supporting material, that nine days, while the starting point is also the finishing point, as the appropriate time to attach the Authority's tariff. The matter was factually dense, the Respondents' financial affairs complex and the precise application of the law was crucially important.[28]

[43] I am also satisfied that the expenses sought by Labour Inspector, which are both reasonable and modest, should also be ordered payable by the Respondents.

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[24] [2024] NZERA 288
[25] *A Labour Inspector v JDL Foods Ltd trading as Chilli India Restaurant* [2024] NZERA 455 (Costs)
[26] Above n 25 at [21]
[27] Above n 25 at [28]
[28] By way of illustration, *A Labour Inspector v Rural Practice Limited* [2024] NZERA 66 runs into 382 paragraphs and *A Labour Inspector v Rural Practice Limited (No.2)* [2024] NZERA 183 is 164 paragraphs.

[44] In respect of the Respondents' ability to pay, it is clear some caution is required about whether the information provided is the fullest picture of the Respondents' financial position. In the end, I am not persuaded I should exercise my discretion to reduce the tariff because I cannot confidently conclude all financial information has been disclosed. Indeed, given the level of uncertainty here, I have no trouble in accepting the Labour Inspector's submission that the Respondents should be found jointly and severally liable for any costs and expenses ordered payable.

Outcome

[45] So then, within 28 days of the date of this determination, Rural Practice Limited and Reza Abdul-Jabbar must pay $32,500 (comprising $4500 for the first day of the investigation meeting and 8 days at $3,500 thereafter) to the Labour Inspector as a contribution to costs **and** $2,662.15 in expenses (comprising Authority's hearing fees of $2.453.28, the Authority's lodgement fee of $71.56 and $137.31 for witness expenses).

[46] Rural Practice Limited and Reza Abdul-Jabbar are jointly and severally liable for the costs and expenses set out in paragraph [45] above. How they apportion these amounts between them is a matter for them, but they must be paid in full by one, other or both.

Residual and outstanding issues

[47] Two issues remain live before the Authority. First, whether the Authority in investigation of the Labour Inspector's employment relation problem was obstructed by the Respondents. The Authority will issue the outcome of its consideration in this respect in due course. Second, costs relating thereto, which remain reserved and, for the avoidance of doubt, also unresolved by this determination.

Andrew Dallas
Chief of the Employment Relations Authority