

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2018] NZERA Wellington 33
3002112

BETWEEN	A LABOUR INSPECTOR OF THE MINISTRY OF BUSINESS INNOVATION AND EMPLOYMENT Applicant
AND	GSTECH LIMITED First Respondent
AND	GHANSHYAM SHARMA Second Respondent

Member of Authority: Trish MacKinnon

Representatives: Claire English, Counsel for Applicant
Paul McBride, Counsel for Second Respondent

Submissions Received: 15 and 31 January 2018 from the Second Respondent
30 January 2018 Applicant

Determination: 30 April 2018

COSTS DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] In my determination of 17 November 2017¹ I dismissed the Labour Inspector's claims against Ghanshyam Sharma. I found that the employee, Pardeep Kumar, on whose behalf the Labour Inspector had raised the claims, had been underpaid by GSTech Ltd (GSTL) in relation to one aspect of his employment. GSTL was ordered to pay the Labour Inspector, for the use of Mr Kumar, wage arrears and holiday pay in the sum of \$923.40 gross. I reserved the issue of costs.

[2] Mr Sharma, who is the sole director of GSTL, now seeks costs on the basis that the claims made by the Labour Inspector against him personally had been dismissed in their entirety. He says his actual and reasonable costs, not including his

own time, some of which had comprised leave taken from his full-time employment for preparation and the hearing, were \$25,184 plus GST of \$3,777.60 and disbursements of \$35.10. Mr Sharma seeks an order reimbursing him for these costs.

[3] Alternatively, should the Authority consider a solely tariff-based approach to be appropriate, Mr Sharma submits an uplift to the Authority's notional daily tariff to approximately \$7,000 per day of hearing would be appropriate.

[4] Additionally, counsel for Mr Sharma submits attempts to resolve costs matters between counsel had not been successful which has led to the current application to the Authority. Counsel submits a further contribution of \$1,500 is appropriate, representing four hours of his time).

[5] Counsel for the Labour Inspector submits that costs should lie where they fall but that if, the Authority disagrees, the appropriate amount of costs to be awarded is the daily tariff multiplied by the hearing time. Counsel for the Labour Inspector refers me to the well-known principles relating to costs in the Authority as noted by the Full Court in *PBO Limited (formerly Rush Security Ltd) v da Cruz*.² Some, but not all, of those principles, which have more recently been confirmed in *Fagotti v Acme & Co Ltd*,³ are:

- That costs are discretionary, with the discretion to be exercised in a principled manner.
- They are to be modest.
- They should not be used as a punishment or expression of disapproval of the unsuccessful party's conduct, although conduct that increased costs unnecessarily can be taken into account in inflating or reducing an award.
- It is open to the Authority to consider whether all or any of the parties' costs were unnecessary or unreasonable.
- They generally follow the event.
- They are frequently judged against a notional daily tariff.
- The nature of the case can influence costs, which has resulted in the Authority ordering that costs lie where they fall in certain circumstances.

[6] Counsel for the Labour Inspector submits that the daily tariff is an appropriate method for assessing costs in this instance. She notes there were no special circumstances in this case that would call for the uplifting of the daily tariff and suggests an order for costs of either \$6,750 or \$8,000 would be appropriate, depending on whether the Authority viewed the hearing as being for two days or one

¹ [2017] NZERA Wellington 113

² [2005] ERNZ 808 (EmpC)

and a half days. Counsel also submits the importance of the proceedings being an action brought by a statutory officer charged with enforcing minimum standards legislation for the protection of workers as distinct from proceedings between two private parties.

[7] I do not find any reason to award indemnity costs. While the Labour Inspector's claims against Mr Sharma failed, I did not find evidence of the "*exceptionally bad behaviour*" the Court of Appeal held to be required for the award of such costs.⁴ I accept the submission made on behalf of the Labour Inspector that the daily tariff is the appropriate mechanism for determining costs.

[8] Nor am I persuaded that this is a case meriting an uplift to the daily tariff. I am mindful that the Labour Inspector was involved in an investigation into serious allegations against the first and second respondents. The fact that she failed to prosecute them successfully does not automatically result in an uplift. My determination made no findings that could be regarded as questioning the Labour Inspector's good faith in bringing the claims to the Authority.

[9] The investigation meeting took place over two days, ending mid-afternoon on the second day. In the circumstances I consider it appropriate for costs to be awarded on the basis of two full days based on the Authority's notional daily tariff of \$4,500 for the first day and \$3,500 for the second day. It is not normal practice for the Authority to grant costs for the preparation of a costs application on the basis that the parties have been unable to resolve the issue between themselves and I see no cogent reason to depart from that practice in this instance.

Orders

[10] The Labour Inspector is ordered to pay Mr Sharma the sum of \$8,000 as a contribution to the costs he incurred in defending the Labour Inspector's claims against him.

Trish MacKinnon
Member of the Employment Relations Authority

³ [2015] NZEmpC 135

⁴ *Bradbury v Westpac Banking Corp* [2009] NZCA 234