

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2016] NZERA Auckland 243
5541492

BETWEEN A LABOUR INSPECTOR
 OF THE MINISTRY OF
 BUSINESS
 INNOVATION AND
 EMPLOYMENT
 Applicant

AND JASVIR SINGH
 Respondent

Member of Authority: Vicki Campbell

Representatives: Alastair Dumbleton for Labour Inspector
 Rebekah Revell for Jasvir Singh

Submissions Received: 18 July 2016 from Labour Inspector
 8 July 2016 from Mr Singh

Determination: 20 July 2016

**COSTS DETERMINATION OF THE
EMPLOYMENT RELATIONS AUTHORITY**

- A. The Labour Inspector is ordered to pay to Mr Singh the amount of \$8,750 without deduction as a contribution to Mr Singh's costs within 28 days of the date of this determination.**

Background

[1] The Labour Inspector lodged an application under section 234 of the Employment Relations Act 2000 (the Act) for authority to bring an action to recover money payable by way of minimum wages or holiday pay against Mr Gurmail Lally, the sole Director and a major shareholder of Freemind Enterprize Limited (Freemind), and Mr Jasvir Singh who is Mr Lally's brother and one of two minor shareholders of Freemind.

[2] In a determination dated 26 May 2016¹ I held that Mr Singh was an Agent of Freemind and authorised the Labour Inspector to bring an action for the recovery of money payable by way of holiday pay and minimum wages of employees of Freemind against Mr Singh. The Labour Inspector failed to prove that Mr Singh directed or authorised the default in the payment of holiday pay and minimum wages and no further orders were made against him.

[3] I reserved costs, indicating that if the parties were unable to resolve that issue, they would have the opportunity to file cost memoranda and evidence. These have now been received by the Authority for consideration. Mr Singh seeks a contribution to his costs at a higher rate than the notional daily tariff.

Costs

[4] The discretion to award costs, while broad, is to be exercised in a principled way. The primary principle is that costs follow the event. The Authority applies a starting point of a notional daily tariff for quantifying costs and may uplift where there is conduct which increases costs unnecessarily.

[5] The Employment Court has held that the assessment of an appropriate contribution to costs in the Authority requires a different approach to assessing costs to that used by the Employment Court.² As noted in *PBO Ltd (formerly Rush Security Ltd) v Da Cruz*³ and confirmed in *Fagotti v Acme & Co Ltd*⁴, awards in the Authority will be modest taking into account conduct which increases costs unnecessarily. Indemnity costs may be justified in relatively rare cases where a party's conduct is particularly egregious.⁵

Determination

[6] Mr Singh submits that in applying to join him to the proceedings the Labour Inspector relied on self-serving statements from Mr Lally who pointed to Mr Singh as being the wrongdoer and that other than Mr Lally's statement the Labour Inspector had

¹ [2016] NZERA Auckland 165.

² *Booth v Big Kahuna Holdings Limited* [2015] NZEmpC 4 at [6].

³ (2006) 7 NZELC 98,128; [\[2005\] ERNZ 808](#); (2005) 3 NZELR 1 (EMC).

⁴ [2015] NZEmpC 135.

⁵ *Tomo v Checkmate Precision Cutting Tools Limited* [2015] NZEmpC 2 at [9].

no evidence to that Mr Singh was involved in Freemind's defaults in payments and the pursuit of Mr Singh was not reasonable or appropriate in the circumstances.

[7] The purpose of section 234 is to attempt to ensure that minimum employment entitlements (wages and holidays) are available to employees, even where employers, which are companies, may either be insolvent or otherwise unable to pay those minimum entitlements. Section 234 is a liability-transfer provision, available if certain statutory prerequisites are made out. Third parties may be held liable (jointly or severally) for the defaults of their companies if they directed or authorised the defaults, but irrespective of any other elements of their personal culpability.⁶

[8] I do not agree that the pursuit of Mr Singh was unreasonable or inappropriate. Mr Singh was clearly involved in the management of the company. The claim for unpaid holiday pay and minimum wages was significant. The company had asserted it did not have the ability to pay. In those circumstances it was entirely appropriate and reasonable to seek to transfer the liability to third parties.

[9] The hearing took two and a half days. The duration of the hearing was exacerbated, not by the conduct of the parties, but by the need to use an interpreter for all evidence, a poor telephone connection to India and the illness of Mr Pannu. There were essentially three claims before the Authority. When looked at over all, two and a half days was not excessive.

[10] Mr Singh seeks an uplift in the daily tariff based on the obstructive behaviour by Mr Lally during the process of preparing for the Authority's investigation. I agree that Mr Lally's refusal to cooperate with Mr Singh in providing documents necessary for his defence of the Labour Inspector's claims was unhelpful. This conduct cannot be sheeted home the Labour Inspector because it was not the Labour Inspector who was not being co-operative.

[11] The Labour Inspector submits that there should be no costs award against it because Mr Singh benefited by the default of Freemind to pay its employees correctly when he received drawings from the company as a shareholder. The drawings came from revenue of the company which were derived from its unlawful employment practices which were implemented on a widespread and continuous basis.

⁶ Above n 4 at [34].

[12] In the alternative the Labour Inspector submits there is a strong case for lowering the daily rate to avoid an iniquitous and unjust outcome that would result from Mr Singh personally being rewarded with drawings funded by Freemind's financial gains, ill-gotten at the expense of its employees, and his further being compensated for the expense of defending his role in Freemind's illicit enterprise.

[13] I am not satisfied Mr Singh has established any grounds for an uplift in the daily tariff. Likewise I am cognisant of the comments of the Court in *PBO*⁷ that costs are not to be used as a punishment.

[14] In the substantive determination I found Mr Singh had no involvement in the calculation and payment of wages for Freemind employees except to the extent that he provided information to Mr Lally on the number of hours the employees in his group had worked each day and then distributing from time to time the wages which had previously been calculated by Mr Lally.

[15] I found Mr Singh and Mr Lally had split up responsibilities for the operation of the business. Mr Singh looked after the workers on the orchards during the working day, while Mr Lally had responsibility for the employment of staff including all decisions relating to the payment and calculations of wages including holiday pay.

[16] Mr Singh was partially successful in his defence of the section 234 application. His success was significant as it meant he did not become jointly liable for the more than \$150,000 in unpaid holiday pay and minimum wages. He is entitled to a contribution of his costs. I have assessed a reasonable contribution as being the notional daily tariff of \$3,500 for each of the two and a half days hearing time.

[17] I consider it appropriate that the Labour Inspector pay to Mr Singh the amount of \$8,750 without deduction as a contribution to Mr Singh's costs and that this payment be made within 28 days of the date of this determination.

Vicki Campbell
Member of the Employment Relations Authority

⁷ Above n 3 at [44].