

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2013] NZERA Auckland 290
5352782

BETWEEN PAUL ALLBON
 Applicant

A N D NICHOLSON RACING
 STABLES LIMITED
 Respondent

Member of Authority: James Crichton

Representatives: Simon Scott, Counsel for Applicant
 Glenys Steele, Advocate for Respondent

Submissions Received: 30 May 2013 and 26 June 2013 from Applicant
 19 June 2013 from Respondent

Date of Determination: 8 July 2013

COSTS DETERMINATION OF THE AUTHORITY

The substantive determination

[1] In its determination issued on 8 May 2013 under [2013] NZERA Auckland 172, the Authority accepted Mr Allbon's claim that he was due unpaid wages and also accepted his claim of unjustified dismissal.

[2] Costs were reserved.

The application for costs

[3] Mr Allbon seeks indemnity costs totalling \$13,685 (inclusive of GST) and a further \$161.56 in disbursements.

[4] Those costs include two mediation attendances each of \$2,300. The primary justification for the claimed indemnity costs appears to be the contention that two *Calderbank* offers were made on Mr Allbon's behalf during the lead up to the

investigation meeting as well as one other request for information, all of which it is contended were ignored.

The response

[5] Submissions filed for Nicholson Racing Stables Limited (Nicholson Racing Stables) indicate that the respondent's financial position is "dire" and that any costs award needs to be met over time. A daily tariff approach of \$1,500 is sought.

[6] Nicholson Racing Stables contend that costs it incurred were materially influenced by the way that the applicant conducted his case and presumably as a particular example of that, reference is made to the aborted first investigation meeting on 18 October 2012 where Member Anderson recused himself. It is suggested that Nicholson Racing Stables was prejudiced by having to appear at a subsequent investigation meeting which increased costs unnecessarily.

[7] The respondent also indicates that it should not be asked to contribute to legal costs incurred that were not in contemplation of Authority proceedings (presumably reference to the two unsuccessful mediations), and the respondent also refers to its own attempt to resolve matters by way of a *Calderbank* offer.

Determination

[8] It is true that this particular matter had something of a tortured history in its progress through the Authority. The question is how much of the additional costs incurred in that regard ought to be visited on Nicholson Racing Stables as the unsuccessful party.

[9] There are two particular aspects of that question. The first is whether the respondent should make any contribution at all to the two unsuccessful mediations and the second is whether it is reasonable for the respondent to contribute to the costs of two Authority hearings, because of the circumstances recited above.

[10] A wider question is whether in fact Mr Allbon has met the test for full indemnity costs. Dealing with that broad question first, the Authority must observe that the award of full indemnity costs in the Authority is a rare award indeed and in the particular circumstances of this case, notwithstanding the difficulty in getting the

matter heard and disposed of, the Authority is not persuaded that there is a basis for awarding full indemnity costs.

[11] It is true that *Calderbank* offers were made on Mr Allbon's account but they were rejected by the respondent. Certainly, there is nothing in those *Calderbank* offers which was close to the awards eventually made by the Authority and so it cannot be argued that there is a basis there for indemnity costs.

[12] There is nothing else in the submissions for Mr Allbon which would seem to justify his claim for full indemnity costs. What is more, the total costs claimed include GST and two mediations, neither of which traditionally form part of costs fixing in the Authority.

[13] Moreover, the Authority is not persuaded that Mr Allbon can claim costs against the unsuccessful respondent because of the necessity for running two hearings. As the present Authority Member understands the position, Member Anderson recused himself after a disagreement with counsel for the applicant, and indeed it seems that the Member recused himself as a consequence of a suggestion from counsel for the applicant. It does not seem to be fair and just for the respondent to be asked to fund the additional cost necessitated because of a decision made because of, or at least at the behest of, counsel for the applicant.

[14] Even if that line of argument is not accepted, clearly the reason there were two investigation meetings was because of the decision of the Authority to bring the first investigation meeting to a premature end. That being the position, it cannot be right for Nicholson Racing Stables to be asked to bear the costs of that decision.

[15] Furthermore, the Authority must take into account the financial circumstances of the respondent. The Authority is advised in submissions for the respondent that Nicholson Racing Stables is struggling financially and in a costs setting environment, that is a relevant consideration that the Authority must take into account. The Authority does not accept counsel for Mr Allbon's submission that the Authority cannot take judicial notice of a submission from a party to the effect that party is impecunious.

[16] The completed Authority investigation took barely two hours. On top of that, Mr Allbon is entitled to a contribution to the costs he incurred in successfully

persuading the Authority that he was entitled to bring his personal grievance notwithstanding that it was outside the 90 day statutory time limit.

[17] Taking both of those factors into account, the Authority thinks the appropriate award is one of \$2,500.

[18] Nicholson Racing Stables Limited is directed to pay to Mr Allbon the sum of \$2,500 as a contribution to Mr Allbon's costs. Nicholson Racing Stables Limited is to have time to pay that sum. Should that be required.

James Crichton
Member of the Employment Relations Authority