

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2014] NZERA Auckland 315
5431758

BETWEEN NICHOLAS PAUL DOLLING
 Applicant

AND TE RAPA WHOLESALE CARS
 2009 LIMITED
 Respondent

Member of Authority: P R Stapp

Investigation Meeting: On the papers

Submissions Received: By 15 July 2014

Determination: 18 July 2014

COSTS DETERMINATION OF THE AUTHORITY

[1] In a determination [2014] NZERA Auckland 235 (16 June 2014) the Authority reserved the matter of costs. The successful respondent has applied for \$10,300 costs and has agreed for the award to be made by instalments of \$15-\$20 per week. The respondent made the concession on an instalment plan taking into account Mr Dolling's financial situation.

[2] Mr Dolling does not accept the claim for costs and says that costs should lie where they fall because he cannot pay due to his financial circumstances.

[3] The Authority's investigation meeting on 10 April 2014 in Hamilton took less than the full day scheduled for the meeting. It involved approximately 3 hours.

[4] At the investigation meeting I gave an indication to the parties that costs would follow the event for the successful party and that the daily tariff would apply and that to move the tariff up or down would require reasons. The failure of both parties to bring relevant documents and the employer not keeping proper records as

required (employment agreement and wage, time and holiday records) did not assist the matter. However, the parties' failings did not necessarily put either party to any extra cost and/or unreasonably extend the time of the Authority's investigation.

[5] In addition, Mr Dolling made a claim for the first time in his written statement of evidence, without putting the employer on proper notice in the statement of problem, for short paid wages, commission and holiday pay that, as it transpires, the employer was required to pay and had unreasonably withheld in the absence of any written employment agreement before the Authority's investigation meeting. The respondent properly decided to pay and fixed that part of the problem without any more costs being incurred over the matter. Mr Dolling also brought a claim for a penalty that only a Labour Inspector could bring for the breach of failing to retain an employment agreement. This is a strange anomaly that exists where a party cannot bring a claim without a Labour Inspector's involvement. This should have been reasonably understood before involving the Authority in it. However, little extra cost would have been involved with this as an issue on its own. It was clear from both the statement of problem and statement in reply what the situation was.

[6] The late claim for unpaid wages, commission and holiday pay needed the Authority's involvement to ensure that Mr Dolling received his correct entitlement, which Mr Wilson agreed to pay without prolonging unnecessarily the issue.

[7] On all the rest of his claims Mr Dolling was unsuccessful in all respects.

[8] Te Rapa Wholesale Cars 2009 Limited sent a "without prejudice except as to costs" offer dated 20 November 2013 to Mr Dolling's representative. The letter offered a full and final settlement to Mr Dolling based on a payment to him of \$3,500 in terms of s. 123 (1) (c) (i) of the Employment Relations Act 2000 (the Act). This offer was open for acceptance until Thursday 28 November 2013. The offer was rejected on 22 November 2013. Thereafter the investigation meeting was first set down for 8 April 2014 on notice dated 17 December 2013. The hearing date was changed on 5 March 2014 for a hearing to be held on 10 April 2014. The changed arrangement has no bearing on costs.

[9] Both parties in this matter had claims that were genuinely competing and required findings from the Authority. Moreover, Mr Dolling was successful in regard to his claim on wages and holiday pay issues in the order of a sum of \$1,862 plus

holiday pay. Even with this success, Mr Dolling's primary claims were unsuccessful and involved no monetary relief whatsoever.

[10] I have considered the *Calderbank* offer. This is because the offer to settle was clearly labelled and made in plenty of time before the Authority set the matter down for an investigation meeting and before any timetable was put in place to incur costs for preparation and subsequently the need for attendances. Also the offer to settle was clear given that it was rejected within days of being made. Finally the offer dealt with any costs, as they had by that stage not involved preparation and attendances. Costs should be set equivalent to the time of the investigation meeting scheduled for a full day based on the daily tariff of \$3,500 even though the investigation meeting lasted less time. In other words the tariff is applied for the full day. This is consistent with a "steely approach" being taken to *Calderbank* offers¹. The investigation meeting straddled morning and afternoon sessions on 10 April. I am not willing to increase the tariff for a sum in the order that the respondent has asked for. My reasons are that the employment relationship problem was a routine matter, that the investigation meeting time mirrored the extent of the problem, that there were genuine issues involved, that the applicant had some measure of success in regard to an issue relating to his entitlements that were not put on notice and the respondent helped with some savings in regard to what the costs could have been on the wages issue when it was the cause of the problem. Not much more extra time was needed to dispose of that issue. No details on the costs and invoices have been provided.

[11] Further, I agree that the order should be paid by instalments as accepted by Te Rapa Wholesale Cars 2009 Limited and order that payments are made on the basis of \$15 per week.

[12] I am satisfied that Mr Dolling has financial difficulties and this has been accepted by the respondent suggesting an amount for instalments. However the information from Mr Dolling in regard to his affairs falls short of supporting that he will not be able to pay and/or make arrangements to pay sometime in the future. The applicant turned down the offer that on the face of his claims being unsuccessful, that would appear to have been a reasonable offer to accept at the time. I set costs in the sum of \$3,500. I leave it to the parties to sort out the commencement date for the

¹ *Health Waikato Limited v Elmsly* [2004] 1 ERNZ 172 (CA)

suggested instalment plan. Otherwise this order remains enforceable in the usual manner.

Order of the Authority

[13] I order Nicholas Paul Dolling to pay Te Rapa Wholesale Cars 2009 Limited \$3,500 costs. Any instalment arrangement between the parties is to be at \$15 per week.

P R Stapp
Member of the Employment Relations Authority