

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2016] NZERA Wellington 107
5569562

BETWEEN STUART NAGEL
 Applicant

AND NELSON UNDERGROUND
 SERVICES LIMITED
 Respondent

Member of Authority: Michele Ryan

Representatives: Peter Kiely, Counsel for the Applicant
 Anjela Sharma, Counsel for the Respondent

Submissions received From the applicant on 9 June 2016
 From the respondent on 23 June 2016
 From the applicant In Reply' on 30 June 2016

Determination: 29 August 2016

COSTS DETERMINATION

Employment relationship problem

[1] In a determination issued on 22 March 2016 I found Mr Nagel had been unjustifiably disadvantaged and unjustifiably dismissed by the respondent.¹ Remedies were reduced by 25% to reflect Mr Nagel's contribution to each of his personal grievance claims.² He was awarded \$9,163.44 in total.³

[2] Mr Nagel seeks a total contribution of \$7,750 towards costs. That sum is said to encompass \$5,250 corresponding to an investigation meeting over 1.5 days, and an uplift on grounds that the respondent unnecessarily increased costs by its approach towards mediation and at the investigation meeting.

¹ *Nagel v Nelson Underground Services Ltd* [2016] NZERA Wellington 36

² Neither party obtained an order for penalties associated with claims that the other breached good faith obligations.

³ \$5,255.77 (gross) as reimbursement for lost wages, \$157.67 in KiwiSaver contributions and \$3,750 as compensation

[3] The respondent denies its conduct increased costs. It says it made a reasonable offer to settle the claim which was rejected. It says costs should either lie where they fall or, if awarded, should not exceed \$4,375 – the sum equal to an investigation meeting of 1.25 days.

The Authority's approach

[4] Both parties referred to the principles set out in *PBO Ltd v Da Cruz*⁴ including that costs are generally determined in the Authority by using, as a starting point, a notional daily tariff which then may be adjusted upwards or downwards depending on the particular circumstances of each case.

[5] Relevant to this matter, I have given regard to the general principles that;

- offers made on a without prejudice basis save as to costs may be considered
- costs generally follow the event and are typically modest
- costs should not to be used as an expression of disapproval of a party's conduct, although conduct which increased costs unnecessarily can be taken into account in an assessment of quantum.

Proposals to settle

[6] It is clear from documentation attached to the parties' respective submissions that there was an exchange of without prejudice offers (save as to costs) between the parties prior to and during the investigation meeting. The award Mr Nagel received from the Authority was almost twice that offered by the respondent and has no bearing on my assessment for costs.

Duration of the Authority's investigation

[7] Mr Nagel is entitled to costs as the successful party. There is a dispute between the parties as to the duration of the Authority's investigation and therefore how the application of the daily tariff should be applied. Counsel for Mr Nagel submits the respondent's late attendance at the beginning of each day of the investigation is a factor that increased his costs.

⁴ [2005] ERNZ 808

[8] An administrative error caused some initial confusion about the correct start time of the investigation on the first day, however both parties became aware of the anomaly the day before the investigation. I am unwilling to apportion costs against the respondent in this situation. I do accept however that the commencement of the second day of investigation was delayed by the respondent without prior notice, albeit marginally.

[9] The investigation meeting spanned one full day and almost two and a half hours on the second day. Based on the notional tariff currently set at \$3,500 per day, I access the starting point for costs in this matter as \$4,500.

Are there any factors that increased costs?

[10] I do not accept the allegation on Mr Nagel's behalf that the respondent introduced witnesses and evidence not relevant to matters requiring determination. The respondent was entitled to produce evidence it considered relevant to whether Mr Nagel contributed to the situations leading to his personal grievance claims.

[11] Next, Mr Nagel submits that the respondent's failure to attend mediation in a timely fashion forced him to lodge proceedings in the Authority so as to seek a direction to mediation. He seeks costs associated with that application and for a half day in mediation.

[12] The Employment Court has left it open as to whether mediation costs should be recoverable. In *RHB Accountants, Kenneth Brown and Steven Wilkins v Rawcliffe*⁵ Judge Inglis considered that the discretion to award costs associated with mediation will turn on the individual case. She noted that costs have, on occasion, been awarded where parties had failed to attend mediation despite being directed.⁶

[13] I do not consider it appropriate to order mediation costs in this instance. It is clear from the correspondence that the parties voluntarily agreed (prior to the Authority's intervention and direction) to attend mediation before Mr Nagel lodged his statement of problem.

[14] At issue is not whether the parties consented to mediation but when that event should have occurred. Submissions on behalf of each party were critical of the other's

⁵ [2012] NZEmpC 31

⁶ Ibid at [30]

conduct towards setting a suitable time for mediation. I favour Mr Nagel's position in this respect.

[15] An email drafted in early July 2015 by the mediation service infers it had been advised that the respondent would not be available to attend mediation before 28 September 2016. That information prompted Mr Nagel to seek assistance from the Authority.

[16] The Authority subsequently received several documents from the parties. Ultimately a telephone conference was convened. There may be reasonable cause for a party to defer a proposed mediation date but the impediment in this instance appears to have been based on the respondent and/or its counsel's short term commitments, although these were not sufficiently specified. General inconvenience alone is not a satisfactory reason for such a delay.

[17] I agreed it was unacceptable for Mr Nagel to have to wait 3½ months from the date on which he raised his personal grievance before mediation could progress. The parties were directed to an earlier fixture.

[18] I accept the respondent's approach in mediation timetabling put Mr Nagel to unnecessary additional cost (although not significantly) to obtain a direction. I consider an uplift of \$250 is appropriate.

Summary of Order

[19] Pursuant to clause 15 of Schedule 2 of the Employment Relations Act I order Nelson Underground Services Limited to pay Mr Nagel the sum of \$4,750 as a contribution to his costs.

Michele Ryan
Member of the Employment Relations Authority