

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2012] NZERA Christchurch 273
5368914

BETWEEN GRAEME VALLANCE
 Applicant

A N D NELSON BRAKE SERVICES
 LIMITED
 Respondent

Member of Authority: James Crichton

Representatives: Shayne Boyce and Kevin Murray, Advocates for
 Applicant
 Clare North, Counsel for Respondent

Submissions Received: 7 November 2012 from Applicant
 10 October 2012 from Respondent

Date of Determination: 18 December 2012

COSTS DETERMINATION OF THE AUTHORITY

The substantive determination

[1] The Authority issued a determination on the substantive matter on 25 September 2012. In that determination, the Authority disposed of Mr Vallance's claim by determining that he was, at the relevant time, a contractor, and therefore Nelson Brake Services Limited (Nelson Brake Services) was completely successful in its defence of Mr Vallance's claim.

[2] Costs were reserved.

The application for costs

[3] Nelson Brake Services seeks a contribution to its costs as the successful party in the substantive determination. Total fees incurred by Nelson Brake Services

amount to \$8,200.65 and the amount sought is \$4,133 being half of the actual costs incurred by Nelson Brake Services. The justification for the increase beyond the daily tariff rate which would otherwise have applied is contained in the submissions filed on behalf of Nelson Brake Services.

[4] The first element of the submission supporting an increase in costs beyond the daily rate is the contention that Mr Vallance caused Nelson Brake Services unnecessary costs and expenses by bringing a claim that had no merit.

[5] Conversely, Mr Vallance points out that he was unsure of the position and felt that the only way of resolving the issue definitively was to make an application to the Authority. Certainly, he denies that the application was in any way frivolous and while he was unsuccessful, he points out that the circumstances of the claim were such that his confusion about the true position (the question whether he was an independent contractor or an employee) was contributed to, to a real extent, by Nelson Brake Services which, during the course of the continuing relationship of a contractual nature, sought to document a change to the relationship by using a standard form employment agreement template. That argument has to have merit; if Nelson Brake Services had not used a document which was plainly unsuitable for purpose, Mr Vallance would not have become uncertain about the position and would not have felt the need to seek judicial clarification of it.

[6] That said, Nelson Brake Services was successful in its defence of Mr Vallance's claim and applying the usual principles, costs would normally follow the event. From the Authority's perspective, there is nothing in the present case which would justify that principle not applying. In particular, the Authority rejects the submission made on behalf of Mr Vallance that costs should lie where they fall. This is not a test case and not a matter of general interest to other parties.

[7] However, Mr Vallance is right to the extent that it is difficult to see how he could have definitively resolved this matter without recourse to the Authority. Clearly the parties engaged through their lawyers with various discussions and correspondence but were unable to resolve matters by agreement and to be fair to the parties and their representatives, it is the sort of matter that would be difficult to resolve by any compromise on one party's part or the other. However, two factors encourage the Authority in the view that the proper course of action is to fix costs in favour of Nelson Brake Services.

[8] Both of these matters were referred to in the company's submissions on costs and both seem to the Authority on point. The first is to remind the Authority that during the period that Mr Vallance was contracting to Nelson Brake Services, unbeknown to Nelson Brake Services, he had been invoicing Nelson Brake Services for statutory holidays and, in ignorance that that was part of the invoice it was paying on, it had paid him for those holidays. In the substantive determination, the Authority referred to Mr Vallance's behaviour in that regard as "*sleight of hand*".

[9] The other and most compelling evidence heard by the Authority in the substantive investigation was evidence from Mr Vallance's own accountant who gave clear evidence that Mr Vallance had always treated himself as self-employed and never in his accountant's presence referred to himself as other than self-employed until the relationship had come to an end.

[10] Both of those matters just referred to call into question whether Mr Vallance came to the Authority with clean hands or not. Given the conviction that his behaviour may not have been entirely straightforward, the Authority is encouraged to make an award of costs, not as a means of condemning Mr Vallance's conduct, but simply because the Authority accepts Nelson Brake Services' submission that, notwithstanding Mr Vallance's entitlement to have access to decision-making services, there was some basis for concluding that his application to the Authority was activated by less than the purest of motives.

[11] It follows that Nelson Brake Services should not have to fund its successful defence of Mr Vallance's claim without having some contribution from Mr Vallance to assist in that regard.

Determination

[12] The law on costs fixing is now well settled. The leading case is *PBO Ltd v. Da Cruz* [2005] 1 ERNZ 808. *PBO* is authority for the view that the Authority can set its own procedure in the costs fixing environment, including in respect of the daily tariff approach to costs determination.

[13] The principles that *PBO* indicates should apply include the fundamental tenet that costs should follow the event, that the Authority has discretion to award costs provided that the Authority undertakes the task on a principled basis and that costs ought not to be a punishment for an unsuccessful party but may increase the costs of a

successful party if the unsuccessful party's behaviour contributed to the costs incurred by the successful party.

[14] The last mentioned proposition is fundamental in the present case. Mr Vallance's behaviour did not suggest that he had come to the Authority with clean hands. Of necessity, the behaviour referred to materially contributed to Nelson Brake Services' costs.

[15] In all the circumstances, the Authority is minded to direct that Mr Vallance is to pay to Nelson Brake Services the sum of \$4,100.33 being the amount claimed by Nelson Brake Services as a contribution to its costs.

[16] The Authority takes the unusual approach of awarding the full claim because of the very reasonable nature of the total fees charged to Nelson Brake Services, notwithstanding its successful result. Solicitors and counsel for Nelson Brake Services performed creditably in this matter while charging fees which are commensurate with the modest nature of costs awards in this jurisdiction.

James Crichton
Member of the Employment Relations Authority