

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2013] NZERA Wellington 146
5410053

BETWEEN MARK MAHONEY
 Applicant

AND AOTEAROA TOURISM
 MANAGEMENT LIMITED
 Respondent

Member of Authority: G J Wood

Representatives: M Mahoney on his own behalf
 T Shreves for the Respondent

Investigation Meeting: By way of submissions

Submissions Received: By 14 November 2013

Determination: 15 November 2013

COSTS DETERMINATION OF THE AUTHORITY

[1] In my substantive determination I dismissed Mr Mahoney's claims because the nature of his relationship with the respondent, Aotearoa Tourism Management Limited (ATM) was never one of employer and employee. On behalf of ATM Ms Shreves seeks full indemnity costs (including mediation) of \$26,699.68, together with witness expenses of \$552.

[2] It was submitted that full costs should be awarded because this was a commercial dispute, Mr Mahoney knew throughout that he was never an employee and therefore the claim before the Authority was vexatious, seeking to bankrupt ATM's principal, Mr Garth Steven. It was submitted that costs for mediation should be recovered because Mr Mahoney refused to extend the scope of the mediation in

order to resolve all commercial disputes between the parties and declined an offer of arbitration.

[3] ATM also relies on an offer of settlement, refused by Mr Mahoney, which essentially would have left the parties to meet their own costs, except for payment of the sums owing to Mr Mahoney as a contractor for work done on the restructuring and which the Authority later identified as still owing and unpaid.

[4] It was also noted that Mr Mahoney pursued unrelated matters in disclosure applications, and continued to raise irrelevant matters during the Authority's investigation.

[5] In response, Mr Mahoney noted that the matter was complex and that Mr Steven put matters in writing that were previously inconsistent with his position in the Authority. I note, however, that the same observation was made by me about Mr Mahoney in my substantive determination.

[6] Mr Mahoney noted that he had been to mediation and was entitled to refuse arbitration. He makes other serious allegations about the conduct of Mr Steven, but which are outside the scope of, and therefore not relevant to, this costs determination.

[7] Mr Mahoney submitted that costs should therefore lie where they fall.

Determination

[8] I note that Mr Steven was never a party to the Authority's investigation process and therefore the alleged objective of bankrupting him could not be achieved in this forum. To bankrupt ATM would affect Mr Mahoney personally as he is a 25% shareholder in the company.

[9] While it is acceptable under the Employment Relations Act for the parties to mediate all matters, not just employment related matters, there is no requirement on the parties to do so. The same applies to the voluntary use of arbitration.

[10] I do not accept that ATM's offer to settle is a factor for increasing costs against Mr Mahoney. The offer was effectively an offer for both parties to walk away, as the sums offered were no more than what ATM agrees is owing to Mr Mahoney. Applicants such as Mr Mahoney go into these matters knowing that if they

are unsuccessful they will have to fund a contribution to the successful respondent's costs, and this applies whether or not there are any settlement offers.

[11] Mr Mahoney did seek to adduce a lot of material from ATM which did not prove relevant to the investigation about the real nature of the relationship between the parties. That led to extra time, particularly in preparation, being required. That is a factor for an uplift of normal costs.

[12] My determination sets out in some detail why Mr Mahoney was aggrieved at his treatment by ATM, and finds support for it in some areas. That is inconsistent with a conclusion that Mr Mahoney was behaving in a vexatious manner. Similarly, determining the real nature of the relationship was a complex matter, as Ms Shreves herself submitted and as was shown in my substantive determination. I therefore conclude that the claim was not vexatious.

[13] Mr Mahoney chose to proceed through the Employment Relations Authority, as he was entitled to do, because he believed he may have been an employee as well a director. He was not correct in this claim and therefore must pay a contribution to ATM's costs. There were no factors suggesting that he was incapable of paying such a contribution.

[14] As noted to the parties in advance, the usual daily tariff in the Authority is \$3,500. The matter was, however, concluded in rather less than a full day. On the other hand, extra time was unnecessarily required to deal with some of Mr Mahoney's requests for information that proved irrelevant. Taking all these factors into consideration, I consider an appropriate contribution towards ATM's costs would be \$3,500.

[15] Witness expenses of \$552 are also sought. This sum was invoiced to ATM by its accountant's principal. I accept that this sum was reasonably incurred by ATM, particularly as the accountant's evidence was very valuable. Mr Mahoney should therefore also be required to reimburse ATM for those expenses.

[16] I therefore order the applicant, Mr Mark Mahoney, to pay to the respondent, Aotearoa Tourism Management Limited, the sums of \$3,500 in costs and \$552 in expenses.

G J Wood
Member of the Employment Relations Authority