

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2012] NZERA Christchurch 238
5372298

BETWEEN DARROCH LIMITED
 Applicant

A N D ALLAN CHISNALL
 Respondent

Member of Authority: M B Loftus

Representatives: Jane Traynor and Emma Coburn, Counsel for Applicant
 Jarrod Lovely, Counsel for Respondent

Submissions Received 24 September 2012 from the Applicant
 7 September and 26 September 2012 from the
 Respondent

Date of Determination: 31 October 2012

COSTS DETERMINATION OF THE AUTHORITY

[1] On 21 August 2012 I issued a determination concluding Mr Chisnall had breached his employment agreement and ordering he pay a penalty. Payment was to Darroch as opposed to the Crown. Costs were reserved.

[2] Notwithstanding the outcome, it was Mr Chisnall who initially sought a contribution toward the costs he incurred. They total \$6,418.80 and he asks that Darroch be ordered to pay at least three quarters of that amount (\$4,814.10).

[3] In support of his claim he submits:

- a. There were, in effect, four parts to Darroch's claim. Only one succeeded and Darroch was never capable of sustaining the other three claims. It therefore put the parties to unnecessary cost;
- b. The effort required was insignificant as Mr Chisnall admitted the acts complained of, though he did not consider his actions culpable;

- c. Darroch refused mediation, again putting the parties to unnecessary cost; and
- d. A subsequent report in the Otago Daily Times (ODT) was written in a way likely to damage Mr Chisnall's new business. Mr Chisnall suggests Darroch might have been a party to the preparation of the article in an attempt to cause him harm.

[4] Mr Chisnall's second submission (26 September) canvases a complaint Darroch filed with the Valuers Registration Board on 14 September. It cites my determination as evidence of misconduct that breached Mr Chisnall's obligations to Darroch and *could potentially tarnish the profession as a whole*. It is submitted this, combined with the ODT article, is evidence the *proceedings were motivated by a desire not to put right any wrongs, but to put Mr Chisnall out of business*. It is submitted costs should not *extend to rewarding the Applicant for this course of conduct – quite the contrary*.

[5] Darroch costs are in the order of \$28,000 (plus GST and disbursements). It also seeks a contribution and suggests 50%. Darroch makes its claim on the basis of success. It submits:

- a. Its costs were reasonable
- b. In the Court a reasonable starting point is 66% of actual costs as opposed to the tariff approach normally adopted by the Authority. It is submitted the tariff approach does not adequately reflect the cost Darroch has been put to *especially considering the unrecoverable loss the applicant has suffered (albeit unquantifiable) as the result of the respondents intentional actions*.

[6] In response to the claim it was only partially so by stating costs follow the event and are not apportioned on an issue-by-issue basis (*Victoria University of Wellington v Alton-Lee* [2001] ERNZ 305). Darroch denies any involvement in the ODT article and argues its attitude regarding mediation was reasonable given a penalty was a significant part of its claim and is unattainable in mediation.

[7] In the alternative, and should a tariff based approach be applied, it is submitted I take account of the efficiency with which the matter proceeded. It is submitted considerably more time may have elapsed had counsel not acted as they did and this

should be reflected in accepting time spent in preparation may not necessarily be reflected in the hearings length (*Beardsley v Canpac International Ltd*, unreported, AA39A/01, 29 May 2001). Various decisions using a ratio based approach are then canvassed before a submission that a 3:1 is often used to calculate preparation and that would be appropriate here. When added to the half day the hearing took, this would mean recoverable time of two days.

[8] Normally the Authority will use a daily tariff approach when assessing the amount (refer *PBO Ltd (formerly Rush Security Ltd) v Da Cruz* [2005] ERNZ 808). The normal starting point is \$3,500 per day and from there adjustment may be made depending on the circumstances.

[9] There are two issues to be determined. They are:

- a. To whom should an award be made, Mr Chisnall or Darroch; and
- b. How much.

[10] As already discussed both parties have applied for a contribution toward their costs. In principle costs follow the event with the successful party entitled to a contribution toward those incurred. Here I have no difficulty in concluding Darroch was the successful party. The claim was Mr Chisnall breached his employment agreement and the breaches warranted damages and a penalty. I concluded Mr Chisnall was in breach. His actions warranted a penalty and while the claim for damages may be capable of being portrayed as a failure, I note that was not because it lacked merit. Damage was suffered but the effect was unquantifiable.

[11] That raises the question of how much. Darroch is asking I abandon the normal tariff approach of the Authority and adopt the Courts methodology of awarding a percentage of actual costs. In support they cite various decisions where their desired approach was used by the Authority. The argument does not sway me. The precedents cited are prior to the adoption of, and the Courts subsequent approval for, the tariff approach. In any event, I note the starting point for the approach sought is a consideration of whether or not the costs were reasonable. While I have detail of the costs incurred, I have insufficient information to ascertain whether or not they were reasonable, especially as I must consider them significant for what was little more than a half day hearing. There is also no explanation as to why two counsel were used. In these circumstances the tariff approach will be applied.

[12] As already said, the hearing took just over half a day. Applying the tariff approach would mean an award in the order of \$2,000. Having considered the submissions and in particular the view that the case was conducted efficiently yet could well have taken longer and that is reflected in preparation time, I consider an award of \$3,000 to be appropriate. To that should be added disbursements of \$636.79 which were itemised.

[13] Finally there is then the issue of Darroch's alleged behaviour and its motivation in seeking costs along with the suggestion that as a result it should not be so entitled. I disregard this submission for two reasons. First there is no evidence Darroch was involved in the preparation of the ODT article. Second, Mr Chisnall's claim Darroch is trying to put him out of business is based on an assertion that during the investigation Darroch said its claims would be limited to the Authority. I have no recollection of such a statement and consider the complaint something for the appropriate professional body to deal with.

Orders

[14] For the above reasons I order the respondent, Mr Chisnall, to pay the applicant, Darroch Limited, the sum of \$3,636.79 (three thousand, six hundred and thirty six dollars and seventy nine cents) as a contribution toward Darroch's costs.

Mike Loftus

Member of the Employment Relations Authority