



New Zealand Employment Relations Authority Decisions

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Guak Media Limited v Moody (Christchurch) [2018] NZERA 1029; [2018] NZERA Christchurch 29 (28 February 2018)

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Guak Media Limited v Moody (Christchurch) [2018] NZERA 1029 (28 February 2018); [2018] NZERA Christchurch 29

Last Updated: 14 March 2018

IN THE EMPLOYMENT RELATIONS AUTHORITY CHRISTCHURCH

[2018] NZERA Christchurch 29
5646301

BETWEEN GAUK MEDIA LIMITED Applicant

A N D STEPHEN MOODY Respondent

Member of Authority: Peter van Keulen

Representatives: Paul Tranter, Representative for Applicant

Peter McRae, Counsel for Respondent

Submissions Received: Written submissions for Applicant on 10 October 2017

Written submissions for Respondent on 22 November

2017 and 23 February 2018

Date of Determination: 28 February 2018

A. Gauk Media Limited must pay Stephen Moody \$8,000.00 (including GST) as a contribution to the costs he has incurred in this matter.

The costs application

[1] In a determination dated 29 September 2017¹ I determined that Gauk Media Limited had not overpaid Stephen Moody as claimed and I dismissed its remaining claims on the basis that I did not have jurisdiction or there was no evidential basis to support the claims I did have jurisdiction to hear.

[2] In my determination, I reserved costs in order to give the parties an opportunity to try and resolve the question of costs. The parties have been unable to agree costs and Mr Moody

now seeks costs.

1 [2017] NZERA Christchurch 167

[3] Mr Moody through his counsel says:

a. Costs should follow the event and as he was entirely successful in defending this matter he should be awarded costs.

b. The daily tariff should be applied on an increased basis given the conduct of this matter by Gauk Media, which increased the costs he incurred.

[4] Mr Moody's application for costs was served on Gauk Media and the Authority requested that it lodge any submissions in response by 6 December 2017. Gauk Media did not respond and did not lodge any submissions by 6 December 2017.

[5] Gauk Media was then given a further opportunity to lodge any submissions on costs in January 2018 but, again, it did not respond.

[6] Prior to Mr Moody's application for costs, Mr Tranter on behalf of Gauk Media wrote an email to the Authority expressing his concern about the process of the Authority's investigation and his dissatisfaction with the outcome. Given the content of the email and that it was not copied to Mr Moody's counsel, the Authority treated the email as a complaint and it was dealt with through the complaints process.

[7] The complaint email did, however, contain some comments from Mr Tranter on costs and in the absence of any submissions in response to Mr Moody's application for costs, I have decided to deal with the cost aspects of the complaint email as submissions. These submissions were forwarded to Mr Moody's counsel for comment.

[8] Gauk Media through Mr Tranter says:

a. Regardless of my determination, which is based on lack of jurisdiction, Mr Moody had a duty to Gauk Media, which he breached by taking intellectual property belonging to it. If Mr Moody had not done this then the case would not have been required.

b. Gauk Media was primarily concerned with protecting its eShops concept and the “Uniquely Nelson” website. It was only during my investigation that it became clear that the Uniquely Nelson website had been removed and was not being continued – this rendered the main point of the claim redundant. In

essence if Gauk Media had known the website was to be removed it would not have pursued its claim.

c. The hearing lasted longer than necessary because of the technical nature of the evidence and my lack of experience in IT causing the evidence to take longer to be explained than would otherwise have been necessary.

d. Gauk Media believes that Mr Moody has not actually incurred any costs in respect of this matter.

Discussion

[9] The power of the Authority to award costs arises from clause 15 of Schedule 2 of the Act. The principles and approach adopted by the Authority in respect of this power are well settled and outlined in *PBO Ltd (formerly Rush Security Ltd) v. Da Cruz*². The principles and the approach to be adopted by the Authority have been reaffirmed recently by the Full Court in *Davide Fagotti v. Acme & Co Ltd*³.

[10] Considering the power to award costs and the principles to be adopted, I am satisfied that it is appropriate to award costs to Mr Moody as he was completely successful in defending all of Gauk Media’s claims.

[11] Having decided to award costs to Mr Moody, the starting point for quantum is the daily tariff. I can depart from applying the daily tariff in appropriate circumstances where, for example, indemnity costs may be appropriate or actual costs incurred since the rejection of a *Calderbank* offer are more appropriate.

[12] There are no factors in this case that warrant imposing costs on some other basis than the daily tariff. I am satisfied that the daily tariff is the correct approach. The applicable daily tariff is \$4,500.00 for the first day and \$3,500.00 for the second day.

[13] The next question is whether I should increase or decrease the daily tariff.

[14] The factors relevant to the consideration of the increase or decrease of the daily tariff include:

² [\[2005\] NZEmpC 144](#); [\[2005\] 1 ERNZ 808](#)

³ [\[2015\] NZEmpC 135](#)

a. Costs awards in the Authority will be modest;

b. It is open to the Authority to consider whether all or any of the parties’ costs

were unnecessary or unreasonable;

c. Costs are not to be used as a punishment or an expression of disapproval of a party's conduct although conduct which increases costs unnecessarily can be taken into account;

d. Without prejudice offers can be considered;

e. Impecuniosity of the other party may be relevant;

f. A decision on quantum should be also in line with principle and not determined arbitrarily bearing in mind the equity and good conscience jurisdiction of the Authority.

[15] I can deal with my assessment of the issue of reducing or increasing the daily tariff in relatively short order:

a. I am satisfied that Mr Moody has incurred costs in this matter being

\$10,000.00 plus GST.

b. This case extended over two days because of the technical nature of the claims and the evidence. That is no fault of any party or the Authority and does not warrant an increase or reduction in the daily tariff.

c. Whilst Gauk Media's claims were not expressed in strict legal terms and were at times difficult to ascertain, increasing some of the work in this matter I do not think this warrants an increase in the daily tariff. It is the nature of the Authority and the investigation process that a Member may have to unravel and piece together claims expressed by parties, particularly those without any legal representation.

d. Gauk Media did not accept any offers made to it to settle this matter.

Essentially the terms of settlement included an undertaking by Mr Moody not to compete with Gauk Media by working for any of its customers for 12

months and a declaration by him that he had no interest in Webify NZ Limited⁴. There was also a cost component in each settlement proposal.

Gauk Media did not provide any reason for not accepting any of the offers and on the face of it, Gauk Media did not better any of these offers in my determination.

However, there is one point about the offers and the refusal to accept them which is unique. Gauk Media's claims were premised on alleged breaches of its confidential information and intellectual property rights. I decided that I did not have jurisdiction to hear the intellectual property claims so I did not determine them. This leaves Gauk Media with the opportunity to pursue those aspects of its claims in another forum should it choose to. Had Gauk Media settled then it would be unable to do that, as the settlement was "full and final". Whilst it may seem a bit strained, it is the case that actually my determination

leaves Gauk Media in a better position than the settlement offer as it has not lost the opportunity to pursue Mr Moody for alleged breaches of its intellectual property rights if it chooses to. For this reason, I do not think the failure to accept the offers made by Mr Moody are a basis to adjust the daily tariff.

[16] Overall, I conclude that I should not adjust the daily tariff.

Determination

[17] Gauk Media must pay Mr Moody \$8,000.00 plus GST5 as a contribution to the costs he has incurred in this matter.

Peter van Keulen

Member of the Employment Relations Authority

4 One of the claims advanced by Gauk Media was that Mr Moody was involved in Webify, a company that had been set up to operate in the same way as Gauk Media using Gauk Media's intellectual property.

5 Applying the principles in *Catherine Stormont v Peddle Thorp Aitken Limited* [\[2017\] NZEmpC 159](#)

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