

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2015] NZERA Auckland 293
5532487

BETWEEN KEVIN MCCORMICK
Applicant

AND COMPASS
COMMUNICATIONS
LIMITED
Respondent

Member of Authority: Robin Arthur

Representatives: Greg Bennett, Advocate for the Applicant
Dean Organ, Advocate for the Respondent

Submissions: 31 July and 4 September 2015 from the Applicant and
17 August and 8 September 2015 from the Respondent

Determination: 24 September 2015

COSTS DETERMINATION OF THE AUTHORITY

A. CCL must pay Mr McCormick \$2500 as a reasonable contribution to his reasonably incurred costs of representation in the Authority investigation of his personal grievance application.

[1] Following an Authority's determination that he was unjustifiably dismissed and should be paid compensation of \$8000 Kevin McCormick sought a further order that his former employer Compass Communications Limited (CCL) should contribute to his costs of representation by also paying him \$3500.¹ The amount sought was the Authority's current 'daily tariff' for costs in a one day investigation meeting.

[2] CCL opposed the order sought on four grounds – firstly, that Mr McCormick had not disclosed his actual costs of representation; secondly, he had failed to comply with an Authority direction to provide information in support of his lost wages claim (which had resulted in no award of that remedy); thirdly, CCL had made a without

¹ *McCormick v Compass Communications Limited* [2015] NZERA Auckland 223.

prejudice offer to settle the matter before the investigation meeting; and, fourthly, CCL was put to extra expense in providing relevant documents because Mr McCormick's representative did not abide by an agreement to co-operate in preparing a common bundle of documents (the CBD) and had refused to include some documents provided by CCL.

[3] While this matter was one that would typically attract the daily tariff, the principles approved by the Employment Court in *PBO Limited v Da Cruz* required the tariff-based approach not to be applied in a rigid manner or without regard to the circumstances of the case.²

[4] Particular issues made it appropriate to call for submissions in addition to the first costs memorandum lodged on Mr McCormick's behalf and the reply memorandum lodged for CCL. A Minute I sent the representatives gave these reasons for asking for further submissions from them:

A relevant principle relating to costs, cited from *Da Cruz* in Mr McCormick's costs submissions, is whether all or any of a party's costs were unreasonable. There is a question as to whether Mr McCormick could reasonably have been charged fees (and therefore incurred costs) for all the preparation work in light of the apparent failure to lodge lost wages evidence (which Mr McCormick's evidence said was in part because Mr Bennett had forgotten to bring material provided). As an element of the daily tariff reflects costs resulting from fees incurred for preparation work, some reduction of the daily tariff seems appropriate.

Similarly, on Mr Organ's argument, costs relating to failure to cooperate in preparing the CBD would not have been incurred by necessity and reasonably.

As the costs determination will need to touch on these matters of a representative's performance or conduct in preparing for an Authority investigation and complying with Authority guidance on what was needed, I considered it necessary to give Mr Bennett the opportunity to respond before going ahead with that.

[5] Mr Bennett lodged a further memorandum to which Mr Organ sent a brief reply. I took account of those and their earlier submissions but did not need to set them out in any detail in this determination.

² *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808, 819-820 as confirmed in *Fagotti v Acme & Co Limited* [2015] NZEmpC 135 at [106]-[108] and [114].

Calderbank offer

[6] Mr Organ's submission on an offer made by CCL to settle the matter before the investigation on a 'without prejudice save as to costs' basis was irrelevant. The offer was for an amount less than what Mr McCormick received as a remedy in the Authority's determination of his personal grievance application.

Document preparation

[7] In a case management conference held by telephone on 28 April 2015 the representatives had agreed to a request from me for them to co-operate in preparing the CBD for reference in witness statements and submissions and during the investigation meeting. Its purpose was to make preparation for and participation at the investigation meeting more efficient. Mr Organ was to provide any additional documents from CCL and Mr Bennett was charged with collation, service and lodging of the CBD.

[8] Mr Bennett refused to include some documents that Mr Organ supplied for the CBD. It was then necessary for Mr Organ to lodge a supplementary bundle. Inexplicably Mr Bennett did not accept for inclusion in the CBD a copy of the minutes or notes of the disciplinary meeting held with Mr McCormick before his dismissal. There was some suggestion the copy first made available had some additional handwritten notes. It was reasonable to ensure there was a 'clean' version of it in the CBD but there could not have been a more relevant document for inclusion in an Authority investigation. It was also, in this case, a helpful document for Mr McCormick because it confirmed evidence that some matters were not adequately canvassed with him. Three other documents rejected by Mr Bennett from inclusion in the CBD were company training and safety background materials that were relevant to questions and submissions in the investigation meeting about the company's culture and what training Mr McCormick may have had – and for that reason alone CCL was entitled to have included in the CBD without fuss. In short the time taken to compile the CBD was unnecessarily increased. It was a problem I concluded Mr Bennett created himself but he said it had "added additional costs" and sought to recover them in the costs award. I have declined to accept any such 'additional' costs were reasonably incurred and have adjusted the tariff downward accordingly.

The lost wages evidence

[9] As noted in the Authority's determination of his personal grievance Mr McCormick had sought an order of lost wages from 1 December 2014 until the date of determination, some seven months.

[10] Because of his lost wages claim the need for proof of mitigation was specifically mentioned in the Authority's case management conference on 28 April 2015. The Authority's Minute to the parties after that call, setting out the directions for preparation for the investigation meeting, included a note that any lost wages remedy was "subject to evidence of reasonable endeavours to mitigate the loss".

[11] Mr McCormick's witness statement, lodged on 12 June 2015, said he had "attempted to mitigate [his] loss by seeking employment" and would "bring with [him] a complete list of applications and jobs that I have asked about". No documents about job search or applications by Mr McCormick were included in the CBD. On 2 July Mr Bennett was reminded, in an email sent to the representatives at my request by an Authority officer, that no mitigation evidence had been lodged as directed. Neither did Mr McCormick provide any such documentary evidence at the investigation meeting on 27 July. His evidence, given under oath, was that he had provided some documents to Mr Bennett but that Mr Bennett had forgotten to bring them.

[12] The memorandum on costs Mr Bennett lodged on 4 September 2015 contradicted his client's evidence in this way:

The lost wages evidence was provided to me, and it did not meet the required level of what is required, given one was dated 28 May 2015, and the other two were dated 5 and 7 May respectively.

The claim for lost wages was only provided on 16 July 2015 so was not available to be included in the bundle of documents. This was the first time we had the details by email, although Mr McCormick had spoken about the few jobs he had applied for and his family issues.

An important aspect is that I am not in the Authority to give evidence to the Authority and when the statement [was] made by Mr McCormick that I forgot to bring the list of positions he had applied for, this was incorrect, the jobs he had applied for were well outside the timeframe of what he should have been applying for. I did not forget but I advised him that he needed to speak about the positions he had applied for at the Authority. The jobs Mr McCormick applied for are attached in a chain email and marked 'B'.

[13] The email referred to was dated 16 July and showed it was sent to the email address of Mr Bennett's colleague. It began with the words: "G'day Greg. As Requested My Job Applications". It included 'cut and paste' sections from emails apparently responding to inquiries from Mr McCormick to potential employers dated 5 May, 28 May, 19 May, 26 June and 7 May. This email appeared to be what Mr Bennett referred to in the above extract from his cost memorandum as the "claim for lost wages only ... provided on 16 July". The dates referred to in it were within the period of loss claimed by Mr McCormick because his statement of problem sought lost wages to the date of the Authority's determination.

[14] What was clear from Mr Bennett's own account was that he did receive some documentary information from Mr McCormick about job inquiries. It was not provided to the Authority either before or at the investigation meeting. If what Mr Bennett got from Mr McCormick on 16 July was, as he said, inadequate, it was not then sufficiently followed up to marshal better evidence in time for the 27 July investigation meeting.

[15] The result of the failure to provide the mitigation evidence was that Mr McCormick missed out on a lost wages award that he might otherwise have got if he had shown he made reasonable endeavours to look for other work and income. Having had adequate notice of the need to do so, it was not appropriate to extend the Authority investigation in light of his failure to provide that evidence, at the very latest, at the meeting.

[16] Attached to Mr Bennett's 4 September costs memorandum was a copy of an invoice showing fees totalling \$7,837.25 were rendered to Mr McCormick. Mr Bennett's time appeared to be charged at \$300 an hour before GST. The invoice notation listed a total of around 12 hours spent on taking instructions for preparing Mr McCormick's witness statement, preparing a draft, and discussions with him. Mr Bennett, as someone trading as an employment law specialist, had the responsibility to ensure his client understood and did what was necessary to arrange the basic evidence of his mitigation endeavours. Fees for all of that supposed preparation time could not have been reasonably incurred in light of the apparent failure to do so adequately. Some deduction from those fees should have applied to whatever was charged by Mr Bennett to Mr McCormick. In turn, for that element of inadequate service, I have applied a deduction from the contribution to those costs that CCL must pay. It was a

part of the costs that could not have been reasonably incurred by Mr McCormick so should not be contributed to by CCL.

Adjustment to the tariff

[17] Costs followed the event of Mr McCormick's relative overall success in establishing a personal grievance for unjustified dismissal. The notional daily tariff of \$3500 was the starting point for a reasonable contribution to reasonably incurred costs that CCL could be required to pay.

[18] Taking into account deductions for two elements on which costs were incurred – inadequacies in preparation of the CBD and preparing evidence without including essential mitigation information – the particular circumstances of the case warranted an award of \$2500 as being reasonably incurred costs for the one day investigation meeting to which CCL should contribute. The adjustment downward applied the principle that it was open to the Authority to consider whether any of a party's costs were unnecessary or unreasonable. It was consistent with a flexible, not unduly rigid application of the tariff and the modest approach to costs.

Robin Arthur
Member of the Employment Relations Authority