

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2011] NZERA Christchurch 194
5353268

BETWEEN MULTI MEDIA
 COMMUNICATIONS LIMITED
 Applicant

AND PHILIP OWEN McCLINTOCK
 Respondent

Member of Authority: M B Loftus

Representatives: Michael Singleton, Counsel for Applicant
 Penny Shaw, Counsel for Respondent

Submissions Received 17 November 2011 from the Respondent
 2 December 2011 from the Applicant

Determination: 2 December 2011

COSTS DETERMINATION OF THE AUTHORITY

[1] In a determination dated 29 September 2011 I rejected an application from Multi Media Communications Limited (MMC) regarding enforcement of a restraint of trade provision contained in the employment agreement it had with Mr McClintock.

[2] The issue of costs was reserved with Mr McClintock, as the successful party, being advised that if he wished to seek a contribution toward his costs, he should do so via a written application. He does.

[3] Mr McClintock's costs totalled \$4,025 and he seeks reimbursement in full.

[4] In support of the application it is submitted that:

1. The costs are reasonable and while the hearing was short, allowance should be made that evidence was via affidavit and the time preparing these was significant;
2. The usual principle is that costs follow the event and Mr McClintock was completely successful;

3. MMC failed to identify an element fundamental to the establishment of a possible claim, namely the existence of a proprietary interest, thus putting Mr McClintock to unnecessary expense;
4. That expense may not have been necessary had MMC *been prudent* and accepted Mr McClintock's suggestion they meet and discuss the issue; and
5. I should be cognisant of comments in *PBO Ltd (formerly Rush Security Ltd) v Da Cruz* [2005] ERNZ 808 that the normal tariff based approach should not be rigidly applied.

[5] In reply reference is made to the principles applicable to the awarding of costs as enunciated in both *PBO v Da Cruz* and *Broughton v Microsoft NZ Ltd* [2011] NZERA Auckland 359 before a submission that the application was urgent and includes an application for damages which remains unresolved. In such circumstances an award (if any) should await the final determination.

[6] In the alternative and in the event I am minded to make an award, it is submitted that an appropriate award would be in the order of \$750 given:

1. MMC demonstrated a prima facie breach and Mr McClintock was not wholly successful as claimed given the finding there was an arguable case, albeit apparently weak – the threshold was therefore met;
2. The decision not to grant the application was made on the balance of convenience and took account of Mr McClintock's health and financial position;
3. The application infers that account should be taken of the respondent's conduct (see 4(d) above) but that is inappropriate as costs should not be used to penalise and MMC did not act inappropriately in respect to the conduct of the proceedings and, in any event, some blame for the parties failure to meet is, in MMC's view, attributable to Mr McClintock;
4. Costs should be limited to those incurred by the hearing and that took less than two hours;

5. Costs awards for interlocutory matters in the Authority are normally at the lower end of the scale and an example of \$1000 in similar circumstances is cited.

[7] As alluded to in both submissions, the Authority will normally assess costs on a daily tariff basis: refer *PBO v Da Cruz*. In assessing that tariff a common starting point is \$3,000 per day: refer *Chief Executive of the Department of Corrections v Tawhiwhirangi (No 2)* [2008] ERNZ 73. From that point adjustment may occur depending on the circumstances.

[8] Mr Singleton, by referring to awards for interlocutory matters, has effectively answered his submission about awaiting a determination of the substantive claim. Apart from the fact there is no guarantee it will proceed, the interlocutory urgent application is a hearing in its own right. The successful party is entitled to costs.

[9] The arguments tendered do not sway me to depart from the tariff approach other than to note while the hearing was short (approximately a quarter of a day), that underestimates the cost as affidavit evidence must be prepared yet no time is spent in testing it. Had the matter been substantive I estimate it would have required a half to two thirds of a day. Applying *Da Cruz* and *Tawhiwhirangi (No 2)*, the award would therefore be between \$1,500 and \$2,000.

[10] As I commented in the original determination MMC's failure to identify a proprietary interest did not mean one does not exist but that failure was, contrary to Mr Singleton's submission, a factor in the outcome. Likewise I am not swayed by the argument that MMC demonstrated a prima-facie breach – it does not overcome the fact that the application was unsuccessful.

[11] There is also the issue of the parties alleged behaviour. It is a vexed one as while costs are not to punish, behaviour that puts a party to unnecessary expense such as (arguably) an unreasonable failure to mediate is a factor to be considered. That said, I have conflicting views from counsel and insufficient evidence upon which to form a view so I shall not consider this argument further.

[12] Given the above, I consider it appropriate to order MMC to pay Mr McClintock the sum of \$1,750 (one thousand, seven hundred and fifty dollars) as a contribution toward costs.

M B Loftus
Member of the Employment Relations Authority