



Employment Court of New Zealand

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-Movements (NZ) Limited v Eveleigh WC 15A/07 [2007] NZEmpC 99 (9 August 2007)

Last Updated: 18 August 2007

IN THE EMPLOYMENT COURT

WELLINGTONWC 15A/07WRC 8/07

IN THE MATTER OF an application for an injunction

AND IN THE MATTER OF an application for costs

BETWEEN AUTO-MOVEMENTS (NZ) LTD
Applicant

AND WAYNE RONALD EVELEIGH
Respondent

Hearing: Written submissions received 7 June and 2 July 2007

(Heard at Wellington)

Judgment: 9 August 2007

COSTS JUDGMENT OF JUDGE C M SHAW

[1] Mr Eveleigh successfully defended an application for an injunction brought by his former employer, Auto-Movements (NZ) Ltd, which alleged that he had breached restraint of trade and non-solicitation clauses as well as his confidentiality obligations under his contract of employment.

[2] Mr Eveleigh has applied for an award of indemnity costs or in the alternative 80 percent of his actual costs. Auto-Movements says that it would be appropriate for both parties to bear their own costs or, alternatively, that any costs awarded should be minimal.

[3] In deciding this matter the well-settled principles relating to costs in the Employment Court apply, in particular those set out in *Binnie v Pacific Health Ltd*^[1]. Mr Eveleigh also relies on a Calderbank offer he made.

[4] In this case there are two main considerations: the reasonableness of the respondent's costs and the conduct of the parties.

Were the respondent's actual costs reasonable?

[5] Mr Eveleigh's actual costs were \$9,140.57 until judgment. Counsel estimates further costs since then including this application will bring the total to \$10,000 including GST and disbursements. There is no dispute that this

amount was reasonable.

[6] The proceedings were brought with urgency and were preceded by three pre-trial phone conferences, one of which was to determine the disclosure of Mr Eveleigh's bank statements which he had until then resisted. The substantive hearing of the application for injunction lasted half a day.

[7] In the circumstances I find that \$10,000 gross is reasonable costs.

Conduct of parties

[8] It was submitted for Mr Eveleigh that Auto-Movements ignored invitations to discuss matters before issuing proceedings. On the other hand Auto-Movements say that Mr Eveleigh was elusive throughout and that this was demonstrated by its need to apply to the Court to obtain disclosure of his bank statements to ascertain what vehicles he had procured. I note that the parties did attend mediation but failed to settle there.

[9] Once proceedings were issued, however, it is clear that on 2 April 2007 Mr Eveleigh offered a proposal to resolve matters. He undertook not to be employed by a competitor of Auto-Movements or trade in competition with it until 14 July 2007; that he would not entice staff away from Auto-Movements for a period ending 31 December 2007; and that all confidential information he became privy to while working at Auto-Movements would remain confidential. These were acceptable to Auto-Movements but only as interim consent orders pending the substantive hearing.

[10] If accepted, these undertakings would have obviated the need for the full hearing which eventuated. As it was, the Court held that Mr Eveleigh was not even bound by a restraint of trade or non-solicitation clause. In addition, no breaches of confidentiality were made out. Mr Eveleigh had therefore made offers which far exceeded what Auto-Movements achieved by its application.

[11] Mr Vincent submitted that Mr Eveleigh's costs up to his offer on 2 April 2007 were \$2,949.08 (including GST and disbursements). All costs incurred by him after that were applied to the successful defence of litigation including this application.

Decision

[12] There is no reason why costs should not follow the event in these proceedings. The sole question is what proportion of the respondent's costs should be borne by the applicant. The usual starting point is 66 percent. The respondent suggests 80 percent. However, I find that the 2 April 2007 offer of undertakings by the respondent provides a useful indicator of the proportion which should be applied in this case.

[13] The costs up to the offer were approximately \$3,000. Up to then, and indeed not until the Court so ordered, the respondent resisted disclosing his relevant bank statements. With those on the table at an early stage along with his explanation for the purchases and financing of the vehicles, the applicant may have been more open to settlement and there is a chance the substantive proceedings could have been avoided. However, the undertakings subsequently offered by the respondent were reasonable and in excess of what the applicant achieved and offered a realistic chance to settle without further costs to the respondent.

[14] In the circumstances, it is appropriate that the applicant meets the respondent's costs incurred since the offer was refused. These amount to \$7,000 including GST and disbursements.

Order

[15] The applicant will pay \$7,000 to the respondent as a contribution to his costs and disbursements.

**C M Shaw
JUDGE**

Judgment signed at 12.30pm on 9 August 2007

^[1] [\[2003\] NZCA 69](#); [\[2002\] 1 ERNZ 438 \(CA\)](#)