

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 143/10
5153623

BETWEEN BRENDAN BURNS
 Applicant

AND MEDIA DESIGN SCHOOL
 LIMITED
 Respondent

Member of Authority: K J Anderson

Representatives: K Nicolson, Counsel for Applicant
 S Langton, Counsel for Respondent

Submissions received: 27 November 2009 from Respondent
 22 December 2009 from Applicant

Determination: 26 March 2010

**DETERMINATION OF THE AUTHORITY ON COSTS AND THE
APPLICATION FOR STAY OF ENFORCEMENT OF DETERMINATION**

Background

[1] This matter has had a turbulent litigious history in which there has not been a winner in real terms. The applicant initially pursued an interim reinstatement application but was unsuccessful.¹ The substantive matter was determined 2nd November 2009 (AA 185A/09). The parties were subsequently unable to resolve the issue of costs and have presented submissions. The interim reinstatement determination of the Authority was subsequently challenged to the Employment Court but then withdrawn at a late stage of the proceedings. The matter of the Employment Court proceedings is relevant to this costs determination as certain findings were made by the Court in relation to the financial position of Mr Burns.

[2] In regard to the substantive matter before the Authority (AA 185A/09), Mr Burns was partially successful in that I found that he had been unjustifiably

¹ AA 185/09, R A Monaghan, Member, 15 June 2009

disadvantaged in his employment and awarded him the sum of \$5,000 pursuant to s.123(1)(c)(i) of the Employment Relations Act 2000. The respondent was unsuccessful with its counter-claims against Mr Burns. Also relevant to this costs determination is that the respondent has filed an *Application for Stay of Enforcement of Determination* regarding the above sum, albeit Mr Nicolson, for the applicant, via an email dated 20th November 2009, indicated that Mr Burns is prepared to put payment of the compensation sum of \$5,000 “*on the back burner*” until the matter of costs is “*sorted.*” Furthermore, given the affidavit of Mr Burns (sworn 17th December 2009) for practical purposes, I conclude that the parties accept that the compensation sum awarded, should be taken into account, in regard to my deliberations pertaining to the final outcome as far as any applicable costs award is concerned.

The Submissions for the Respondent

[3] The respondent seeks an award of costs on two counts. Firstly, in regard to its successful defence of the applicant’s interim reinstatement application and then its “*substantially successful*” defence of the applicant’s substantive claims.

[4] The respondent has incurred solicitor/client costs of \$28,673 (excluding GST) in defending the interim matter and a further \$54,926.50 (excluding GST) in defending the substantive matter, bringing the total costs to \$83,599.50 plus \$510.55 in disbursements.

[5] In regard to overall proceedings in the Authority, the respondent points to a Calderbank offer of \$18,250 that was made to Mr Burns on 14th May 2009 (\$36,500 reduced by 50% for contribution) plus a contribution of \$1,500 towards his legal costs.

[6] While acknowledging the general tariff based approach of the Authority in awarding costs, the respondent submits that a reasonable rate of \$2,500 per day should be increased by 50% because of the refusal of Mr Burns to accept the Calderbank offer that has now been revealed to be substantially in excess of the award that Mr Burns received as the outcome of the determination of the substantive matter. The respondent says that for the interim reinstatement matter, based on a daily tariff of \$2,500 per day, and allowing two days for preparation, the costs calculation should be

\$5,000. This sum should be increased by 50% arriving at a total of \$7,500. A similar formula has been applied to the substantive hearing allowing for three days for the hearing and one day to prepare closing submissions; a sum of \$10,000 – increased by 50% - being \$15,000.

[7] Based on the above calculations the respondent seeks an award of costs totalling \$22,500 plus disbursements of \$510.55.

The Submissions for the Applicant

[8] The applicant has incurred costs for the substantive matter of \$22,050, without disbursements.

[9] The applicant submits that he was successful in his claim of unjustified disadvantage as well as successfully defending the counter-claims of the respondent.

[10] In regard to the Calderbank offer, the applicant submits that it is incorrect that it was rejected by the applicant. Rather the applicant says that because the letter was sent to the post office box of his counsel, who was away from Auckland for a period of time, the letter remained unopened and the applicant did not sight the offer until after the date for acceptance had expired. The offer was never revisited when the respondent became aware of the circumstances. In summary, the applicant says that the Authority should not give any weight to the Calderbank letter as the applicant never had an opportunity to consider it.

[11] The applicant suggests firstly that a rather convoluted option could be considered by the Authority. This would involve letting costs lie where they fall considering that both parties had some success, and then the compensation award for \$5,000 could be reduced by \$1,000 to take into account that the Employment Court awarded costs against Mr Burns of \$1,000. Alternatively, it is suggested that the Authority should award Mr Burns one third of his costs plus \$4,000 for his disadvantage claim. Therefore, the applicant seeks an award of costs of \$7,350 plus \$4,000 compensation as previously determined.

Determination

[12] I have given close consideration to the submissions of both parties but when it comes down to it, I have to say that there remains one overriding factor that I must take into consideration. This is that, according to the affidavit of Mr Burns, he has returned to Ireland, on borrowed money, to seek work and as of 17th December 2009, he was in an impecunious state. That Mr Burns is in this financial position was accepted by the Employment Court (Couch J.) in a costs judgment issued on 17th November 2009, taking into account an affidavit sworn by Mr Burns. The Court was persuaded that Mr Burns was “*truly impecunious*” and made a minimal award of \$1,000 by way of costs.

[13] While I do not know what the current financial status of Mr Burns is, I think that it is reasonable to conclude that it is unlikely to have improved greatly hence, any detailed analysis of the respective submissions of the parties would not be particularly productive.

[14] Nonetheless, in the round, it is clear that given the interim and the substantive hearings, the respondent has been more successful overall and is entitled to recognition of this in regard to an award of costs, albeit I do not accept that the purported Calderbank offer can have any influence on this. On the other hand, it has to be accepted that Mr Burns is in an impecunious position and it would be unreasonable for the Authority to impose any further undue hardship upon him.

[15] It seems to me that this problem calls for a practical albeit perhaps somewhat unorthodox solution. I conclude that in the circumstances, an award of costs to the respondent of \$5,000 is appropriate but that this sum should then be set off against the compensation sum of \$5,000 awarded to Mr Burns in the substantive decision. It is so ordered.

K J Anderson
Member of the Employment Relations Authority