

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

[2016] NZERA Christchurch 73  
5504673

BETWEEN                      DUNCAN MACNAB  
   Applicant

A N D                              MOUNT CAMPBELL  
   COMMUNICATIONS  
   LIMITED  
   First Respondent

   LLOYD WENSLEY  
   Second Respondent

Member of Authority:        M B Loftus

Representatives:             Paul McBride, Counsel for the Applicant  
   Graham Downing, Counsel for the Respondents

Submissions Received:      10 December 2015 from Applicant  
   11 December 2015 from Respondent

Date of Determination:      3 June 2016

---

**COSTS DETERMINATION OF THE AUTHORITY**

---

[1]     On 2 November 2015 I issued a determination<sup>1</sup> concluding Mr MacNab had a personal grievance in that he had been unjustifiably dismissed by the first respondent, Mount Campbell Communications Limited (Mount Campbell), on or about 10 August 2014.

[2]     There was also a conclusion Mount Campbell breached the employment agreement by failing to review Mr MacNab's performance as required but no remedies accrued as a result. Mr MacNab was unsuccessful with a claim a penalty be imposed on the second respondent for being responsible for this breach.

---

<sup>1</sup> [2015] NZERA Christchurch 164

[3] Mount Campbell's counter claim for an order rectifying the written employment agreement was dismissed.

[4] Costs were reserved and Mr MacNab, as the successful party, now seeks a contribution toward his costs.

[5] Normally the Authority will use a daily tariff approach when addressing a costs claim.<sup>2</sup> The normal starting point is \$3,500 per day and from there adjustment may be made depending on the circumstances.

[6] The investigation took the better part of a day but Mr MacNab seeks considerably more than the above tariff. Mr MacNab notes costs of over \$15,000 and suggests a contribution in the \$12,000 plus disbursements (travel at \$207).

[7] In support of his claim Mr MacNab notes there were two distinct issues – the personal grievances and the counter claim with the latter requiring additional work via a detailed and separate Statement in Reply. It also saw an order the parties attend a second mediation. Mr MacNab also notes he objected to the order to mediation and claims to be vindicated by my conclusion it would be unlawful to grant the counterclaim.<sup>3</sup>

[8] Having canvassed the law relating to costs in the Authority Mr MacNab refers to both *Carter Holt Harvey Ltd v Eastern Bays Independent Industrial Workers' Union*<sup>4</sup> and *Rodkiss v Carter Holt Harvey*<sup>5</sup> as supporting a conclusion I increase both the daily rate and the number of days. He submits they should be applied here by awarding \$4,000 a day for three days: namely 1 day on the personal grievance plus one day's preparation; half a day preparing to address the counter claim and half a day at the mediation it caused.

[9] The higher hourly rate is said to be justified by:

- a. No finding of contribution;
- b. The fact Mt Campbell was put on notice it was acting improperly before doing so;

---

<sup>2</sup> refer *PBO Ltd (formerly Rush Security Ltd) v Da Cruz* [2005] ERNZ 808

<sup>3</sup> n.1 at [38]

<sup>4</sup> [2011] NZEmpC 135

<sup>5</sup> [2015] NZEmpC 147

- c. The fact Mt Campbell was in receipt of legal advice and therefore making a fully informed decision to continue upon its chosen course;
- d. The decision to file a counter claim which essentially tried to enforce an unlawful provision and considerably increasing costs;
- e. The Respondent's counter claim asked the Authority to pay the costs of its application to remedy its own mistake, in circumstances where that indulgence would ordinarily mean it was liable to meet the other party's costs;
- f. The second ordered mediation is recoverable;<sup>6</sup>
- g. Ms MacNab was forced to move to Hawkes Bay as a result of Mt Campbell's actions and he, along with counsel, should therefore be able to claim travelling costs (\$207).

[10] By way of response Mt Campbell notes the hearing took only  $\frac{3}{4}$  of a day and therefore \$2,625 should be the starting point.

[11] Mt Campbell then goes on to note there were two respondents with one, Mr Wensley, being successful in defending the claims against him. It is submitted he should never have been a party.

[12] It is then submitted the counterclaim was not separate but intrinsically intertwined with the grievance and it did not lengthen the investigation. It is further submitted *the direction to a second Mediation was a mandatory requirement under s 164(a) of the Employment Relations Act. It is well established that costs cannot be awarded in relation to Mediations.*

[13] It is also argued the counterclaim was not a forlorn endeavour as while unsuccessful *there is clear authority that rectification can be ordered by the ERA.*

[14] Finally it is submitted that cost regimes should be applied in a way that provides certainty to the parties and departure from normally applied scales should only occur in very special circumstances.

[15] Payment of the travel is conceded.

---

<sup>6</sup> *Fagotti v Acme & Co Ltd* [2015] NZEmpC 135

[16] There are two parts to this claim. They are (1) I increase the daily tariff and (2) I increase the time to which it applies. Having considered the submission and the law I reach the following conclusions.

[17] The increase Mr MacNab seeks to the daily rate is not great - \$500. He argues it is justified by reason of Mt Campbell having pursued what turned out to be a forlorn cause. To me the argument fails to convince as it appears punitive. It is well established costs are not to be used to punish.

[18] Turning to the application I increase the time to which a costs award applies. This is based on three main contentions. The first is I recognise preparation time; the second seeks recognition of the time taken to file a reply to the counter claim and the third relates to the order the parties attend a second mediation.

[19] While there is some disagreement about the hearings length and while it took the better part of a day it is not a full day.

[20] I am not persuaded to recognise preparation time. The daily rate has always been considered inclusive of preparation and there is no real argument as to why I should depart from that well established principle.

[21] The counter claim, while permissible, was unusual and undoubtedly required research and consideration. I conclude it did lead to additional effort and cost. There is then the fact the detailed response appears to have assisted the investigation and focused the parties' attention as I do not consider the counter claim greatly extended the hearing time. Much of the evidence about intent was going to be offered in any event and the relevant submissions were reasonably short.

[22] Similarly I note Mr Wensley's success in defending the claim against him personally added almost nothing to the investigations length.

[23] There is then the second mediation. While it is well established mediation is part of the process and a cost to be expected which will not be recoverable, that principle generally applies to a first mediation. There are examples of mediation costs being recognised where it is a second one and the parties had no choice as a result of an order of the Court or Authority. This was, as Mr McBride submitted, recognised by the Court in the *Fagotti* decision. Both factors are present here and some recognition should be taken of that.

[24] Finally there is the issue of what the Court labelled *proportionality* in the *Fagotti* decision. This case did require additional time and it would be wrong to see that diminish the value of Mr MacNab's success to an improper degree.

[25] Having considered the submission I conclude an increase in the tariff is warranted, at least in relation to recognising the time this case required. I consider \$5,500 appropriate. To that I add the travel.

### **Conclusion and orders**

[26] As a result the respondent, Mount Campbell Communications Limited, is to pay the applicant, Duncan MacNab, the sum of \$5,707 (five thousand, seven hundred and seven dollars) as a contribution toward the costs he incurred in pursuing his claim.

M B Loftus  
Member of the Employment Relations Authority