

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2017] NZERA Auckland 392
3004471

BETWEEN JCR (2006) LIMITED T/A
1ST CALL RECRUITMENT
Applicant

AND HAMISH MCARTHUR
First Respondent

AND MAC RECRUITMENT
LIMITED
Second Respondent

Member of Authority: Robin Arthur

Representatives: Richard Upton, Counsel for the Applicant
Melanie O’Neill, Counsel for the Respondent

Submissions: 6 December 2017 from the Applicant and the
Respondents

Determination: 18 December 2017

COSTS DETERMINATION OF THE AUTHORITY

[1] By determination issued on 22 November 2017 the Authority found Hamish McArthur had breached a restraint of trade term in his employment agreement with his former employer JCR (2006) Limited.¹ The company, whose recruitment consultancy business trades as 1st Call, failed in its claim for Mr McArthur to pay damages and for the company he set up, Mac Recruitment Limited, to pay a penalty. However Mr McArthur was ordered to personally pay a penalty of \$9000 for soliciting 1st Call clients within the timespan of his restraint of trade.

[2] The determination encouraged the parties to resolve any issue of costs but set a timetable for memoranda if an Authority determination of costs was needed. It included this indication to parties that might have assisted resolving that issue themselves:

¹ *JCR (2006) Limited t/a 1st Call v McArthur & Mac Recruitment Limited* [2017] NZERA Auckland 362.

If asked to determine costs the Authority's assessment typically applies a notional daily rate, unless particular circumstances or factors require an upward or downward adjustment of that tariff.² As a preliminary view, it seems any award of costs to 1st Call should be based on the tariff for one day, not the two days taken by the investigation meeting. The meeting was unnecessarily lengthened by 1st Call pursuing points regarding damages, which it had not adequately quantified or mitigated, and regarding the non-competition clause it abandoned on the second day. By contrast, Mr McArthur had made a number of candid admissions and provided information that reduced the amount of time needed. This preliminary view is subject to submissions and information as yet unknown to the Authority, such as whether any prior offers to settle the matter might need to be taken into account.

[3] The parties did not settle costs themselves. They lodged memoranda for the Authority to consider in assessing costs.

[4] 1st Call's memorandum acknowledged it had succeeded with some but not all of its claims. It accepted the Authority's preliminary view that an award of the tariff for one day of the investigation meeting, rather than the full two days, was "a sensible way" of reflecting its limited success.

[5] Mr McArthur's memorandum analysed the six elements of 1st Call's substantive claim to identify it was successful on one, the breach of the restraint term, but with the penalty of \$9000 awarded being less than the \$40,000 1st Call sought. It noted a penalty was claimed but not awarded against Mac Recruitment Limited for aiding and abetting Mr McArthur's breach of his obligations to 1st Call.

[6] On that basis Mr McArthur sought "costs for 1st Call turning what essentially could have been a half day investigation meeting, into a two day investigation meeting". Alternatively, he submitted costs should lie where they fell. Both those propositions had to fall at the hurdle of the principle that costs follow the event. In this case, the substantive outcome was that Mr McArthur had breached his obligations and he had to pay a penalty for it. In that respect 1st Call was the 'successful' party and was entitled to an award providing a contribution to its reasonably incurred costs in achieving that outcome. From that starting point other adjustments might be required through application of the relevant principles for assessing costs.

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

[7] There was more weight in Mr McArthur's argument that a larger downward adjustment should be made than was proposed in the Authority's preliminary indication to the parties.

[8] The failure of 1st Call to get a penalty awarded against Mac Recruitment Limited was not part of that equation. As the parties (or anyone else reading the substantive determination) could see, an allowance had already been made for the reality that the actions of Mr McArthur and his one person company were effectively one and the same. This meant imposing a penalty on that company risked amounting to a double punishment.³ However, to take further account of that concession in the assessment of costs would, perversely, then have given Mr McArthur a double benefit from it.

[9] The issue was whether three aspects of 1st Call's claim in which it was either unsuccessful or had inadequately prepared for warranted a reduction to the tariff of one day rather than two days – that is from \$8000 to \$4500 – or to even less than that amount.

[10] The preliminary indication given was expressly said to be subject to submissions the parties might make. The memoranda of both parties made no reference to any without prejudice offers that might have resulted in earlier settlement of the substantive claim. The inference could be taken that there were none or none for amounts sufficient to be taken into account in the costs assessment.

[11] The other relevant principle to consider was whether 1st Call's conduct of its claim had unnecessarily increased costs, for which it should not have the benefit in any award made. The Authority meeting was unnecessarily lengthened by 1st Call pursuing points regarding damages, which it had not adequately quantified or mitigated, and by pursuing a claim about a non-competition clause that it abandoned on the second day. It had also not clarified its position about a claim for an account of profits until the beginning of the investigation meeting.

[12] Mr McArthur's memorandum on costs persuasively described how the investigation meeting was unnecessarily lengthened by the time taken in pursuit of those points. A reduction of the tariff to the amount typically awarded for one full

³ *JCR (2006) Limited*, above n 1, at [33]-[34].

day of an investigation meeting was not enough to indicate what portion of 1st Call's claimed costs were consequently unnecessarily or unreasonably incurred. Instead the sum of \$3500 was the appropriate, modest sum that Mr McArthur must pay 1st Call as a contribution to its costs reasonably incurred in establishing breaches by him of one term of his agreement, for which he has been ordered to pay a penalty.

[13] Mr McArthur must also reimburse 1st Call the sum of \$71.56 for the fee paid to lodge its claim in the Authority.

Order

[14] Mr McArthur must pay 1st Call \$3500 as costs and the \$71.56 reimbursement by 1 February 2018.

Robin Arthur
Member of the Employment Relations Authority