

CSAT/8(No.3)

THE ARBITRAL TRIBUNAL OF THE COMMONWEALTH SECRETARIAT

In the Matter between

SUMUKAN LTD

Applicant

And

THE COMMONWEALTH SECRETARIAT

Respondent

Before the Tribunal Constituted by

Professor Duncan Chappell - President

Dame Joan Sawyer, DBE, PC, Member

Miss Anesta Weekes QC, Member

RULING ON COSTS AND COMPENSATION

Introduction

1. This Ruling addresses the outstanding issues of the quantum of compensation and costs which the Tribunal deferred when it delivered its judgment of 25 April 2005.

Heads of relief sought and the Tribunal's findings:

2. In the judgment, the Tribunal considered the principal heads of relief sought by the Applicant as follows:

(i) Ownership of the software and website and all intellectual property therein - the Tribunal rejected this claim. It concluded that "the collective ownership of the software and website and all intellectual property rights therein belong not to the Applicant but to the Respondent (para. 3.30).

(ii) Damages for refusal by the Respondent to accept that the Applicant had fulfilled its contractual obligations - In considering this claim, the Tribunal directed its attention to the Applicant's claim for reimbursement of certain expenses it had incurred as a result of the Respondent's breach of contract in undermining the basis of the initial contract. The tribunal concluded that no such breach had occurred (para. 4.44).

(iii) Specific performance - the Tribunal rejected the Applicant's claim for the relief of specific performance for the Respondent's refusal to give the Applicant an official reference at the conclusion of the consultancy (para. 4.46).

(iv) Delayed payment of consultancy fees and costs in recovering payment - the Tribunal concluded that the withholding by the Respondent of the Applicant's final invoice for consultancy fees was not unreasonable given the Respondent's concerns about the Applicant's satisfactory completion of the terms of the consultancy (para. 5.5).

(v) Delayed payment of the Applicant's travel expenses claim and costs of recovery - in this regard, the Tribunal concluded that "the Respondent did not respond diligently or appropriately to the Applicant's legitimate request for reimbursement of its travel expenses under the terms of the consultancy (para. 5.7).

(vi) Other relief sought by the Applicant relating to the expenses incurred in the development, launching and hosting of the website - the Tribunal concluded that having determined that the prototype website is owned by the Respondent rather than the Applicant (para. 6.12), there was no basis upon which the Applicant can base a claim for recovery of expenses (para. 6.14).

3. It was against this background that the Tribunal deferred making a decision on the quantum of compensation the Applicant would be entitled to and which the Respondent would be liable to pay under item (v) of the heads of claim detailed above in respect of which the Applicant was successful, as well as the general issue of costs of the Application. Instead, the Tribunal invited submissions from counsel for both parties on these issues and on the basis of which it would make its ruling.

4. Counsel for the Applicant and the Respondent filed their written submissions on 9 May and 16 May 2005 respectively. Subsequently the Applicant's representative, Ms Jananayagam, filed additional submissions on 16 June 2005 which the Tribunal decided to read "de bene esse". Having read all the submissions, the Tribunal is now in a position to give its ruling.

Damages and compensation

5. First, leaving aside for the moment the costs aspect of the claim, while the Tribunal had no hesitation in finding that the Respondent must compensate the Applicant for the delay in reimbursing her travel expenses, the only difficulty the Tribunal had was in determining the quantum of compensation that the Respondent should pay. In this regard, the Tribunal had concluded that the failure by the Respondent to reimburse the Applicant's travel expenses in a timely manner amounted to a breach of an implied term for which the Applicant is therefore entitled to damages.

6. However, taking into account the amount involved and also taking into account that there was no evidence to suggest malice or deliberate refusal by the Respondent to pay, the Tribunal concludes that the Applicant is entitled to only nominal damages of £100. In addition, the Tribunal concludes that a reasonable estimate of the Financial loss the Applicant suffered as a result of the late payment of her travel expenses, and for which she is also entitled to be compensated, is the interest a trading bank would charge for an outstanding debit balance of £394.53 (the total amount of the travel claim) which remained unsettled for 5 months or the interest a similar amount invested in a trading bank would yield over the same period of time, whichever is the higher.

Costs

7. As regards the costs of the application, the general rule is that costs follow the event. Under Article V4 of its Statute, the Tribunal is empowered to determine the costs of an application and in doing so, it may take into account the means of the parties.

8. It is evident from the above that the only head of claim in which the Applicant was successful, out of six heads of claim, pertains to the delayed reimbursement of her travel expenses, while she failed in the other five heads of claim. The amount involved in the successful claim was £394.53 which, even after adding the costs that she could reasonably expect to be awarded in respect of the delay and to which she is nevertheless entitled, pales into insignificance when compared to the potential costs she would be liable to pay to the Respondent in respect of the five heads of claim in which she failed.

9. However, the Applicant's lawyers on their own admission in the submission they filed on behalf of their client said that the delay by the Respondent in paying the travel expenses caused the Applicant to "divert management time and resource to addressing the issue and seeking to persuade the Secretariat to pay monies which it should have recognized were due and to be paid." The submission pointed the Tribunal to documentary evidence, which the Tribunal has closely examined, including log of time spent chasing outstanding monies. All of this evidence shows that all the work involved, albeit additional work, was done internally by existing staff who were salaried employees of the Applicant. None of the documentary evidence drawn to the Tribunal's attention suggested that the Applicant incurred any additional outlay of expenditure in chasing the outstanding monies.

10. Accordingly, for reasons that presently will become apparent, the Tribunal concludes that the Applicant will gain nothing by being awarded costs in respect of the delay to cover such items as telephones, faxes, e-mails, and photocopies which would normally form part of allowable costs.

11. So far as the Respondent is concerned, having successfully defended five of the six main heads of claim, by the same token they should also be entitled to their costs. However, as the Tribunal has ruled in the case of the Applicant, Counsel for the Respondent on her own admission in her submission stated that "the Respondent was represented mainly by senior salaried officers." Similarly, as in the case of the Applicant, all the work, albeit additional work, done by the officers in conducting the Respondent's defence was done internally by salaried officers who were already being paid for that work. Counsel for the Respondent did not draw to the attention of the Tribunal any documentary evidence to suggest that the Respondent incurred any additional outlay of expenditure in defending the claims (apart from time estimates and the relatively small amounts spent on such items as faxes, telephones, photocopying and travel).

12. For the reasons explained in paragraphs 8 to 11, the Tribunal's ruling regarding costs therefore is that each party bears its own costs.

Given on this 22nd day of August, 2005 in London

Signed

Professor Duncan Chappell

Anesta Weekes QC