IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE

[2019] NZERA 277
3024584

	BETWEEN	MURRAY BAIN Applicant
	AND	SMART ENVIRONMENTAL LIMITED Respondent

Member of Authority:	Nicola Craig
Representatives:	Chris Grenfell, counsel for the Applicant Gretchen Stone, counsel for the Respondent
Investigation Meeting:	On the papers
Submissions Received:	19 March 2019 from the Applicant 2 April 2019 from the Respondent
Date of Determination:	9 May 2019

COSTS DETERMINATION OF THE AUTHORITY

A. Smart Environmental Limited is ordered to pay to Murray Bain within 28 days of the date of this determination $8,800.00 as a contribution towards his costs, along with $71.56 for the filing fee.

The substantive determination

[1] On 20 February 2019 I issued a determination[1] finding that:

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[1] *Murray Bain v Smart Environmental Limited* [2019] NZERA 91

(a) Smart Environmental Limited (Smart or the company) had paid Murray Bain all that was due under clause 3.1 of the Settlement Agreement between the parties;

(b) Smart breached clause 5 of the Settlement Agreement by making disparaging comments about Mr Bain. It was ordered to pay Mr Bain a penalty of $8,000;

(c) Smart had not established that Mr Bain breached clause 5 of the Settlement Agreement by making disparaging remarks about it; and

(d) Mr Bain had not breached the restraint of trade provision in the Settlement Agreement.

[2] I invited the parties to attempt to resolve the question of costs between themselves, noting that if they were unable to do so and costs were sought that I would take into account the mixed success of each party.

[3] The parties have been unable to resolve the costs question by agreement and Mr Bain has applied for costs.

Submissions on behalf of Mr Bain

[4] Mr Bain does not seek a specific amount of costs. Rather he seeks for the Authority to make an award of costs in his favour in an amount which the Authority thinks fit for the period up to shortly before the investigation meeting (1 November 2018) and on an indemnity basis from 30 October 2018, when a 'walk away' offer was made.

[5] Two offers were made by Mr Bain to resolve this matter. On 25 May 2018 Mr Bain's representative emailed Smart's Human Resources Manager who was then representing the company. The email was noted to be "without prejudice (save as to costs)". Settlement was proposed on the basis of a payment of $15,000 by Smart to Mr Bain along with a mutually agreed memo to recipients of the 25 January 2018 memorandum which was the basis of Mr Bain's disparagement claim. The Human Resources Manager replied on 31 May 2018, advising that Smart would be declining the proposal. No reason was offered.

[6] At a case management conference held on 30 October 2018 I encouraged the parties to undertake discussions about possible resolution of their claims, particularly as the two mediations had occurred without Smart being legally represented. Later that day Mr Bain made a "without prejudice (save as to costs)" offer to settle the proceedings. This involved

both parties discontinuing their claims against the other with no issue as to costs. That offer was not accepted by Smart on the basis that the company had reportedly made a number of prior attempts to resolve this matter by agreement along the lines that Mr Bain now proposed. However, having incurred costs associated with drafting and filing of evidence and preparation for the investigation meeting, Smart wished to have the opportunity to defend the allegations made against it and the opportunity to clear its name. There was no counter offer.

[7] An uplift on tariff costs and indemnity costs from the final Calderbank offer are sought on the basis that Smart conducted its litigation in a manner which resulted in additional costs for Mr Bain. The submissions refer to Smart:

(a) Failing to file its briefs of evidence as directed, with the briefs being filed a day late without prior notice or leave from the Authority;

(b) Making unnecessary requests for further evidence;

(c) Failing to negotiate or engage in settlement discussion, including after the Member had recommended the parties to do so;

(d) Being wholly unsuccessful in its counterclaims which took up the bulk of written and oral evidence time;

(e) Succeeding only regarding Mr Bain's payment claim, on which little time was spent by the parties and was essentially raised as an auxiliary cause of action; and

(f) Initially seeking a remedy in its counterclaim (damages) which was not available to it and which Mr Bain was required to address and submit on during a case management conference.

[8] Mr Bain incurred costs of $18,613 (plus GST and disbursements) during the proceeding. A spreadsheet setting out the dates and amounts of invoices was provided.

Submissions on behalf of Smart

[9] Smart seeks that costs should lie where they fall as both parties were partially successful. It has not accepted that there is a reasonable basis upon which the Authority should impose an award of costs against Smart.

[10] As regards Mr Bain's unsuccessful claim regarding payment being owed to him, this is described as a claim with no realistic chance of success. Smart is said to have incurred significant costs in successfully defending that claim.

[11] As regards its unsuccessful defence of the allegation of disparaging comments, Smart says that it was entitled to seek to protect its good name in defending such allegations which questioned the company's credibility and the opportunity to do so is not quantifiable in purely financial terms.

[12] It is noted that Smart attended two mediations and engaged in good faith in an attempt to resolve Mr Bain's claims against it.

[13] The 'walk away' offer was noted to have occurred the day before the commencement of the investigation meeting when the parties had incurred the majority of their respective costs and all witnesses had been briefed. Further, Smart was entitled to continue to defend the claims against it, particularly Mr Bain's claim which put at issue its integrity which was not solely a financial consideration for Smart.

[14] Smart submits that its counterclaims did not impact on the issue of costs as they were dealt with in the same pleading and the investigation meeting remained able to be concluded in one day. Mr Bain was noted as providing no evidence to support his claim that Smart's counterclaims took up the bulk of written and oral evidence time and this submission is not accepted as accurate by Smart.

Costs award

[15] The Authority's power to award costs under clause 15 of Schedule 2 of the Employment Relations Act 2000 is governed by principles set out by the full Employment Court in *PBO Limited (formerly Rush Security Limited) v Da Cruz*[2]. These include a requirement that the discretion be exercised in accordance with principle and not arbitrarily, considering equity and good conscience. Further, costs are not to be used as a punishment or as an expression of disapproval for an unsuccessful party's conduct, although conduct which increased costs unnecessarily can be taken into account in inflating or reducing an award.

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2 [2005] 1 ERNZ 808

[16] The investigation meeting lasted a day. The notional daily tariff is $4,500. On the basis that Mr Bain successfully established one of his claims and received a penalty some costs should prima facie be awarded to him.

Indemnity costs

[17] The Court of Appeal considered indemnity costs in *Bradbury v Westpac Banking Corporation*[3]. Indemnity costs are exceptional and require exceptionally bad behaviour.[4] Examples provided were the making of allegations of fraud knowing them to be false, particular misconduct that causes loss of time to the Court and other parties, commencing and continuing proceedings for some ulterior motive and making allegations which ought never to have been made or unduly prolong a case by groundless contentions.[5]

[18] In *Stormont v Peddle Thorp Aitken Ltd*[6] this approach was recognised by Chief Judge Inglis in the employment context.[7]

[19] I set out below my views on Smart's actions which caused additional costs to be incurred. However, I do not consider those actions meet the test of exceptionally bad behaviour, noting also that until July 2018, the company was representing itself, as it was entitled to do. I conclude that indemnity costs are not appropriate and the starting point is therefore the daily tariff of $4,500.

[20] For the sake of completeness I also note the complexity of attempting to make different awards for different time periods, one based on the notional daily tariff and one based on indemnity costs. The notional daily tariff includes components for preparation and for attendance at an investigation meeting, but is presented as one figure in the relevant practice note.[8]

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3 [2009] NZCA 234
4 *Bradbury* at [28]
5 *Bradbury* at [29], from Shepherd J.'s summary in *Colgate – Palmolive Co v Cussons Pty Ltd* (1993) 118 ALR 248 at para [24]
6 [2017] NZEmpC 159
7 Paragraph [8]
8 Employment Relations Authority Practice Note 2, Costs in the Employment Relations Authority, 30 June 2016

Mixed success

[21] In *Coomer v JA McCallum & Son Limited*[9] Judge Smith stated that a nuanced assessment of competing considerations is required in cases where parties have had mixed success. Reference was made to the Court of Appeal's statement that " … success on more limited terms is still success".[10] Mr Coomer could not have achieved his success, limited though it was, without lodging his claim in the Authority.[11]

[22] Of the witness statement evidence, my impression is that similar amounts were spent on each of Mr Bain's two claims and Smart's restraint of trade claim, with a lesser amount on Smart's disparaging comments claim. By my estimation about half of the investigation meeting time was devoted to Mr Bain's successful claim regarding Smart's disparaging comments. Mr Bain also achieved a fairly substantial penalty being ordered to be paid to him. The remaining hearing time was split relatively evenly between the three other claims; Mr Bain's unsuccessful claim and Smart's two unsuccessful claims.

[23] I consider that Mr Bain should receive an uplift on the daily tariff reflecting his successful defence of both Smart's claims. The hearing would not have been as long as it was without those claims. However, that uplift is not as large as it would have been had he not brought his claim for money owing, which also consumed some time. A $2,000 uplift is appropriate.

Calderbank offers

[24] The first Calderbank offer from May 2018 was clearly identified as such and occurred at a time well before the investigation meeting. However, it required $15,000 to be paid, which is almost twice the amount of the penalty which was awarded against Smart in the substantive determination. I therefore disregard that Calderbank offer.

[25] The second Calderbank offer was clearly identified as being "without prejudice (save as to costs)". It occurred two days before the investigation meeting but did not come out of the blue as the prospect of settlement had been discussed at the case management conference, as well as Smart having previously suggested the same resolution. The offer would have resulted in Smart being considerably better off, as it would not have had to pay the $8,000

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9 *Coomer v JA McCallum & Son Limited* [2017] NZEmpC 156
10 *Weaver v Auckland Council* [2017] NZCA 330
11 *Coomer* at [43]

penalty to Mr Bain. I recognise that Smart wanted to defend itself for non-financial reasons, however it was unsuccessful in doing so. The rejection of the offer was unreasonable.

[26] Taking into account the high proportion of fees incurred prior to the offer I allow a modest uplift of $1,500.

Conduct resulting in additional costs

[27] I have already taken into account the issues of Smart's unsuccessful counterclaims and the Calderbank offers. I now look at whether there are any remaining issues which may justify an uplift in terms of Smart's conduct leading to additional costs.

[28] Smart initially filed a statement in reply which did not include a counterclaim. At the first case management conference counterclaims were mentioned and Smart was directed to file an amended statement in reply. The first amended statement in reply mentioned both of Smart's counterclaims but did not set out particulars although a letter from a staff member referring to various events was attached as were documents relating to Coastal Bins Ltd. That company was the subject of Smart's unsuccessful claim that Mr Bain had breached the restraint of trade provision.

[29] After a second mediation Smart obtained legal representation. I directed that Smart file another statement in reply which was done. At that point a claim for damages, to be identified following document disclosure, was incorporated. Mr Bain sought further particulars regarding the counterclaims. Another case management conference was held. A further statement in reply was later filed. I identified an issue regarding the jurisdiction for damages claims for breach of settlement agreements. That claim was subsequently withdrawn.

[30] Overall the number of statements in reply and case management conferences was considerably in excess of what is required in most Authority cases and did not reflect the relative lack of complexity of the issues. I consider that an $800 uplift should be made for Smart's conduct of the proceedings which increased Mr Bain's costs.

Conclusion

[31] To the notional daily tariff of $4,500 I have allowed uplifts of a total of $4300. I order Smart to pay Mr Bain within 28 days of the date of this determination the sum of $8,800.00 as a contribution towards his costs and $71.56 for the Authority's filing fee.

Nicola Craig
Member of the Employment Relations Authority