

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 208/08
5125247

BETWEEN CURTAIN MAKERS NEW
ZEALAND
Applicant

AND CATHERINE CROCOMBE
First Respondent,
BRENT KELLY
Second Respondent,
JUDI RUTHERFORD
Third Respondent,
MARY HENDERSON
Fourth Respondent,
DAVE FOGARTY
Fifth Respondent,
CARBAT LIMITED
Sixth Respondent

Member of Authority: Marija Urlich

Representatives: Simon Menzies, for Applicant
Melanie O'Neill, for First, Second, Third, Fourth and
Sixth Respondents
Scott McKenna, for Fifth Respondent

Submissions received: 13 June 2008

Determination: 16 June 2008

COSTS DETERMINATION OF THE AUTHORITY

[1] The applicant filed an urgent application for interim injunctions against the respondents on 26 May 2008. The Authority convened a telephone conference call with the parties on 30 May 2008 during which the following directions were made:

- (i) the parties directed to attend mediation on Tuesday, 3 June 2008;
- (ii) the respondents to file and serve their affidavits by Tuesday, 10 June 2008;
- (iii) the applicant to file and serve any reply affidavits by Thursday, 12 June 2008;

(iv) an investigation meeting to be held on Thursday, 13 June 2008.

[2] On 11 June 2008 Mr Menzies wrote to the Authority:

“...
 2. *My client received yesterday a number of affidavits on behalf of the Respondents and it is clear there are significant factual matters in dispute.*
 3. *It is impracticable to respond in a meaningful way to those affidavits prior to the scheduled hearing. My client has also reflected on the value of interim relief at this stage. It has therefore decided to focus on the claim for damages and abandon the applications for interim relief.*
 ..”

[3] The respondents’ now seek an award of costs against the applicant.

Submissions

[4] The parties have filed costs memoranda augmented by oral submissions.

[5] Ms O’Neill, in submissions in support of the application for costs, referred to the following legal principals:

- (i) where proceedings are withdrawn shortly before hearing, an adverse award of costs is likely to be made¹;
- (ii) that costs should follow the event in interim injunctions².

[6] She submits that a high contribution towards costs totalling \$11,947.50 should be ordered against the applicant for the following reasons:

- (i) the applicant abandoned its application after the respondent had filed all its evidence;
- (ii) the applicant’s claim were speculative and unsupported;
- (iii) the undertaking as to damages was unsupported and worthless and points to a real possibility that costs will not be paid if left to a later date;

¹ *Sheiling Laboratories Limited v Smith Shaw J* unrpt AEC 48/95

² *AC Neilson (NZ) Limited v Pappafloratos* 5/9/03, Shaw J, WC 17B/03

- (iv) the likelihood of the matter proceeding to substantive hearing is questionable given the respondents' comprehensive response to its claims;
- (v) factual disputes are common in injunctive settings where they are considered to an arguable case standard;
- (vi) the applicant has not replied to the respondents' open offer to inspect their computers, one of the remedies sought and;
- (vii) the respondents' costs have been unnecessarily added to by the general terms in which the relief sought was expressed;
- (viii) there was no prospect of success against the first and fourth respondents, the claims were speculative and their employment agreements had no restraining clauses;
- (ix) there was no prospect of success against the sixth respondent as there was no privity of contract³;
- (x) the second and third respondents' restraining clauses are unenforceable.

[7] Mr McKenna, for the fifth respondent, seeks an award indemnifying costs totalling \$3500.00. He cites *Paki v Panel Holdings Limited* 2/5/08, Colgan CJ, AC12/08 in support. In that case the plaintiff took no steps to pursue her challenge and her former employer was put to expense for no purpose. He submits this is an analogous situation and the fifth respondent has been put to costs for no purpose. In addition Mr McKenna made the following submissions:

- (i) *PBO Ltd v Da Cruz*⁴ sets out the principals to apply to costs in the Authority;
- (ii) Particular weight should be given to the following features of this matter:
 - The applicant sought and was granted an urgent hearing of its application;
 - The large number of parties increased the necessary preparatory work;

³ *Credit Consultants Debt Services NZ Limited v Wilson* 5/4/07, Colgan CJ, Travis, Shaw JJ WC 12A/07

⁴ [2005] 1 ERNZ 808

- The low prospect of success against the fifth respondent given the weak evidence in support of the claim and existence of other adequate remedies;
- The abandonment of the application at the 11th hour when extensive costs had been incurred.

[8] Mr Menzies submits costs should be reserved for the following reasons:

- (i) *NZ Automotive Association v McKay*⁵ is authority for the proposition that it is more just to deal with costs on an interlocutory application when the substantive proceedings are determined and this is an appropriate case for costs to be reserved;
- (ii) The affidavits and preparation for the interim hearing are intermingled with the substantive issues between the parties;
- (iii) The applicant could not meaningfully respond to the respondent's affidavits given the factual disputes they revealed and the time available;
- (iv) The applicant is pursuing the substantive claim and challenges much of the evidence provided by the respondents;
- (v) Given the disputed matters will be determined at the substantive hearing it is premature to determine costs at this early stage;
- (vi) Focussing on the substantive issues will reduce costs for all parties; and
- (vii) The Authority has insufficient information on which to determine costs at this stage.

Determination

[9] Proximity to hearing and steps taken in preparation are relevant to a consideration of costs where proceedings have been withdrawn prior to hearing⁶.

[10] The abandonment of the application for interim relief was at a very late stage. In abandoning its application the applicant has avoided the costs and inconvenience of

⁵ [1996] 2 ERNZ 622, Colgan J

⁶ *Data Group Ltd v Gillespie* 22/3/04, Travis J, AC16/04

meeting a tight timetable. This possibility was not available to the respondents who complied with the timetable set at the request of the applicant.

[11] The respondents' preparation for the interim hearing was unnecessary. This lack of necessity is compounded by the timing of mediation which was scheduled, by agreement of the parties, at an early stage in the timetable in order to minimise hearing preparation costs. A further compounding feature is the unnecessary complexity caused by the applicant's citing of the sixth respondent against whom there was no prospect of success⁷.

[12] I do not accept the interim orders sought and the substantive matters are so intertwined as to justify delaying the setting of costs in relation to the interim application. The interim relief "event" is concluded, albeit unusually by the abandonment of the applicant. A substantive hearing cannot alter that fact.

[13] If the respondents are successful at substantive hearing, they cannot seek costs for which they have already received an award. If the applicant is successful at the substantive stage any proven loss can be remedied by an award of damages and any costs award must necessarily relate to those substantive proceedings. An assessment of merits is not appropriate at this stage. The applicant abandoned its opportunity to have the Authority assess the merits of its interim application.

[14] For the above reasons I find the respondents are entitled to a high award of costs. Indemnity costs are not warranted. I am satisfied as to the level of actual costs incurred and that they are reasonable given the nature of this matter. The first, second, third, fourth and sixth respondents are entitled to a contribution of \$8000 to costs reasonably incurred. The fifth respondent is entitled to a contribution to his costs of \$2000.

Marija Urlich

Member of the Employment Relations Authority

⁷See *Credit Consultants* above