

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2015] NZERA Auckland 21
5537981

BETWEEN	E-LIGHTING LIMITED Applicant
A N D	GABRIELLE DICKENS First Respondent
A N D	DAX PETER Second Respondent
A N D	HUNZA PRODUCTIONS LIMITED Third Respondent

Member of Authority: Eleanor Robinson

Representatives: David Fleming, Counsel for Applicant
Simativa Perese, Counsel for First and Second Respondents
Peter J Davey, Counsel for Third Respondent

Date of Determination: 19 January 2016

COSTS DETERMINATION OF THE AUTHORITY

The substantive determination

[1] The Applicant, E-Lighting Limited (E-Lighting) has been substantially successful in the Authority both in terms of obtaining interim injunctive relief against the First and Second Respondents and in terms of the relief ordered in the substantive determination dated 29 September 2015, [2015] NZERA Auckland 300.

[2] The Applicant is seeking a contribution towards its actual costs.

[3] Costs were reserved in the hope that the parties would be able to settle this issue between them. Unfortunately they have been able to do so, and both parties have filed submissions in respect of costs.

[4] This matter involved several days of investigation meeting and investigation time:

- (a) There was a hearing in relation to interim injunctions on 13 February 2015 which was conducted in a single day with evidence being dealt with on the papers;

- (b) Investigation meetings in relation to the substantive matter were held over five days, 13-14 April, 14 May, 12 June and 4 August 2015. Four of the days were full day meetings, while one day, 12 June 2015, involved a half day of investigation meeting;
- (c) An investigation meeting in relation to the Third Respondent's strike-out application was held on 21 April 2015. This was a half day investigation meeting;
- (d) A half day facilitation meeting with Member Crichton was held on the afternoon of 12 June 2015, attended by all parties and by Counsel;
- (e) A second facilitation meeting with Member Crichton was held on 15 July 2015. Whilst only the Applicant and the First and Second Respondents attended in person, Counsel were required to be available for the duration of the meeting and to participate in it by telephone at all times.

[5] In addition, there were numerous case conferences and memoranda required.

Submissions for the Applicant

[6] The Applicant submits that it has been substantially successful against all three Respondents and costs should follow the event in accordance with the general rule. It is submitted that the starting point for setting costs should be the Authority's notional daily rate of \$3,500.00, with adjustments made including allowances for mediation and the facilitation process conducted by Member Crichton.

[7] In relation to the interim hearing on 13 February 2015, it is submitted that an upward adjustment should be made to reflect the following factors:

- (a) A substantial amount of pre-hearing work was required, especially in relation to the preparation of extensive affidavit evidence;
- (b) The First Respondent in particular brought evidence about a number of matters which had no real bearing on the issues before the Authority, and were an apparent attack on the character of the Applicant's Director, Mr Peden. This added unnecessarily to the cost of the proceedings;
- (c) The matter was relatively complex legally, and a certain amount of legal research and argument was required.

[8] It is submitted that the substantive proceedings which were lengthy for Authority proceedings occupying 4.5 days of investigation meeting time were caused in part by the factual complexity of the case. However, a significant portion of the length of the investigation meeting was attributable to the way in which the Respondents conducted the proceedings.

[9] It is submitted that the Respondents called a large amount of evidence about issues which had no real bearing on the issues before the Authority and again appeared to be an attempt to smear the character of Mr Peden. The issues included:

- (a) Whether Mr Peden acted in a blameworthy manner in relation to the liquidation of Lighting Pacific;
- (b) Criticisms by the First Respondent of Mr Peden's management of E-Lighting;
- (c) Complaints about Mr Peden's expectations of the First Respondent in terms of hours of work;
- (d) Criticisms of Mr Peden's management of LuxR Limited;
- (e) Criticisms that in the First Respondent's opinion Mr Peden spent little time at work, and that he chose to spend time with his family;
- (f) An allegation that Mr Peden directed staff to take items from Hunza Productions Limited (Hunza) without paying for them;
- (g) Allegations that the First and Second Respondents were required to work unpaid hours;
- (h) Allegations of name calling within E-Lighting.

[10] It is submitted that there should be a modest uplift on tariff costs for the investigation meeting held on 21 April 2015 in relation to the Third Respondent's strike-out application in order to reflect:

- (a) At the request of the Third Respondent, full legal argument was required including appearances in person; and
- (b) The Third Respondent persisted with its strike-out application despite a memorandum seeking a strike-out having already been considered by the Authority prior to the meeting on 13 and 14 April 2015.

[11] It is submitted that no adjustment to the overall costs is required due to without prejudice offers made. It is noted that no offers had been made by any of the Respondents that would be relevant on a *Calderbank* basis.

[12] The Applicant submits that it has incurred actual costs in excess of \$50,000.00. In addition to a contribution to the actual costs, fees and other disbursements or expenses are also claimed. These include fees payable to the Authority by the Applicant, a total of \$1758.19 made up of:

- (a) The filing fee of \$71.56;
- (b) Hearing fees of \$153.33 per half day after the first day of which there were 10 including two half day facilitation meetings with Member Crichton meaning that hearing fees of \$1,533.30 are payable;
- (c) A fee of \$153.33 payable in relation to the successful application for removal of remaining parts of the matter to the Employment Court.

[13] Other disbursements and expenses include:

- (a) Courier charges of \$96.71;
- (b) External printing costs of \$259.19 in relation to the bundle of documents filed by the Applicant;
- (c) The sum of \$2,478.25 for having the First Respondent's computer forensically examined by Computer Forensics Limited.

[14] It is submitted that for these reasons, cost should be awarded as follows:

- (a) Costs in relation to the interim hearing held on 13 February 2015 should be set at \$5,250.00, a 50% uplift on tariff costs of \$3,500.00 for a one day meeting;
- (b) Costs for the substantive investigation meeting dates of 13-14 April, 14 May, 12 June and 4 August 2015 should be set at 1.25 times the tariff cost of \$3,500.00 per day for 4.5 days. This amounts to \$19,687.50;
- (c) Costs in relation to the investigation meeting held in relation to the Third Respondent's strike-out application to be set at \$1,750.00;
- (d) Costs of \$1,000.00 should be allowed for attendance at the Authority-directed mediation which was a necessary part of the proceeding; and

- (e) Costs of \$1,750.00 should be allowed for attendances in relation to the facilitation process conducted by the Authority;
- (f) Costs of \$1,750.00 should be allowed in terms of the opposing application to have costs set by the Authority and the costs submissions themselves.

[15] The Applicant should be reimbursed the Authority filing fee and hearing fees of \$1,758.19

[16] *The* applicant should be reimbursed:

- (a) Courier charges of \$96.71;
- (b) Printing costs of \$259.19; and
- (c) Computer forensic costs of \$2,478.25.

[17] The Applicant considers that the Respondents should be jointly and severally liable for payments of the above amounts. The Applicant submits:

- (a) The First and Second Respondents were both subject to interim injunctions and have been held jointly and severally liable for damages which was the main remedy sought through the substantive proceeding. They have also been jointly represented throughout the proceeding and have effectively acted as a single community of interest. On that basis it would be artificial to separate the two of them for costs purposes;
- (b) It is in the interests of equity that the First and Second Respondents be jointly and severally liable for the majority of the amounts set out above;
- (c) The Third Respondent is in a different position. It is liable for a penalty but not for damages. Its participation in the hearing and in particular its exercising of its right to separately cross-examine witnesses for the Applicant added to the length of the procedure. It was also responsible for the strike-out application heard on 12 April 2015. It is submitted in the circumstances the Third Respondent should be ordered to make a significant contribution towards the overall amount sought including the whole of the \$1,750.00 sought in relation to the strike-out application.

Submissions for the First and Second Respondents

[18] The First and Second Respondents agree that costs should follow the event and that the notional daily rate is in the sum of \$3,500.00. However, the First and Second Respondents differ as to the application of the principles involving costs and the quantum.

[19] In respect of the reimbursement sought, it is submitted that there is a proper basis for the recovery of the filing fee of \$71.56 and the hearing fee, but no proper basis for the claim of the fee to remove the damages issues to the Employment Court. It is submitted that the Applicant chose to remove the issue and has done so for its own advantage and should therefore make due payment.

[20] In addition, it is submitted that there is no proper basis for the claim to be reimbursed for courier charges, external printing costs and costs of computer forensic analysis adding up to \$2,773.44. They are not disbursements that are reasonably recoverable in a costs award.

[21] In respect of the uplift of approximately \$10,000.00, the First and Second Respondents submit that the Applicant has not advanced a proper basis upon which the Authority can make a principled decision in its favour. It is submitted:

- (a) The dispute required substantial pre-hearing work and was relatively complex legally requiring a significant amount of legal research;
- (b) In relation to substantive proceedings, it was lengthy and a number of issues were raised by the Respondents which did not impact on the issues before the Authority.

[22] The First and Second Respondents submit that these considerations do not amount to a proper basis for determining costs because, in reality, the dispute before the Authority was no different from a commercial dispute concerning alleged breaches of contract. The contractual legal issues were not complex which proved to be the case before the Authority which dealt with the legal issues by relying on settled legal principles and applying those principles to the findings of fact.

[23] It is further submitted that it is relevant, in terms of the costs of the proceedings, that the investigation meetings were sporadic and this impacted upon the cost because part-heard matters are always more expensive to parties because of the need for lawyers to reacquaint themselves with the file and the factual matrix each time.

[24] The First and Second Respondents submit that the Applicant had properly conceded that it was not completely successful against the First and Second Respondents. It is

submitted that the major argument the Applicant relied upon was that the First and Second Respondents breached the restraint of trade clauses in their employment agreements. The issues in the proceedings were two fold in line with the Authority's determination:

- (a) Did the First and Second Respondents breach the terms of their employment agreements vis-à-vis the restraint clauses; and
- (b) If the First and Second Respondents did not breach the express terms of their employment agreements, were there implied terms of the contracts which were breached?

[25] The claims based upon and made in reliance on a breach of restraint of trade failed because the First and Second Respondents were not subject to the contractual restraint of trade provisions alleged by E-Lighting.

[26] While it is accepted that ultimately the Applicant was successful in relation to the implied terms, it would be fair for the Authority to give a significant discount to the First and Second Respondents on account of their success in respect of the first issue.

Submissions for the Third Respondent

[27] The Third Respondent notes that in *Booth v. Big Kahuna Holdings Ltd*, [2015] NZEmpC 4 at [17] it was said that parties who elect to incur costs that are likely to exceed the Authority's notional daily rate are:

Entitled to do so but cannot confidently expect to recoup any additional sums.

[28] The Third Respondent further notes that it was recently confirmed by the Employment Court in *Southall v. Tuau* [2015] NZEmpC 177 at [18] that costs awards in the Authority will be modest.

[29] Counsel for the Third Respondent submits that in the present cases the Statement of Problem that was initially filed by E-Lighting sought an interim injunction and damages against the Respondents which included the Third Respondent. Following the Third Respondent's Statement in Reply dated 29 January 2015, Counsel for the Applicant filed a memorandum dated 30 January 2015 in which it was accepted that there was no jurisdiction to seek an injunction or damages against the Third Respondent directly.

[30] The Third Respondent was accordingly not a party to the interim injunction application and therefore no order for costs should be made in relation to that application and

also in respect of the Authority-directed mediation at that time. This is also a factor as to why the Third Respondent should not be jointly and severally liable for damages.

[31] Despite the lack of jurisdiction to pursue an injunction or damages against the Third Respondent, the Applicant nevertheless decided to pursue the penalty claim knowing that it would incur additional costs in pursuing the Third Respondent which could not be recouped under the Authority's notional daily rate. As a result, the Third Respondent had to be involved in a lengthy investigation meeting much of which was not relevant to the penalty claim against it.

[32] The penalty claim against the Third Respondent for aiding and abetting a breach of the duty of fidelity was neither factually nor legally complex so as to justify increasing the notional daily rate. Further, the Applicant's claims also included a claim that the Third Respondent had aided and abetted a breach of the restraint of trade provision in an unsigned employment agreement by the First and Second Respondents. The Applicant was unsuccessful in relation to this aspect of the claim which it pursued despite the fact that there were clear indications in the determination in respect of the interim injunction that there was no arguable case in relation to this claim.

[33] Accordingly, part of the Applicant's claim was unsuccessful which is also a factor against any claim for increased costs.

[34] Further, contrary to the Applicant's claim, the Third Respondent did not conduct itself in any way that lengthened the Authority's investigation meetings. It needed to be separately represented and cross-examine witnesses and in fact was under an obligation to put its case to those witnesses.

[35] It is submitted that no costs should be ordered in respect of the facilitation carried out by the Authority with the consent of the parties on 12 June and 15 July 2015. It is pointed out that Counsel were not even in attendance at the facilitation on the latter date. It is submitted that such costs should not be taken into account when this has been undertaken as part of a voluntary effort to resolve the dispute and in circumstances where the Authority cannot make any assessment as to what transpired between the parties during the course of those meetings. The Third Respondent was a secondary party to those proceedings and it would be unfair for costs to be awarded against it in respect of those meetings.

[36] The Applicant also claims costs for the application to dismiss the penalty claim. However, the Third Respondent should not be penalised for requesting an oral hearing for that application especially given that the hearing took only approximately one quarter of a day. Costs should be limited on that basis to one quarter of a day, being \$875.00.

[37] Moreover, the claim for costs needs to take into account that the Applicant failed in respect of its application to extend the interim injunction which is the subject of a separate determination dated 25 May 2015. The parties filed additional submissions in relation to that application and these costs are presumably included in the costs which are part of the invoices for the Applicant.

[38] It is further submitted that the claim for costs includes a claim for the process of having costs set. However, that issue has been dealt with on the papers and no hearing has been required. There was also no correspondence from Counsel for the Applicant on the issue of costs prior to filing the memorandum of Counsel dated 30 November 2015. Instead, the Applicant chose to file a lengthy memorandum on costs rather than attempting to seek agreement on the issue of costs between the parties. Accordingly, the Third Respondent should not have to bear the Applicant's costs of having to respond to the claim for costs.

[39] In terms of the disbursements, it is submitted that it is unclear whether the Applicant has been invoiced for the hearing fees as it would seem they have not been paid.

[40] The Third Respondent should have no liability in respect of the filing fee for the removal of the damages claim to the Employment Court.

[41] In addition, courier fees are not usually claimable as a disbursement and there was no common bundle of documents produced so a fee for photocopying of documents should not be included. Further the claims for fees charged by Computer Forensic Solutions Limited is irrelevant to the claim against the Third Respondent because there was no computer forensic evidence presented against it.

[42] It is submitted that in all the circumstances any award of costs should be limited to the standard daily rate of \$3,500.00 with a total hearing time of 4.75 days making a total cost of \$16,625.00 plus the filing fee and the hearing fees, provided that hearing fees have been invoiced.

[43] Given the limited role that the Third Respondent played in the proceedings, it is submitted that any award of costs and disbursements for the filing and hearing fees against Hunza should equate to no more than half of those costs and disbursements.

Principles

[44] The power of the Authority to award costs arises from Section 15 of Schedule 2 of the Employment Relations Act 2000 which states:

15 Power to award costs

- (1) The Authority may order any party to a matter to pay to any other party such costs and expenses (including expenses of witnesses) as the Authority thinks reasonable.*
- (2) The Authority may apportion any such costs and expenses between the parties or any of them as it thinks fit, and may at any time vary or alter any such order in such manner as it thinks reasonable.*

[45] Costs are at the discretion of the Authority, as observed by Chief Judge Colgan in *NZ Automobile Association Inc v McKay*¹.

[46] The principles and the approach adopted by the Authority on which an award of costs is made are well settled and outlined in *PBO Limited (formerly Rush Security Ltd) v Da Cruz*². I observe that it is a principle that costs in the Authority will be modest.

Determination

[47] This was a protracted matter involving a quarter day interim injunction application, and an application for the interim injunction to be extended, which was heard ‘on the papers’, 4.5 days of the substantive investigation meeting and a half day strike out application, a total of 5.25 days of an investigation meeting.

[48] Costs normally follow the event and on the basis of the normal daily tariff rate of \$3,500.00 applied in the Authority, this equates to \$18, 375.00.

[49] Mr Fleming on behalf of the Applicant has applied for an uplift in the normal daily tariff. It is incumbent upon me that I approach the question of costs in a principled manner and not arbitrarily, and I therefore consider each ground for uplift separately, and the issue of apportionment between the Respondents.

Interim Application

[50] An uplift in costs is sought in relation to the interim matter on the basis of interim application which was heard on an urgent basis involved preparation over and above that usually required for an interim application and irrelevant issues were raised which represented an apparent attack on the character for Mr Peden.

¹ [1996] 2 ERNZ 622

² [2005] 1 ERNZ 808

[51] I do not accept that it was necessary for me to traverse irrelevant evidence or that issues of unusual legal complexity were involved at this interim stage.

[52] Accordingly I award no uplift in costs on this ground.

Fees payable to the Authority

(i) Filing Fee

[53] Filing fees are normally claimable by the successful party.

[54] The Applicant is to be reimbursed the Authority hearing fee of \$71.56.

[55] The hearing fees are also claimable. There were 5 full days which have been invoiced to the Applicant by the Authority.

[56] The Applicant is to be reimbursed the Authority hearing fee of \$1,533.30.

(ii) Mediation Costs

[57] This matter was filed seeking interim injunctive relief and urgency. In such matters mediation is directed on an urgent basis and an early mediation date is prioritised and allocated.

[58] Mediation is thus directed as an early opportunity for the parties to resolve matters as soon as is practicably possible and contain costs prior to embarking upon the Authority process which, although proceeding in a timely manner, may not provide the parties as quickly as desired with the relief sought.

[59] Although the Authority is not party to the mediation discussions, there is no reason for me to believe that any of the parties did not participate in that process in good faith.

[60] I acknowledge that this matter was the subject of a direction order by the Authority. In these circumstances I make a minimal costs award of \$200.00.

(iii) Facilitation Costs

[61] Facilitation is a voluntary process. In this case it took place after all parties had incurred significant costs and represented an attempt by the parties to resolve the dispute voluntarily without further costs being incurred. It was not a directed process as part of the proceedings before me.

[62] I was not privy to the facilitation process which was conducted by another Member; however I am aware that attendance was on a voluntary basis by the parties.

[63] Having considered this issue, I see no basis for uplift in costs on this ground.

Pre-hearing costs and the complexity of the matter before the Authority

[64] It is not usual for the Authority to award costs involved in the preparation of a case on the basis that the daily tariff rate reflects the fact that virtually all cases require preparation unless a case is unusually complex in nature requiring preparation beyond that normally expected.

[65] Whilst the case before me was more complex factually than others, it was not unusually legally complex and the reimbursement on a daily tariff basis to some extent takes account of preparation time.

[66] However I accept that in a case of this length and factual complexity some additional preparation would have been necessitated on the basis, and award an uplift in costs of \$1,250.00.

Irrelevant Evidence.

[67] Mr Fleming submits that time was spent during the substantive part of the investigation process dealing with issues relating to the character of Mr Peden which were not pertinent to the issues for determination.

[68] I accept that a portion of the evidence submitted by the First Respondent centred upon Mr Peden's conduct in the workplace, and was not strictly relevant or helpful to me in determining the issues before me. It was necessary to investigate these matters and this involved time taken in questioning and cross-examination which lengthened the proceedings.

[69] I award an uplift in the costs on this basis of \$1,500.00.

Disbursements

(j) Courier charges and photocopying charges

[70] These are a normal disbursements and the Applicant is to be reimbursed for the courier charge of \$96.71 and the external printing costs of \$259.19.

(ii) Forensic Computer fees

[71] I accept that given the nature of the claims against the First Respondent, the Applicant considered it prudent to have her computer forensically examined.

[72] The Applicant is to be reimbursed for the forensic computer charges of \$2,478.25.

Costs Application

[73] The claim for costs has been assessed 'on the papers' and no hearing time is involved as is the normal procedure.

[74] No costs are awarded in respect of the costs submissions.

Costs Allocation

[75] The total costs awarded to the Applicant are \$25,764.01.

[76] The First and Second Respondents were represented jointly throughout the process, and I consider it appropriate that they are jointly and severally responsible for that proportion of the costs which are awarded against them.

[77] The Third Respondent engaged throughout the overall process by exercising its statutory right to cross-examine the witnesses and therefore it is reasonable that it is responsible for some of the overall costs. In addition, the Third Respondent was solely responsible for the strike out application heard on 12 April 2015.

[78] I order in these circumstances that the First and Second Respondents are jointly and severally to pay the Applicant the sum of \$17,176.01, pursuant to clause 15 of Schedule 2 of the Employment Relations Act 2000.

[79] I order that the Third Respondent is to pay the Applicant the sum of \$8,588.00, pursuant to clause 15 of Schedule 2 of the Employment Relations Act 2000.

Eleanor Robinson
Member of the Employment Relations Authority