

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON OFFICE**

BETWEEN Lawrence Fenerty (applicant)

AND Max Tarr Industrial Limited (respondent)

REPRESENTATIVES Graham Rossiter for Mr Fenerty
Geoff O'Sullivan for the Company

MEMBER OF AUTHORITY Denis Asher

SUBMISSIONS RECEIVED by 18 June 2007

DATE OF DETERMINATION 20 June 2007

COSTS DETERMINATION OF AUTHORITY

Employment Relationship Problem

1. In my substantive determination dated 7 May 2007 (WA 71/07) I found that the restraint of trade agreement between the parties should be amended to a duration of three months.
2. Mr Fenerty now seeks costs.

Mr Fenerty's Position

3. In submissions filed on 23 May & 18 June the applicant says, having initiated proceedings in respect of the status of a restraint clause set by the former employer, and having succeeded in that the Authority reduced the term of the restraint provision from 12 to 3-months (an outcome consistent with submissions filed by Mr Fenerty), costs should follow the event.

4. The general principles and case authorities relevant to costs are clear and are well known.
5. Two Calderbank proposals were made by the applicant. A letter dated 15 February 2007 proposed settlement on the basis that Mr Fenerty would accept a restraint period of 3-months. A further proposal was put in writing on 2 April that the applicant would accept a restraint of 6-months: neither was accepted by the Company.
6. While a conventional investigation did not take place in this case (the parties agreeing it be done on the papers), the work required warrants costs in favour of the applicant of \$5,000 (i.e. 20 hours of solicitor-client costs at \$250 per hour).

Company's Position

7. In a submission dated 5 June, the Company says it seeks costs of \$3,000 plus disbursements against total fees in the Authority of \$7,060.13.
8. Costs are sought on the ground that Mr Fenerty was entirely unsuccessful in his application.
9. The Company does not accept the Calderbank proposals say what they are represented as saying.
10. There is some confusion as to what the Authority's determination was, but what is clear is that the restraint of trade as set out in the applicant's employment agreement was to apply for a duration of 3-months.

Discussion

11. In my substantive determination I was satisfied that Mr Fenerty was not to undertake any duties for his current employer that he had previously performed for the Company for 3-months from that date of the commencement of his present employment. The effect of my decision was to amend both the duration (12-months) and extent (any employment to previous duties) of the original restraint of trade applying to the applicant. I am therefore satisfied that Mr Fenerty succeeded significantly in respect of his original application and that costs therefore follow the event.
12. I am reinforced in this finding by Mr Fenerty's 'Calderbank' offers to similarly vary the duration and extent of the restraint of trade: *Watson v New Zealand Electrical Traders Ltd t/a Bay Switchgear*, unreported, Colgan CJ, 24 November 2006, AC 64/06.

13. General principles and case authorities relevant to costs are clear and are well known. There are no features or aspects to Mr Fenerty's case that would justify his recovery of full costs.
14. Much of this problem revolved around agreed facts: the bulk of work required of the representatives was to set out submissions on their client's behalf.
15. In all the circumstances, and bearing the above in mind, I am satisfied that Mr Fenerty is entitled to recover \$1,500 of his costs.

Decision

16. The Company is to pay to Mr Fenerty as a contribution to his fair and reasonable costs, the sum of \$1,500 (fifteen hundred dollars).

Denis Asher
Member of Employment Relations Authority

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