IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

[2014] NZERA Christchurch 18
5420477

	BETWEEN	G L FREEMAN HOLDINGS LIMITED Applicant
	A N D	DIANE LIVINGSTON Respondent

Member of Authority:	M B Loftus
Representatives:	Tim McGinn, Counsel for Applicant Robert Thompson, Advocate for Respondent
Submissions Received:	23 December 2013 from Respondent 3 February 2014 from Applicant
Date of Determination:	4 February 2014

COSTS DETERMINATION OF THE AUTHORITY

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[1] On 27 November 2013 I issued a determination rejecting Freeman's application the respondent, Ms Livingston, be required to pay a penalty for having breached a term in her employment agreement regarding confidentiality.

[2] Costs were reserved.

[3] Ms Livingston spent $1,928.62 defending the claim and asks it be reimbursed in full.

[4] Normally the Authority will use a daily tariff approach when addressing a costs claim (refer *PBO Ltd (formerly Rush Security Ltd) v Da Cruz* [2005] ERNZ 808). The normal starting point is $3,500 per day and from there adjustment may be made depending on the circumstances.

[5] This hearing took just over an hour which, applying the above formula, would see a contribution of approximately $550.

[6] As already said, Ms Livingston seeks more. She justifies this with a submission that notwithstanding the short hearing time other requirements such as the preparation of a statement of defence, briefs and submissions were not similarly abbreviated. There was also a requirement to prepare for a claim that was withdrawn during the hearing.

[7] Mr Thompson also submits Freeman's were aware of Ms Livingston's limited means and the financial consequences of an attempt to defend the claim. Despite that it chose to pursue the matter in a punitive attempt to put Ms Livingston to unreasonable cost and the situation was aggravated by Freeman's refusal to consider numerous undertakings given in an attempt to avoid litigation.

[8] Should I reject the argument in support of full reimbursement, Ms Livingston suggests $1,200 as an appropriate alternate.

[9] Freeman's accepts Ms Livingston was successful and may be entitled to a modest contribution to costs. The suggestion no more than a modest contribution is warranted is supported with an argument Ms Livingston was not without fault and *technically* there was a conversion. I discount this argument as it seems contrary to both the claim and the outcome.

[10] Freeman's denies it had knowledge of Ms Livingston's financial state and counters with a suggestion that if she was impecunious as stated she could have sought legal aid. Mr McGinn also submits Ms Livingston increased costs by claiming the proceedings be struck out as frivolous and vexatious. While unobtainable this still had to be addressed during a telephone conference.

[11] Mr McGinn also submits Ms Livingston's costs are excessive. He states there is no breakdown explaining how 7.25 hours were incurred and suggests 4 to be a more reasonable estimate. In closing, and given the unsuccessful strike out application, Mr McGinn suggests $500 to be a reasonable award.

[12] The argument for full costs is untenable. A costs award is a contribution and not full indemnification except in exceptional circumstances and where the type of

behaviours discussed in *Bradbury v Westpac Banking Corporation* [2009] 3 NZLR 400 are present. In this case there is no evidence of such behaviour.

[13] When I add a conclusion an award of full reimbursement would, in effect, be punitive and the principles of *Da Cruz* preclude that to Mr McGinn's points about no breakdown and the possibility they include the fraught strike out application, I conclude the claim for full reimbursement is untenable.

[14] Turning to what may be a reasonable contribution I note Mr McGinn's concession 4 hours may be a generous but reasonable estimate of the time required. I also note it would not be out of step with the historical approach to an award of costs by applying two hours preparation for each hour of hearing, especially where the ratio is distorted by a short hearing time as occurred here. Four hours at Mr Thompson's hourly rate would see an award of $1,000. Having considered the submissions, I conclude that to be appropriate.

[15] I therefore order the unsuccessful applicant, G L Freeman Holdings Limited, to pay the respondent, Ms Livingston, the sum of $1,000 (one thousand dollars) as a contribution toward costs.

M B Loftus
Member of the Employment Relations Authority