

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 211/07
5042033

BETWEEN IC Frith (NZ) Ltd Applicant
AND Camille Young Respondent

Member of Authority: Yvonne Oldfield
Representatives: Rick Hargreaves for Applicant
 Sarah-Jane Neville for Respondent
Investigation Meeting 22 August 2006
Submissions received: 16 May from Respondent
 30 May from Applicant
Determination: 13 July 2007

DETERMINATION OF THE AUTHORITY AS TO COSTS

History of proceedings

[1] This employment relationship problem was lodged in the Authority in June 2006. The applicant alleged that Ms Young had acted in breach of a restraint of trade provision and in breach of her obligations of confidentiality. It was not in dispute that Ms Young had left the applicant's employment for that of a competitor. During my first telephone conference in the matter the parties agreed that the second part of this problem, relating to the alleged breach of confidentiality, be put "on hold" and asked me to begin by determining whether the post employment restraint was enforceable and/or whether to modify it. A half day meeting confined to those issues was held on 22 August 2006.

[2] On 24 October 2006 I issued a determination in which I concluded:

"that the parties did not turn their minds to the issue of restraint of trade, that there was no consideration for a post-termination restraint of trade, and that the

agreement does not contain a restraint of trade, express or implied, capable of being modified.

This determination does not dispose of all elements of the employment relationship problem. It is therefore premature to address the issue of costs and that matter is reserved. A conference call will be scheduled to discuss how to proceed with the outstanding issues between the parties.”

[3] A conference call proceeded on 2 November. In relation to the outstanding issue of alleged breach of confidentiality the applicant sought wide ranging disclosure of material in the possession of the respondent and her new employer. This was opposed by the respondent on the basis that the requests were unreasonably wide, intruded on Ms Young’s privacy, and were essentially a “fishing trip” because the applicant did not have any evidence to support its assertions that Ms Young had breached confidentiality.

[4] A series of telephone conferences were held with the representatives to canvass these issues. The parties also provided written submissions on the necessity for and scope of disclosure. This process, and the orders which followed, are documented in Minutes dated 3 November, 30 November, and 21 December 2006 (attached.) The effect of the orders was that certain telephone records be produced to the Authority for inspection by me, with the parties’ representatives in attendance. I convened a meeting for this purpose on 1 March 2007. Its outcome is recorded in a Minute dated 1 March 2007 (attached.)

[5] The respondent supplied further telephone records on 21 March. On 27 April the applicant withdrew its claims relating to the alleged breach of confidentiality.

Submissions

[6] The respondent seeks full indemnity costs of \$17,945.00 and disbursements of \$688.54. In support of this claim Ms Neville argues that:

- i. Ms Young faced a claim in excess of \$200,000.00 and was warranted in instructing Counsel;
- ii. The first claim involved complex legal issues while the second, although eventually withdrawn, involved time consuming disclosure and inspection of documents. In these circumstances, the level of costs incurred was reasonable;
- iii. Neither of the applicant's claims had merit, and this view was conveyed from the outset in correspondence between counsel. Ms Young was ultimately successful in all aspects of her defence;
- iv. Ms Young asserts that the applicant has deliberately damaged her reputation within the insurance industry. This has included the lodging of a complaint to the insurance discipline and complaints committee alleging misconduct by Ms Young. The subject matter was similar to the issues raised in this case and it was dismissed.

[7] For the applicant, Mr Hargreaves argues that:

- i. The standard approach to costs in the Authority is for the successful party to be entitled to a modest contribution to costs assessed by reference to a daily tariff;
- ii. There is no reason in this case to depart from this approach;
- iii. Costs awards are not to punish or reward parties;
- iv. A reasonable contribution to costs in this case would be \$1,000.00 for costs involved in the investigation of the first part of the claim;
- v. Costs should lie where they fall in relation to the interlocutory matters relating to the second part of the claim since "*it is unusual for the Authority to grant costs in relation to steps taken after an investigation meeting.*"

[8] In relation to the investigation of the first part of the employment relationship problem, Mr Hargreaves argues that it was reasonable for the applicant to bring the case because the central issue (what happens when the duration of a restraint has not been specified) had not previously been determined. He says however that the issues were narrow and matters were dealt with expediently. Costs were minimised because there were no urgent applications, there was very little documentation and the

respondent prepared only one witness statement. He also noted that no experts were called to give evidence.

[9] In relation to the second part of the matter, Mr Hargreaves has argued that there can be no award of costs because any steps taken in relation to it were after an investigation meeting. He notes also that the applicant has already picked up the cost of production of phone records by Telecom.

[10] Finally Mr Hargreaves notes that submission relating to the alleged damage to Ms Young's reputation is not relevant to costs.

Determination

[11] I begin by recording that I accept Mr Hargreaves final submission, recorded here at paragraph [10]. Otherwise, I propose to deal separately with the costs relating to the two parts of this employment relationship problem.

[12] With respect to the first part, I see no reason to depart from the Authority's usual approach. For the Authority to consider full indemnity costs the circumstances of the case would need to be unusual (such as, for example, where the arguments lacked substance or where grounds were withdrawn without advice to Counsel.) This case has no such features.

[13] The Authority's "standard" approach to costs is not however to be applied inflexibly and I am satisfied that this case merits a higher than usual award for a half day matter. It did involve novel issues which required Counsel to bring relevant case law to my attention. Both assisted the Authority with thorough preparation of evidence and argument and it was this that enabled me to complete the investigation meeting in a half day.

[14] Taking all factors into account, including the high level of costs Ms Young has incurred, I am satisfied that she should receive a contribution of \$3,000.00 to the costs associated with the investigation and determination of the first part of the employment relationship problem.

[15] I turn now to the question of the costs associated with the second part of the employment relationship problem.

[16] I reject the submission that this part of the process should not attract an award of costs because it was after an investigation meeting. This part of the process formed the early part of the investigation of the second aspect of the applicant's case. Although the matter was withdrawn before a full investigation was completed, it had certainly begun. A partial investigation is capable of attracting an award of costs albeit a modest one reflecting the stage to which it had proceeded.

[17] Because Ms Neville did not provide any breakdown of how Ms Young's costs were made up I do not know what portion of those costs related to this part of the proceedings. I do know however that four telephone conferences, a written submission and a short (two hour) attendance at the Authority were required. I note that extensive preparation was not required for the meeting in the Authority which was of course for the sole purpose of inspecting documents.

[18] In all the circumstances I conclude that the respondent is entitled to a contribution of \$1,000.00 to the costs incurred in the second part of the investigation.

[19] In summary therefore the applicant is ordered to pay to the respondent a total of \$4,000.00 as contribution to her costs.

Y S Oldfield

Member of Employment Relations Authority