

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2014] NZERA Auckland 297  
5444588

BETWEEN	ISO LIMITED Applicant
A N D	JASON KENA First Respondent
A N D	INDEPENDENT STEVEDORING LIMITED Second Respondent

Member of Authority: James Crichton

Representatives: Daniel Erickson, Counsel for the Applicant  
Matthew McGoldrick, Counsel for the First Respondent  
Shima Grice, Counsel for the Second Respondent

Submissions Received: 10 July 2014 from the Applicant  
27 June 2014 from the First Respondent  
30 June 2014 from Second Respondent

Date of Determination: 11 July 2014

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**COSTS DETERMINATION OF THE AUTHORITY**

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**The substantive determination.**

[1] In my substantive determination issued on 17 June 2014 as [2014] NZERA Auckland 240, I dismissed ISO's claims and reserved costs.

**The first claim for costs**

[2] The first respondent (Mr Kena) seeks an award of costs in the sum of \$12,666 exclusive of GST. That represents a claim for full indemnity costs.

[3] In the alternative, Mr Kena seeks an award of \$7,000 if the Authority is not minded to contemplate full solicitor/client costs.

[4] Dealing first with the claim for full indemnity costs, Mr Kena argues that the behaviour of ISO justifies full indemnity costs and he relies on the decision of the Court of Appeal in *Bradbury v. Westpac Banking Corporation Ltd* [2009] NZCA 234.

[5] Particular reliance is placed on ISO's determination to continue with its proceedings even after relevant undertakings were allegedly provided by Mr Kena, the contention that ISO actually sought to prevent competition and/or prevent Mr Kena from earning a living, and the suggestion that ISO's case was "*hopeless*".

[6] In the alternative, if the Authority is not minded to contemplate full solicitor/client costs, a significant uplift in the daily tariff is sought so as to double the daily tariff rate. The arguments for this increase are the same as those advanced in support of full indemnity costs.

### **The second claim for costs**

[7] The second respondent (Independent Stevedoring) seeks full indemnity costs of \$12,975.94 exclusive of GST. Like Mr Kena, Independent Stevedoring relies on *Bradbury* to support that claim.

[8] It is contended that ISO had an ulterior motive, namely the prevention of competition and/or the restriction on Mr Kena earning a living, that ISO proceeded with a "*wilful disregard*" of known facts and/or clearly established law and that the case was a hopeless one.

### **The response**

[9] ISO's submissions make plain that it has endeavoured to settle the costs issue with the first and second respondents but has not been successful. A significant reason for that is its conviction that in effect there should be a single sum fixed for a costs award and not two sums, that is, that there is no justification for an award in favour of each of the first and second respondents.

[10] Moreover, ISO maintains that there is no basis for full indemnity costs because a proper construction of *Bradbury* does not support the contentions advanced for full solicitor/client costs in the particular circumstances of this case.

[11] ISO accepts that it has an obligation to contribute to the costs incurred by the successful parties, given that they were entirely successful, but that the appropriate

way to do this is by the application of the Authority's customary daily tariff approach and that there is no justification for separate awards, as the respondents claim.

### **Issues**

[12] This case raises the unusual question of whether there can be an award of costs made in favour of two successful respondents. That issue needs to be considered by the Authority first.

[13] Next, I need to consider whether this is a case where full indemnity costs ought to apply.

### **One costs award or two?**

[14] I agree with submissions filed for ISO that this particular question does not appear to have been considered yet by the Authority. On the face of it, the practical question must be whether it was necessary for both of the respondents to be separately represented. There can be no question about the involvement of the first and second respondents; both were sued by ISO and so both are required to engage in the Authority's process. The question is whether they need separate representation because that separate representation of course of necessity generates its own separate cost.

[15] While Mr Kena and Independent Stevedoring maintain that the claims against them were different, that would seem to draw a rather long bow because the claims made by ISO against the respondents relied on the same set of facts.

[16] Indeed, it is difficult to see how the interests of Mr Kena could be different, for the purposes of this proceeding, from the interests of Independent Stevedoring.

[17] Moreover, there was no suggestion of any conflict of interest between Mr Kena and Independent Stevedoring and indeed every indication in the evidence given by both of the respondent parties that they were each of them on all fours with the other.

[18] ISO refers me to the High Court Rules and to McGechan on Procedure and from those sources I discern the principle that the central question must be whether the two parties have common interests or not and thus as a corollary whether the evidence or submissions of one party could be or was relied upon by the other.

[19] It goes without saying that parties can instruct whomsoever they choose in respect of legal proceedings in which they are involved, but I do not think it can be right that in a case such as the present one, parties with substantially the same defence to a claim can expect, on successfully resisting that claim, to be awarded separate costs where the interests of those parties are common and substantially overlap and each may be seen to rely on and gain support from the evidence and/or submission of the other.

[20] I conclude then that my obligation in the present matter is to make a single award of costs and I intend to proceed on that footing on the basis that counsel for the first and second respondents will need to engage with each other and determine the way in which the costs award is shared as between them.

### **Is there an argument for indemnity costs?**

[21] I am not persuaded that this is a case where indemnity costs are appropriate. In my view, the threshold for indemnity costs is a high one. As I understand *Bradbury*, the misbehaviour of the unsuccessful party must be so bad as to justify the appellation “*flagrant*” before the non-exclusive list of cases where indemnity costs may be appropriate, can be accessed.

[22] It follows from that understanding that it is not sufficient for the claiming party to identify one of the grounds on which it is said indemnity costs are appropriate unless they are also able to demonstrate that the misbehaviour constitutes “*exceptionally bad behaviour*”.

[23] There simply is no evidence of “*exceptionally bad behaviour*” on the part of ISO. It is true that ISO was unsuccessful but it cannot be said that it behaved badly at least to the extent that it seems to me *Bradbury* requires.

[24] I understand that Mr Kena and Independent Stevedoring rely particularly on the contention that ISO ought to have accepted Mr Kena’s undertakings but in my judgment, ISO was perfectly entitled to pursue the matter on the footing that it wanted a judicial pronouncement on the matter. Of course, it has to take the consequences of pursuing that course of action and being mistaken, but I am not persuaded by the arguments of the respondents that ISO’s behaviour is characterised by the level of wickedness that it seems to me *Bradbury* requires.

[25] Both of the respondents quote from my substantive determination to justify their view that ISO's behaviour was sufficiently culpable to justify indemnity costs. But all my determination did was make findings against ISO on the evidence I heard and the purpose of its advancing its proceeding was presumably to have the Authority do precisely that. I do not accept that any of the conclusions I made in the substantive determination suggest flagrant misconduct by ISO; all they suggest is that ISO was wrong.

### **Determination**

[26] This was a case dealt with in a little less than one hearing day. On normal principles then the starting point is \$3,500, the Authority's daily tariff. The question is whether that tariff ought to be reduced or augmented by any of the factors which the Authority ought properly to take into account.

[27] I have already rejected the notion that full indemnity costs ought to apply and equally rejected the contention that there ought to be two awards of costs in favour of the first and second respondents respectively.

[28] However, it is the case that ISO proceeded against both Mr Kena and Independent Stevedoring. And those claims by ISO proceeded despite assurances from Independent Stevedoring, undertakings from Mr Kena, no evidence whatever of any wrongdoing by Mr Kena and the curious metamorphosis of Mr Kena's original period of employment in an associated company of ISO without a restraint of trade, to the most recent employment relationship with ISO directly, where there was a restraint of trade provision, and where the circumstances in which that subsequent employment agreement was executed must have raised some concerns, on any reasonable analysis.

[29] Those factors seem to me to justify an uplift in the daily tariff because I think all of those factors taken in their totality suggest a determination to proceed which while it is not sufficient to ground a claim of indemnity costs for reasons I have already indicated, is certainly enough to justify an uplift in the daily tariff rate.

[30] One of those factors on its own might not justify an uplift, but all of them together in my judgment necessitate some response from the Authority in fixing costs in this matter.

[31] I think the proper award in the present case is an award of \$7,000 and I direct that ISO is to pay that sum to solicitors for the first respondent who is to hold that sum in trust pending discussion between the first and second respondents as to what share of those costs each of the respondents is to be entitled to.

James Crichton  
Member of the Employment Relations Authority