

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2016] NZERA Wellington 2
5550330

BETWEEN LIGHHOUSE ECE LIMITED
Applicant

AND LISA MARIE HALLIWELL
Respondent

Member of Authority: Trish MacKinnon

Representatives: Andrea Pazin, Counsel for Applicant
Viv d'Or, Counsel for Respondent

Investigation Meeting: On the papers

Submissions Received: 12 October 2015, from Applicant
25 September and 20 October 2015, from Respondent

Determination: 5 January 2016

COSTS DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant, Lighthouse ECE Limited (Lighthouse), employed Lisa Halliwell as Network Coordinator in Wellington from 3 November 2014 until Ms Halliwell resigned in February 2015. Ms Halliwell informed her employer she was taking up a position with one of its competitors in Wellington.

[2] On 31 March 2015, Lighthouse filed a statement of problem in the Authority against Ms Halliwell alleging she had breached a number of provisions of her employment agreement relating to confidential information, non-solicitation of staff, and her post-employment restraint. It also alleged she had breached her implied duty of fidelity and her obligations of good faith to Lighthouse.

[3] Ms Halliwell denied the allegations.

[4] The Authority directed the matter to mediation but was informed by counsel for Ms Halliwell on 17 July 2015 that the matter had not resolved.

[5] Lighthouse informed the Authority in the course of a telephone conference on 4 September 2015 that it intended to discontinue the proceedings. Ms Halliwell, through her counsel, Ms d'Or, initially opposed this, and indicated she wished the matter to be heard. As this appeared to be on the basis that she wished to pursue costs against Lighthouse, it was agreed the issue of costs would be determined on the papers following submissions by the parties.

[6] The applicant formally withdrew the proceedings on 8 September 2015.

Submissions

[7] Ms Halliwell seeks an award of full indemnity costs against Lighthouse in the sum of \$6,583.75 and a further \$2,242.50 in costs for the preparation of the costs application. In submissions on behalf of Ms Halliwell, Ms d'Or has also asked the Authority to consider imposing a fine of \$10,000 on Lighthouse for a breach of good faith. This is based on a claim of abuse of process, as Ms Halliwell alleges that Lighthouse did not act reasonably by knowingly commencing a proceeding for which it had no evidential support. Ms d'Or asks that the penalty be paid to Ms Halliwell.

[8] She submits Lighthouse knew its allegations against Ms Halliwell were fabricated and malicious and had been commenced for an ulterior motive. This was to intimidate Ms Halliwell for the purpose of obtaining information about its competitor. Ms d'Or submits that this is a case where costs for mediation should be awarded given the good faith displayed by the respondent.

[9] She relies on the general principles relating to the fixing of costs in the Authority that are referred to in *PBO Limited (formerly Rush Security Limited) v Da Cruz*.¹ These have recently been reconfirmed by the Full Court of the Employment Court in *Fagotti v Acme & Co Limited*.² Ms d'Or also relies on *Bradbury v Westpac Banking Corporation*³ for her application for indemnity costs.

¹ [2005] ERNZ 808 (EmpC).

² [2015] EmpC 135.

³ [2009] 3 NZLR 400.

[10] In relation to Ms Halliwell's claim of a breach of good faith by Lighthouse, Ms d'Or submits Lighthouse knew the allegations it made in its Statement of Problem regarding Ms Helliwell's relationship with its competitor were unable to be substantiated.

[11] Lighthouse, through its counsel, Ms Pazin, resists the application and submits that costs should lie where they fall. It submits there is no basis on which to find that it has exhibited the type of behaviour required to justify an award of indemnity costs.

[12] Ms Pazin resists the award of any penalty or costs and submits that, if the Authority is minded to order costs, they should be modest and reflect only a small portion of the Authority's daily tariff of \$3,500 given the early stage at which the proceedings were withdrawn.

Discussion

[13] The level of costs to be awarded, if any, in such circumstances depends largely upon the timing of the withdrawal of the claim. In *Eden v Rutherford & Bond Toyota Ltd* Colgan CJ held (not disturbed on appeal):

..... the closer in time that proceedings are withdrawn before a hearing, the greater will probably have been the time put into their preparation by the other party and, therefore, the costs which the other party will have incurred reasonably and which may be the subject of an order.

[14] In this instance Lighthouse indicated its intention to withdraw the proceedings during a telephone conference that had been convened to discuss how the matter was to be progressed. Had it not been for that indication of withdrawal, the matter would have been set down for investigation. A schedule would have been put in place for filing of briefs of evidence leading up to the investigation.

[15] Instead, Lighthouse's early indication of withdrawal precluded the need for Ms Halliwell to incur costs in preparing briefs of evidence or preparation for an investigation meeting. From that perspective its action could be seen as being responsible.

[16] I am not persuaded by Ms d'Or's submission that Lighthouse demonstrated bad faith or malice in commencing proceedings. Such motivation is not apparent from the documents filed with submissions. There is no evidence of the "*exceptionally bad*

behaviour"⁴ required for indemnity costs to be awarded, and none to support a claim for abuse of process.

[17] Ms Halliwell has undoubtedly incurred legal costs arising from her former employer's commencement of proceedings against her. These include the drafting of a statement in reply and the costs of her counsel's attendance at the mediation directed by the Authority.

[18] In light of the withdrawal of proceedings I find it reasonable that Lighthouse contribute to those costs although the level of contribution should be moderate because of the early stage at which the withdrawal was made.

[19] I find a contribution of \$500 to Ms Halliwell's costs to be appropriate in the circumstances.

Determination

[20] Lighthouse ECE Limited is ordered to pay costs in the sum of \$500 to Lisa Halliwell.

Trish MacKinnon
Member of the Employment Relations Authority

⁴ n3 at [28].