

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

CA 202/10
5304463

BETWEEN OVER THE TOP LIMITED
Applicant

A N D STEPHEN BECK
First Respondent

A N D HELICOPTERS
QUEENSTOWN LIMITED
Second Respondent

Member of Authority: Helen Doyle

Representatives: Grant Walker, Counsel for Applicant
Hugh Matthews, Counsel for Respondents

Submissions Received: 6 October 2010 from Applicant
14 September from Respondents

Date of Determination: 29 October 2010

COSTS DETERMINATION OF THE AUTHORITY

[1] The applicant lodged with the Authority an application headed *urgent application to Employment Relations Authority*. The applicant wanted the following remedies:

- (a) An abridgment of time for the respondents to reply;
- (b) A compliance order requiring the respondents to give six weeks' notice as required by his employment agreement;
- (c) An order that the first respondent be restrained from working in breach of the restraint of trade set out in the employment agreement;

- (d) An order that the second respondent not employ the first respondent in breach of the restraint of trade;
- (e) An order for damages arising from the first respondent breaching his employment agreement;
- (f) A penalty for breach of the employment agreement by the first respondent;
- (g) A penalty for breach of good faith;
- (h) An order that all or part of the penalties be paid to the applicant because of the breach;
- (i) Alternatively, the applicant reserved the right to cancel the contract between the parties and seek leave under s.9 of the Contractual Remedies Act 1979 by seeking an order preventing the first respondent from working for the second respondent and damages;

[2] The Authority granted the application urgency on 3 May 2010 and abridged the time for the respondents to lodge a statement in reply to three days.

[3] The parties were advised on 4 May that the Authority intended to hold a case management conference on Thursday, 6 May. The Authority was then advised that Mr Matthews was representing both the first and second respondents and he would attend at the telephone conference with the Authority.

[4] During the telephone conference on 6 May, Mr Walker accepted that there could not be a compliance order against the second respondent but there was a discussion as to whether there could be a claim based on aiding and abetting a breach of contract. There was a discussion about how to progress the matter and Mr Walker said that the Authority could determine the matter on the papers. Given Mr Matthews view of evidential disputes he did not consider that the matter could be dealt with on the papers. In those circumstances the Authority indicated that the earliest hearing date would probably be 21 May. It was, however, agreed that the Authority would make some inquiries as to whether another Member could deal with the matter at an earlier time.

[5] After the telephone conference had ended, inquiries were made with other Members and two Members indicated their availability for an investigation meeting in Queenstown on 13 or 14 May 2010. The Authority's support officer duly offered the parties these earlier investigation meeting dates.

[6] The emails on the file indicate that the 14 May date was unsuitable for Mr Matthews but he said he was available for an investigation meeting in Queenstown on 13 May. Both the 13 and 14 May dates were unsuitable to the applicant.

[7] On 10 May 2010, the Authority received an email from Mr Walker advising, amongst other matters, that the applicant had decided to apply for the matter to be dealt with on a non-urgent basis.

[8] By this time, statements in reply had been received on 7 May 2010 from both respondents. When the Authority received Mr Walker's email that the matter would proceed on a non-urgent basis and that an amended statement of problem would follow, the Authority duly vacated the dates of 13 and 21 May and indicated that it would wait for the amended statement of problem. An email to this effect was sent to Mr Matthews on Monday, 10 May 2010.

[9] On 23 August 2010, Mr Walker advised the Authority the applicant had decided to withdraw the application before the Authority.

[10] Mr Matthews, on behalf of both respondents, indicated that he wished to seek costs and the Authority duly set a timetable for the exchange of memoranda.

[11] Submissions have now been received from Mr Matthews and Mr Walker.

The respondents' submissions

[12] Mr Matthews submits that the respondents between them have incurred combined solicitor/client costs of \$2,981 inclusive of GST and Mr Matthews also seeks a further \$500 for the costs submissions.

[13] Mr Matthews submits that the costs are reasonable given the urgency of the application, the required preparation of evidence in reply and research on relevant issues and the differing issues and considerations for each of the respondents.

[14] The respondents seek that the applicant pay the actual and reasonable costs incurred by the respondents of \$2,981 together with further costs of \$500 in relation to the application for costs. It is submitted that these costs were necessarily incurred in response to the urgent application, that the view that the application could be dealt with on the papers was always an unreasonable expectation and the hearing dates offered by the Authority were prompt.

The applicant's submissions

[15] Mr Walker, on behalf of the applicant, submits that the Authority should exercise its equity and good conscience discretion and order costs lie where they fall because the respondents refused to negotiate – documents 3-8 attached to the application; further that because the matter could not be dealt with on the papers, this made it difficult for the applicant to achieve an effective remedy. The dates offered by the Authority of 13 and 14 May were not suitable for the principal witness as she had her mother's birthday in Auckland.

[16] Mr Walker submits that the applicant had been effectively deprived of a remedy when it became clear that the matter could not be heard on the papers and a hearing date could not be obtained until just before the end of the six week restraint period.

[17] Mr Walker submits that the refusal to have the matter heard on the papers must be considered in a decision on costs.

[18] Mr Walker submits that the applicant's claim was meritorious but it was abandoned when it became clear that there was no cost-effective way for it to proceed.

[19] In the event that there is an order as to costs, Mr Walker submits that costs orders need to reflect costs that are reasonably incurred and should not be punitive in nature and that the only steps taken were the lodging of a statement of problem, statements in reply and a case management conference.

[20] Mr Walker submits that the applicant withdrew the urgent nature of the application in a timely manner on 10 May, within seven days from the day of lodging the problem in the Authority.

[21] Mr Walker submits that urgency itself should only be taken into account when determining costs when the actions taken by the applicant incur extra costs and that a statement in reply being required to be lodged earlier is not such a step.

[22] Mr Walker submits that the briefing of the first respondent was premature and noted that it had been agreed no written briefs of evidence would be required for the investigation meeting.

[23] Mr Walker submits that, in all the circumstances, costs should lie where they fall.

Determination

[24] The leading Employment Court judgment on costs in the Authority is *PBO Ltd (formerly Rush Security Ltd) v Da Cruz* [2005] 808. The Court in *PBO* set out the basic principles appropriate to the Authority in the exercise of its discretion as to costs. One of the principles was that awards would be modest and frequently judged against a notional daily rate that is now recognised as up to \$3000 per day.

[25] I find that in this case where there has been a withdrawal of proceedings and the respondents have been required to take some steps under time pressure costs should follow the event. The matters advanced by Mr Walker should be carefully assessed in terms of the exercise of the discretion as to costs. I also intend in the exercise of my discretion as to costs to have regard to a notional daily tariff that may have been imposed had the matter gone to an investigation meeting.

[26] In *Data Group Ltd v Gillespie* 22/3/04 AC 16/04 Judge Travis considered the issue of costs where the plaintiff had decided not to pursue a de novo challenge. The defendant had taken limited steps. Judge Travis had regard to the stage the proceedings were withdrawn at and the steps required of the defendant before the proceedings were withdrawn. He ordered the plaintiff pay the defendant the sum of \$600.

[27] In this case the urgency aspect of the case was promptly withdrawn within 7 days of lodging the problem. I take that into account. Within that time the respondents had each lodged and served statements in reply, Mr Matthews attended a case management conference and preparatory steps had been undertaken in terms of briefing witnesses for an investigation meeting. I accept Mr Walker's submission that

written statements of evidence were not required for the hearing but notwithstanding that it would be highly unusual for a representative not to brief a witness to gain an understanding of the defence and I do not conclude such a step was unreasonable.

[28] The Authority cannot deal with a matter on the papers where there is opposition from one party to doing so. This is because the Authority is not able to resolve any actual or potential disputes that may arise on the papers. That was Mr Matthews view and I accept that such a view was not unreasonable. In those circumstances I do not take that matter into consideration. It would have meant that the parties would not have had to travel to Queenstown but the Authority would have had to receive statements in reply and probably an agreed statement of facts.

[29] The applicant tried extensively to resolve the matter. I take that into account. I accept that it could not be said on the face of the papers that this claim was without merit.

[30] Awards in the Authority should be modest. There were different issues and considerations with respect to the two respondents and therefore it is not appropriate to treat the costs as somehow a duplication of the work for the other respondent.

[31] I am of the view that a fair and reasonable award of costs for each respondent would be \$400.

[32] I order Over The Top Limited to pay to Stephen Beck the sum of \$400 being costs.

[33] I order Over The Top Limited to pay to Helicopters Queenstown Ltd the sum of \$400 being costs.

Helen Doyle
Member of the Employment Relations Authority