

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2014] NZERA Auckland 33  
5434249

BETWEEN                      MARK REEKIE  
   Applicant  
  
A N D                              BLACKFOOT NEW  
   ZEALAND LIMITED  
   Respondent

Member of Authority:        Rachel Larmer  
  
Representatives:              Richard Harrison, Counsel for Applicant  
   Shan Wilson and Anna Sinclair, Counsel for Respondent  
  
Investigation Meeting:        On the papers  
  
Submissions Received:        23 December 2013 from Respondent  
   20 January 2014 from Applicant  
   24 January 2014 from Respondent  
  
Date of Determination:        30 January 2014

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**COSTS DETERMINATION OF THE AUTHORITY**

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**A.        Costs are to lie where they fall in respect of this matter.**

**Employment relationship problem**

[1]        Blackfoot has incurred total legal costs of \$53,478.53. It seeks an award of indemnity costs against Mr Reekie. Mr Reekie submits costs should lie where they fall because both parties had an equal measure of success.

[2]        This matter has resulted in two determinations. The first relates to Mr Reekie's application for a declaration that the restraint in clause 13.2 of his employment agreement with Blackfoot was unreasonable and therefore unenforceable. Mr Reekie

succeeded with this claim.<sup>1</sup> The second determination relates to Blackfoot's application that the restraint be modified to make it reasonable and enforceable. Blackfoot succeeded in respect of that application.<sup>2</sup>

[3] Blackfoot also sought a declaration that the restraint in Mr Reekie's employment agreement prevented him from soliciting clients or alternatively that the restraint should be modified to include non-solicitation of clients. Blackfoot did not succeed on these aspects of its claim because the restraint did not refer to solicitation or non-solicitation and it was unreasonable to add new restrictions into a restraint that the parties had not agreed to at the outset of their employment relationship.

[4] The first determination was issued after a one day investigation meeting. The parties were then directed to mediation in accordance with the requirements of s.164 of the Employment Relations Act 2000 (the Act) which is a prerequisite to the Authority modifying a restraint clause. The parties attended a half day mediation on 25 November 2013 which did not resolve the modification issue. Blackfoot seeks to recover its legal costs for this mediation.

[5] The modification issue was dealt with on the papers with both parties filing affidavit evidence and lengthy submissions. For the purposes of assessing costs I approach the modification evidence and submissions as if it involved another full one day investigation meeting. This means that costs will be assessed on the basis of a two day investigation meeting notwithstanding one of those days was effectively conducted 'on the papers'.

[6] I find that an award of indemnity costs is not appropriate. I do not accept Blackfoot's submissions that there have been "*aggravating features*" to Mr Reekie's conduct. Even if I had accepted the matters referred to in paragraph 26 of Blackfoot's submissions (and I do not) I would nevertheless have found they still did not support an award of indemnity costs. I consider that the features inherent in cases involving awards of indemnity costs are completely absent in respect of this matter.

[7] I adopt the Authority's usual notional daily tariff based approach to assessing costs. The current notional daily tariff is \$3,500 which must then be adjusted on a principled basis to reflect the particular circumstances of this case. The principles

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<sup>1</sup> *Reekie v. Blackfoot New Zealand Limited* [2013] NZERA Auckland 521.

<sup>2</sup> *Reekie v Blackfoot* [2014] NZERA Auckland 564.

relating to costs awards by the Authority are so well established I do not need to restate them.<sup>3</sup>

[8] Blackfoot says that it made two Calderbank offers which were unreasonably rejected by Mr Reekie so the costs awarded should reflect that. Mr Reekie says these two offers were not unreasonably rejected because he did not agree with elements of the offers which Blackfoot was ultimately unsuccessful on.

[9] The first Calderbank offer was made on 17 September 2013 which if accepted would have avoided both parties incurring the entire time and cost of the Authority's proceedings because Mr Reekie did not file his Statement of Problem with the Authority until 01 October 2013. One aspect of that offer involved Blackfoot's proposal to modify the restraint to 11 months. However this was made on the basis that Mr Reekie agree to not "*solicit*" the clients who fell within the terms of the restraint.

[10] Mr Reekie was given less than 24 hours to consider this offer before it was withdrawn. I find that was an unreasonable timeframe in the circumstances which would not have allowed Mr Reekie sufficient time to take advice and consider the multitude of issues raised by Blackfoot in its Calderbank offer not all of which related to the reasonableness and therefore enforceability of the restraint.

[11] I find that Mr Reekie did not unreasonably reject this first offer. The restraint did not refer to non-solicitation so Blackfoot was asking for him to agree to an additional restriction over and above what had been agreed at the outset of his employment. It in effect required him to agree to another non contractual restraint.

[12] I consider it was reasonable for Mr Reekie to decline to do so. His view on the non-solicitation issue was upheld by the Authority so it was not unreasonable for him to refuse to accept a wider (in terms of the type of conduct restricted) restraint than already existed.

[13] The second Calderbank offer was made by Blackfoot to Mr Reekie on 18 October 2013 in which Blackfoot agreed to reduce the restraint from 12 months to 9 months. However, this offer also required Mr Reekie to agree to not solicit specific clients Blackfoot listed who it considered fell within the terms of Mr Reekie's

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<sup>3</sup> See as an example *PBO Limited (formerly Rush Security Ltd) v Da Cruz* [2005] ERNZ 808.

restraint. I again find Mr Reekie did not unreasonably reject this offer for the same reasons as the 17 September offer.

[14] I therefore consider that the two Calderbank offers are not factors which should result in an increase to the notional daily tariff.

[15] I accept Mr Reekie submission that this is an appropriate case for costs to lie where they fall. Both parties had an equal measure of success. Mr Reekie succeeded in respect of the first determination which related to his application to the Authority. If costs were to be awarded then they would be in his favour on that point he brought to the Authority which I find involved one day of the Authority's investigation time.

[16] Blackfoot did not at any time concede that the restraint was unreasonable or unenforceable so Mr Reekie was required to litigate that issue in order to establish his view that that was correct.

[17] Blackfoot succeeded in its application to have the restraint modified so it would be entitled to costs in respect of that issue had costs been awarded, but any such award would have had to have been adjusted to reflect that Blackfoot did not succeed on the non-solicitation issue.

[18] I also agree with Mr Harrison's submission that Blackfoot unnecessarily increased both parties' costs by referring to matters related to counterclaim evidence which were not relevant to the restraint issue. The counterclaim is before the Authority in separate proceedings and I made it clear to the parties that the two matters would be dealt with separately. I specifically put the counterclaim evidence to one side when addressing the restraint matters. It was therefore unhelpful and unnecessary for such evidence to be produced in this matter.

[19] For the forgoing reasons I consider that the interests of justice are best served by costs lying where they fall.

**Rachel Larmer**  
**Member of the Employment Relations Authority**