

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI  
TE WHANGANUI-Ā-TARA ROHE**

[2020] NZERA 362  
3073634

BETWEEN                      STEWART FINANCIAL GROUP  
Applicant

AND                              BRAD JAY MACDONALD  
Respondent

Member of Authority:        Trish MacKinnon

Representatives:             Dave Robb, advocate for the Applicant  
Vance Leach, counsel for the Respondent

Investigation Meeting:        On the papers

Submissions and further    4 May 2020 from the Applicant  
Information Received:        11 March 2020 from the Respondent

Date of Determination:       7 September 2020

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**COSTS DETERMINATION OF THE AUTHORITY**

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[1]     Stewart Financial Group Limited (‘Stewart Financial’ or ‘the company’) brought proceedings against its former employee, Brad MacDonald, alleging he had breached terms of his employment agreement that had survived his resignation. The company claimed Mr MacDonald had not complied with the non-solicitation provisions of the employment agreement after he had left the company but while the non-solicitation provisions were still in force.

[2]     Mr MacDonald denied all the allegations against him.

[3]     The matter was set down for an investigation meeting which was scheduled for 26 March 2020. A timetable was put in place for the filing of evidence. Four briefs of evidence were filed by Stewart Financial and six briefs of evidence were filed by Mr MacDonald.

[4] On 5 March 2020, Stewart Financial notified the Authority by email, copied to Mr MacDonald, that it was withdrawing the proceedings with immediate effect. Mr MacDonald did not oppose the withdrawal but asked for costs to be determined.

[5] A timetable for submissions was set which, due to difficulties experienced by representatives related to COVID-19 alert levels, was extended to 12 June 2020. Both parties provided submissions and Mr Nicholas Stewart, a director of Stewart Financial, also provided a statement which he subsequently affirmed by telephone.

### **Submissions**

[6] Mr Leach, counsel for Mr MacDonald, submits an award of indemnity costs on a solicitor/client basis is appropriate and he seeks reimbursement of \$10,386.49, including both GST and disbursements. Mr Leach notes those costs were calculated from 17 June 2019 to the date of drafting the costs submissions, which were included in the total sum sought.

[7] On 17 June 2019, which was almost three months before Stewart Financial lodged a statement of problem in the Authority, Mr Leach had responded on a 'without prejudice save as to costs' (Calderbank) basis to correspondence from Stewart Financial to Mr MacDonald. In addition to rejecting all the allegations made against his client, Mr Leach had put Stewart Group on notice that, if he was required to take any further steps in relation to the matter, Mr MacDonald would seek full indemnity costs.

[8] For this reason, and because Mr MacDonald had been put to what he perceived to be further unnecessary time and expense by actions of Stewart Financial, Mr Leach submits it would not be appropriate for costs to be calculated using the notional daily tariff the Authority normally applies. Referring to *Bradbury v Westpac Banking Corporation*,<sup>1</sup> and to *Reid v New Zealand Fire Service Commission (No 2)*,<sup>2</sup> Mr Leach submits an award of indemnity costs is appropriate on the grounds that Stewart Financial:

- (a) was aware its claim could not succeed against Mr MacDonald and had commenced proceedings in wilful disregard of known facts or clearly established law;
- (b) had been put on notice that indemnity costs would be sought should a claim be filed;

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<sup>1</sup> [2009] NZCA 234.

<sup>2</sup> [1988] 3 ERNZ 1237.

- (c) had acted and conducted itself in a manner that unnecessarily increased Mr MacDonald's costs;
- (d) had commenced or continued proceedings for some ulterior motive.

[9] In the alternative, if the Authority rejects indemnity costs, Mr MacDonald asks that costs be awarded on a 2B basis under District Court Rules 2014, in which case the sum sought would be \$8,308.50.

[10] Appended to submissions on behalf of Mr MacDonald was correspondence Mr Leach had engaged in with Stewart Financial before and after the company lodged proceedings in the Authority. These included a letter dated 21 February 2020 in which Mr Leach set out three questions, two legal and one factual, which he said would have to be answered in the affirmative for Stewart Financial to succeed in the Authority's investigation. He set out the reasons he believed the employer's claims would fail.

[11] In the same letter, Mr Leach rejected a Calderbank offer that had apparently been made by letter of 20 December 2019 by Stewart Financial and made a counter-offer on behalf of Mr MacDonald. He ended the letter by asserting Mr MacDonald would be seeking full indemnity costs if Stewart Financial did not accept the counter-offer, and noted the costs sought would include those incurred before the company had lodged its statement of problem in the Authority.

[12] Mr Leach submits the Employment Court's judgment in *Data Group Limited v Gillespie* is relevant to a determination of costs when a party has withdrawn proceedings prior to a hearing.<sup>3</sup> In that case the Court took into account not only the length of time between the date of withdrawal and the intended hearing date, but also the steps taken by the parties in preparation for the hearing.

[13] Mr Leach submits the withdrawal of the matter three weeks before the scheduled investigation meeting was an act of bad faith by Stewart Financial, designed to ensure Mr MacDonald incurred substantial costs. He was required to file substantive amounts of evidence in his defence and his preparations for the investigation meeting were "*particularly advanced*".

[14] Stewart Financial, through its advocate, Mr Robb, resists Mr MacDonald's application for costs and submits each party should bear its own costs. Alternatively, if the Authority

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<sup>3</sup> *Data Group Limited v Gillespie* EmpC Auckland AC16/04, 22 March 2004.

exercises its discretion to award costs, Stewart Financial submits the appropriate level to be \$500.

[15] Part of the company's submissions focus on matters relating to the substantive claims made by the company that would have been investigated had the Authority's hearing gone ahead. It defends its proceedings against Mr MacDonald and Mr Robb observes it did not file for an injunction or file proceedings under urgency, which, he suggests, could have stopped Mr MacDonald from operating.

[16] Stewart Financial outlined the approach it took, which was to write to Mr MacDonald in the first instance, indicating its intention to seek to enforce the provisions of his employment agreement it believed he had breached and to seek penalties. In response to Mr Leach's reply on behalf of Mr MacDonald, it proposed mediation, which Mr MacDonald rejected.

[17] In submissions for Stewart Financial, Mr Robb suggests that, if Mr MacDonald "*had been upfront about the clients and provided the relevant factual information*" about them early on, the matter would have proceeded differently. The company blames Mr MacDonald for choosing to "*hang on to that detail until 21 February 2020.*"

[18] It also cites the fact that one of Mr MacDonald's witnesses was the son of a long-term Stewart family friend and previous Board member as a reason for the withdrawal of the matter. It says this created "*a new and complex dynamic*" for Stewart Financial which had not known about this witness until 21 February 2020. This led to Stewart Financial reviewing its application to the Authority and taking into account the effect continuing with the proceedings would have on personal relationships.

[19] Mr Stewart deposed that the company foresaw a negative impact on its workplace culture and relationships arising from the composition of the respective parties' list of witnesses and the content of their briefs of evidence. This played a part in the decision to withdraw the proceedings.

[20] Stewart Financial denies Mr MacDonald could have fully prepared for the 26 March 2020 investigation meeting as the company had not yet filed its reply witness statements, which were due the day after proceedings were withdrawn. The company also refers to the intervention of the COVID-19 situation and to the likelihood that the investigation would not have gone ahead because of the state of national emergency declared on 25 March 2020.

[21] The company denies its withdrawal of proceedings was in bad faith or that there was any ulterior motive, as alleged by Mr MacDonald.

### **Discussion**

[22] The Authority's power to award costs derives from Schedule 2, clause 15 of the Employment Relations Act 2000 (the Act). Awards are discretionary and it is up to the Authority to decide whether they should be awarded and, if so, in what amount. Underpinning awards of costs are principles that were referred to with approval by the Full Court of the Employment Court in *PBO Limited (formerly Rush Security Limited) v Da Cruz*<sup>4</sup> and confirmed a decade later by the Full Court in *Fagotti v Acme & Co. Limited*.<sup>5</sup>

[23] Among the principles are that the discretion to award costs is to be exercised in accordance with principle rather than arbitrarily. Costs will usually follow the event, which normally results in the successful party being entitled to a reasonable contribution to its actual costs from the unsuccessful party.

[24] Costs are modest and are to be considered in the light of the particular circumstances. They are frequently judged against a notional daily tariff but that tariff should not be applied rigidly without regard to the particular characteristics of the case. If a party's conduct has unnecessarily increased costs, that factor may be taken into account in the award that is made. However, costs are not to be used as a punishment or as an expression of disapproval of a party's conduct.

[25] In relation to costs and the withdrawal of proceedings, former Chief Judge Colgan held in *Eden v Rutherford & Bond Toyota Ltd* (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.<sup>6</sup>

[26] Judge Travis took a similar position in the *Data Group Limited* case regarding the timing of withdrawal of a claim and its impact on the amount of preparatory work undertaken,

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<sup>4</sup> [2005] ERNZ 808 (EmpC).

<sup>5</sup> [2015] EmpC 135.

<sup>6</sup> [2010] NZEmpC 43 at [8].

awarding \$600 to Mr Gillespie where proceedings against him had been withdrawn “*in a timely fashion*”.<sup>7</sup>

[27] In the current instance the proceedings were withdrawn three weeks from the scheduled date for the investigation meeting, and after Mr Leach had filed six witness briefs of evidence on Mr MacDonald’s behalf. There had been correspondence between the parties and two case management conferences with the Authority. I have no doubt some preparation for the investigation meeting had also occurred. All of this amounted to a reasonable volume of work undertaken by Mr Leach. I find that should be recognised in an award of costs to Mr MacDonald.

[28] Stewart Financial is correct to assume the Authority’s investigation meeting would not have gone ahead on 26 March 2020, due to the country being in alert level four lockdown by that time. However, that is of little relevance to a consideration of costs in this matter. Had it not been for the withdrawal of proceedings, the investigation meeting would have been rescheduled for a later date. On 5 March 2020, when Stewart Financial withdrew proceedings, lockdown was not in contemplation and the firm expectation was that the matter would be heard on 26 March.

[29] Having found costs to be appropriate, I do not accept Mr MacDonald’s submission that full solicitor/client costs are warranted. To impose indemnity costs on Stewart Financial would be unnecessarily punitive: an approach that is at odds with one of the principles underpinning awards of costs in the Authority. Some situations, where there has been “*exceptionally bad behaviour*”<sup>8</sup> exhibited by a party, may merit indemnity costs. However, I am not persuaded this is one of them.

[30] I do not accept Stewart Financial had an ulterior motive in bringing proceedings against Mr MacDonald or that it showed bad faith in the matter. It was reasonable for the company to raise with Mr MacDonald concerns over what it perceived to be a breach of the surviving obligations of his employment agreement after it became aware of former clients who had migrated to Mr MacDonald’s newly-established business.

[31] Once it had received Mr MacDonald’s response, Stewart Financial suggested mediation, which he rejected. The proposal to mediate was a pragmatic and sensible response

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<sup>7</sup> N3 at [7].

<sup>8</sup> [2009] 3 NZLR 400 at [28].

from the company at that point. It demonstrated a desire to resolve expeditiously, and without recourse to litigation, its concerns over Mr MacDonald's actions.

[32] Mediation at that point may have allowed Mr MacDonald to allay his former employer's concerns regarding the particular clients it had lost to him since his resignation. There can be no certainty about that, however, and it will not play a determinative part in my consideration of costs. It is, however, a further reason for declining Mr MacDonald's request for indemnity costs.

[33] His alternative proposal for costs to be determined on a 2B basis under District Court Rules 2014 is also declined. The Authority operates its own costs regime which, as noted earlier, entails a notional daily tariff approach. The tariff approach provides a starting point to the Authority's calculation of costs in a particular matter and the tariff may be reduced or increased according to the factors relevant to the situation.

[34] In this case I find it helpful to take the daily tariff, currently \$4,500 for the first day of an investigation meeting, as a starting point. There was no investigation meeting but I consider the amount of preparation that was required of Mr MacDonald merits a starting point of an award of one third of a day, or \$1,500.

[35] Factors meriting an uplift to the starting point include Mr MacDonald's notice to Stewart Financial, through counsel, at an early, pre-lodging of proceedings, stage that he would be seeking indemnity costs if he was required to take any further steps in the matter. This was reiterated in all subsequent correspondence.

[36] Stewart Financial dismissed this in submissions as a "*common place litigation tactic*". In its view, a party's declaration that it is going to seek indemnity costs does not mean such costs are warranted. I agree with that general view. However, in this situation, I consider the consistent message in Mr Leach's correspondence with the company regarding costs, combined with the relevant information he provided about the clients named by Stewart Financial, and his identification of pertinent legal issues the company would be required to address, merit an uplift of \$500.

[37] I do not find Stewart Financial's submissions compelling concerning Mr MacDonald's late disclosure, on 21 February 2020, of particulars regarding the six clients at the heart of the company's allegations. Mr Leach's letter of 28 May 2019 stated categorically that all of those

people had independently approached Mr MacDonald and all were personal or family friends of his. There is no evidence that Stewart Financial requested more information about the relationships each of those people had to, or with, Mr MacDonald after receiving Mr Leach's letter. The relationships were expanded upon in the briefs of evidence filed by Mr Leach in accordance with the Authority's timetable on 21 February 2020, but the information about them may well have been available to the company earlier if it had asked.

[38] Stewart Financial has not resiled from its view that Mr MacDonald breached the non-solicitation provisions of his employment agreement. It says it withdrew proceedings due to the impact continuing litigation would have on other people, including its current employees and family friends. The company was entitled to withdraw proceedings, but must contribute to the costs Mr MacDonald incurred.

[39] In arriving at the amount of that contribution, I have not included any consideration of costs for attendance at the Authority-directed mediation, sought by Mr MacDonald. The general position adopted by the Authority is that parties should fund their own preparation for, and attendance at, mediation unless some particular or unusual circumstance of the case makes it appropriate to do so.<sup>9</sup> I do not find the circumstances of this case warrant deviation from that position and have not taken into account the mediation-related costs incurred by Mr MacDonald.

[40] I conclude that Stewart Financial Group Limited should pay Mr MacDonald \$2,000 as a contribution to the legal costs he incurred in defending this matter before the company withdrew the proceedings.

[41] I make an order accordingly and a further order that the amount be paid in full within 28 days of this determination.

Trish MacKinnon  
Member of the Employment Relations Authority

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<sup>9</sup> Practice Note Costs in the Employment Relations Authority:  
[www.era.govt.nz/assets/Uploads/ERA/ERA-Costs-Practice-Note-0616.pdf](http://www.era.govt.nz/assets/Uploads/ERA/ERA-Costs-Practice-Note-0616.pdf)