

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2018] NZERA Christchurch 57
3019811

BETWEEN	SAMANTHA WERNER Applicant
A N D	PC & KL BLACK LIMITED (deregistered) First Respondent
A N D	KAREN LYNDA BLACK Second Respondent
A N D	PAUL CRAIG BLACK Third Respondent

Member of Authority:	David Appleton
Representatives:	Anna Oberndorfer, Advocate for Applicant Richard Hearn, Counsel for Respondents
Investigation Meeting:	Determined on the papers
Submissions Received:	27 April 2018 from Applicant 17 April 2018 from the Respondents
Date of Determination:	30 April 2018

**COSTS DETERMINATION OF THE
EMPLOYMENT RELATIONS AUTHORITY**

[1] By way of a determination dated 20 March 2018¹, the Authority determined that it did not have the jurisdiction to enforce a record of settlement against the second and third respondents personally, even though they had caused the applicant's former employer (the company) to enter into the settlement agreement but did not declare that the company had already ceased to trade so that it could not pay the sums promised in the settlement agreement.

¹ [2018] NZERA Christchurch 35

[2] Costs were reserved, and the parties invited to agree how costs were to be dealt with between them. Evidently, they have been unable to agree, and this determination disposes of the question of costs.

[3] Submissions have been received on behalf of the second and third respondents, who seek indemnity costs against the applicant in the sum of \$3,119.38 (which is a GST inclusive sum). Mr Hearn submits that the award of costs on an indemnity basis is justified in accordance with the list of circumstances endorsed by the Court of Appeal in *Bradbury v Westpac Banking Corporation*² for when indemnity costs have been ordered. These circumstances are:

- (a) the making of allegations of fraud knowing them to be false and the making of irrelevant allegations of fraud;
- (b) particular misconduct that causes loss of time to the Court and to other parties;
- (c) commencing or continuing proceedings for some ulterior motive;
- (d) doing so in wilful disregard of known facts or clearly established law;
- (e) making allegations which ought never to have been made or unduly prolonging a case by groundless contentions, summarised in French J's "hopeless case" test.

[4] Mr Hearn says that the second and third respondents rely upon grounds (a), (d) and (e). He says that the applicant was put on notice by letter dated 29 September 2017 that the application lacked merit, and also refers to the case management telephone conference call in which I referred to the hurdles that I saw in the applicant successfully pursuing her case.

[5] Mr Hearn also wrote to Ms Oberndorfer on a without prejudice save as to costs basis on 16 February 2018 in which he stated that his clients offered to settle the proceedings by allowing her client to discontinue with no issue as to costs. He stated that, if they were required to respond to submissions his client[s] "...will be seeking costs..". Mr Hearn's email to Ms Oberndorfer did not state that his clients would do so on an indemnity basis however.

[6] Mr Hearn says that the submissions lodged on behalf of the applicant alleged fraud by the directors without any substantiating evidence of legal basis, and failed to address "the many deficiencies with the claim which had previously been raised by the Authority...", and showed no arguable basis on which the claim could succeed.

² [2009] 19 PRNZ 385, at [29]

[7] Ms Oberndorfer submits that costs should lie where they fall, on the basis that it would be inequitable to award any costs to the respondents when their "...wrongful actions caused the applicant to pursue further steps in litigation than was necessary". Ms Oberndorfer relies on the fact that the respondents attended mediation on behalf of the first respondent company knowing that the company had ceased trading several months before, but did not state this fact at the mediation.

[8] Ms Oberndorfer also submits that the applicant's claims were legitimately and fairly pursued, and were necessary to affirm her rights by reference to the principles of natural justice. She also submits that the factual situation in *Werner v PC & KL Black and others* was unique, and that the applicant's position was unclear, and was required to be tested judicially.

Discussion and disposition

[9] The Authority's power to award costs is set out in clause 15 of Schedule 2 of the Act, which provides as follows:

15 Power to award costs

(1) The Authority may order any party to a matter to pay to any other party such costs and expenses (including expenses of witnesses) as the Authority thinks reasonable.

(2) The Authority may apportion any such costs and expenses between the parties or any of them as it thinks fit, and may at any time vary or alter any such order in such manner as it thinks reasonable.

[10] The Authority is bound by the principles set out in *PBO Ltd v. Da Cruz*³ when setting costs awards. These include:

- a. There is discretion as to whether costs would be awarded and in what amount.
- b. The discretion is to be exercised in accordance with principle and not arbitrarily.
- c. The statutory jurisdiction to award costs is consistent with the equity and good conscience jurisdiction of the Authority.
- d. Equity and good conscience are to be considered on a case by case basis.

³ [2005] 1 ERNZ 808

- e. Costs are not to be used as a punishment or as an expression of disapproval of the unsuccessful party's conduct although conduct which increased costs unnecessarily can be taken into account in inflating or reducing an award.
- f. It is open to the Authority to consider whether all or any of the parties' costs were unnecessary or unreasonable.
- g. That costs generally follow the event.
- h. That without prejudice offers can be taken into account.
- i. That awards will be modest.
- j. That frequently costs are judged against a notional daily rate.
- k. The nature of the case can also influence costs and this has resulted in the Authority ordering that costs lie where they fall in certain circumstances.

[11] The first question to ask is whether costs should lie where they fall, or whether a contribution to the costs of the second and third respondents should be awarded. I agree with Ms Oberndorfer that the applicant's case was not hopeless, in that she was relying on the principles of equity and good conscience inherent in the employment jurisdiction, in an unusual factual situation.

[12] Whilst I had referred at the case management conference call to what I saw as several hurdles against the applicant, I was also clear that further argument would be welcome if Ms Oberndorfer could articulate an approach which circumvented those hurdles. To her credit, Ms Oberndorfer concentrated in her submissions on the special nature of the employment relationship and the statutory nature of the mechanisms designed to address employment relationship problems. Ultimately, I was not convinced, but there was clearly an arguable case to be made.

[13] However, this was still a situation where the respondents were wholly successful, and where the applicant was pursuing untested arguments in the face of unfavourable case law. I am satisfied that it is appropriate to award a contribution towards the costs of the second and third respondents.

[14] Having established that, the next question is to decide whether costs should be awarded on an indemnity basis.

[15] First, the ‘without prejudice save as to costs’ offer made on 16 February 2018 does not succeed in justifying an award of costs on an indemnity basis because Mr Hearn did not say that a rejection of the offer would result in an application for costs on a full indemnity basis. It is well established that such offers must be transparent. This offer did not satisfy that requirement.

[16] Turning to Mr Hearn’s main submission arguing for an award of indemnity costs, I accept that the non-exhaustive factors set out in *Bradbury* are the correct factors to take into account, along with any other relevant factors. I will examine the three factors relied upon by the respondents in turn.

The making of allegations of fraud knowing them to be false and the making of irrelevant allegations of fraud.

[17] I had found that the second and third respondents had not made any obviously unlawful gain by causing the company to enter into the record of settlement, and so fraud was not made out. I do not accept that the applicant or Ms Oberndorfer made an allegation of fraud knowing it to be false, or that the allegation was ‘irrelevant’. The conduct of the second and third respondents in not declaring that the company had ceased to trade when they caused it to enter into the settlement agreement was open to scrutiny and raised questions. It was the definition of ‘fraud’ not being satisfied that caused the allegation to fail. It was an argument that needed to be examined however. I therefore reject that this justifies an award on an indemnity basis.

Making allegations in wilful disregard of known facts or clearly established law.

[18] I assume that Mr Hearn relies on the second limb of this factor. I have already said above that the applicant’s case was not hopeless, and that an argument was pursued that had the potential of success in this jurisdiction. Indeed, the applicant has challenged the determination of the Authority, and she may succeed in her argument before the Employment Court. I do not believe that this factor justifies the award of costs on an indemnity basis therefore.

Making allegations which ought never to have been made or unduly prolonging a case by groundless contentions, summarised in French J's "hopeless case" test.

[19] The applicant's allegations were factually correct in that the second and third respondents did cause the company to enter into the settlement agreement but did not declare that the company had ceased to trade so that it could not pay the sums promised in the settlement agreement. It was not a hopeless case to pursue, and, again, this factor does not justify the award of costs on an indemnity basis.

[20] I am not aware of any other relevant factors which could justify an award of costs on an indemnity basis.

[21] If costs are not to be awarded on an indemnity basis, in what amount should the award be made? The daily tariff approach is adopted when an investigation meeting has taken place. This matter was determined on the papers, however. I estimate that, if an investigation had taken place, it would have taken half a day. Adopting the daily tariff approach to a half day investigation meeting, that results in an award of \$2,250.

[22] I see no reason to either uplift or reduce that sum. The costs incurred by the second and third respondents appear to be reasonable in the circumstances.

Order

[23] I order the applicant to pay to the second and third respondents, in whatever proportion Mr Hearn advises, the sum of \$2,250 as a contribution towards their joint legal costs.

[24] This sum is to be paid by the applicant to the second and third respondents no later than 14 days after the date when Mr Hearn advises the applicant, or Ms Oberndorfer, of the proportions in which the costs award is to be paid, and has also advised of the bank account number or numbers to which the payment or payments are to be made.

David Appleton
Member of the Employment Relations Authority