**IN THE EMPLOYMENT RELATIONS AUTHORITY**
**AUCKLAND**

AA 389A/10
5309736

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| | BETWEEN | ANDREW EDWARDS<br>Applicant |
| | AND | ERS NEW ZEALAND LIMITED T/A TRANSPACIFIC INDUSTRIAL SOLUTIONS<br>Respondent |

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| Member of Authority: | Robin Arthur |
| Representatives: | Sherridan Cook and Gemma Mayes for Applicant<br>Daniel Erickson for Respondent |
| Submissions received : | 24 September 2010 from Applicant<br>16 October 2010 from Respondent |
| Determination: | 21 December 2010 |

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## COSTS DETERMINATION OF THE AUTHORITY

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[1] Determination AA389/10 (27 August 2010) found a restraint of trade clause preventing work for a competitor was not enforceable against Mr Edwards while other clauses prohibiting customer and employee solicitation were enforceable for three months and not the longer periods asserted by his former employer, ERS New Zealand Limited (ERS).

[2] The determination also imposed a penalty of $3000 on Mr Edwards because he breached duties to ERS during his employment by transferring information to his home computer, delaying responses to information requests and seeking a private donation.

[3] The parties were encouraged to resolve any issues of costs in this matter between themselves. They were unable to do so and lodged memoranda for the

Authority to consider before determining costs.

[4] Mr Edwards sought an award of $14,000 as a reasonable contribution towards his actual legal costs of $48,000. This was based on seeking a notional daily rate of $4000, higher than the usual rate, for the two days of the investigation meeting and a further two days of preparation time – giving a total of $16000 – from which he proposed a deduction of $2000 could be made to reflect the partial success of ERS in its counterclaims. He also sought $893 for disbursements (which included preparing an agreed bundle of documents and his fee for lodging this matter in the Authority).

[5] He submitted three factors favoured an award of costs on the basis proposed:

(i) his relative success in the non-competition clause being found unenforceable and defending five of the eight grounds on which ERS made counterclaims; and

(ii) two "without prejudice" offers made to settle the matter with ERS which would have placed more restrictions on him then resulted from the Authority's determination; and

(iii) the complexity of preparing for two full days of investigation with a large number of witnesses and many issues.

[6] ERS submitted both parties enjoyed a measure of success in the Authority such that costs should lie where they fall and the "without prejudice" offers, analysed closely, were not relevant to costs in this particular case.

**Determination**

[7] Costs in this matter may be set on the basis of a notional daily rate, adjusted upwards or downwards to take account of relevant principles and the particular circumstances of the case.[1]

[8] Although I have read the detailed analysis of the issues and outcomes set out in the memoranda lodged by the parties, I consider the starting point for costs needs to be assessed more broadly. The central issue for both parties was whether Mr Edwards was free to start a new job with Spotless as soon as his notice period expired with

[1] *PBO v Da Cruz* [2005] 1 ERNZ 808.

ERS, despite the explicit restraint terms in his employment agreement. That was really what he sought a declaration about from the Authority. And that was the issue on which he was successful. The other issues – the customer and solicitation restraints and ERS' counterclaims of breaches of fidelity and trust by Mr Edwards – were ancillary to that main issue. Costs follow the event of Mr Edwards' success on the main issue and the starting point in the usual daily tariff of $3000.

[9] I do not agree a tariff-based assessment requires additional days for preparation time. While I acknowledge that approach was adopted by the Employment Court in its calculation of costs in the *Tawhiwhirangi* case,[2] that is not the methodology routinely adopted in the Authority and neither is it mandatory in the exercise of what is a statutory discretion.[3]

[10] There were two very full days of investigation, running into the early evening each day, and I accept this should be taken as amounting to an extra half day. There was a short period where the investigation adjourned after the Authority asked the parties to discuss whether they might resolve the matter between themselves. Nothing came of that adjournment. Accordingly the standard tariff yields a total $7500 in costs for two and a half days, subject to any factors or principles applied for its upward or downward adjustment.

[11] While lengthy I do not accept this case was inherently more complex than many matters in the Authority, although the manner in which it was litigated by both parties resulted in many issues for investigation in both the claim and counterclaim. No increase in the tariff is warranted on that basis.

[12] The two 'without prejudice' offers from Mr Edwards are a factor supporting an increase in the tariff, particularly given the more favourable determination on the restraint clauses. However I accept ERS' submissions that those offers required any settlement to include paying Mr Edwards a substantial but disputed bonus of around $30,000 (reduced to $17,500 in the second offer). ERS has not paid that bonus and it remains in dispute between the parties. Consequently it cannot be said ERS would have been better off if it had accepted one of those two offers and spared

[2] *Chief Executive of the Department of Corrections v Tawhiwhirangi (No 2)* [2008] ERNZ 73.
[3] Clause 15 of Schedule 2 of the Employment Relations Act.

Mr Edwards the expense of pursing his claim against the enforceability of the restraint in which he was largely successful. But for that element I would have increased the daily rate by at least $1000 but, because of it, I consider no adjustment is necessary.

[13] The last particular factor is an assessment of the relative success of ERS in its counterclaims. Mr Edwards successfully defended five allegations of breaching his duties by approving a 'loan' to a staff member, failing to apply company vehicle policy, inappropriate sponsorship approval, encouraging employees to work outside corporate policy on recruitment processes and approving marketing material without following internal processes. However ERS did establish three breaches for which a penalty was imposed. As noted in ERS's memorandum such sanctions are reserved for instances of wilful or deliberate conduct. While costs are not to be used to express disapproval of Mr Edwards' conduct or further punish him for those breaches, ERS is entitled to some credit for its costs in proving them. The total of $7500 is adjusted downward by $1500 for that purpose.

[14] The result is an assessment of $6000 as a reasonable contribution to Mr Edwards' costs. I note both parties spent considerably more than that – $55,000 for ERS and $48,000 for Mr Edwards. However that is a matter subject to the caution given by the Court in *Da Cruz* at [47]*:*

> *… [W]e urge representatives of parties to be conscious of the costs that are accumulating as a matter proceeds. Cases should be approached economically and in a way that is likely to leave a successful party with a satisfactory outcome. There is an overall need to ensure that costs being incurred are reasonable in the light of the amount that is likely to be recovered as remedies and costs from the Authority.*

[15] An award of $6000 costs is consistent with the principles that awards are to be modest and reflect what is reasonably required in preparing for an Authority investigation. ERS is to pay that amount to Mr Edwards as a contribution to his reasonably incurred costs and a further amount of $893 for disbursments.

Robin Arthur
Member of the Employment Relations Authority