

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2013]NZERA Auckland 378
5404053

BETWEEN ALLIED WORKFORCE
LIMITED T/A TRADEFORCE
RECRUITMENT
Applicant

A N D DEANNE TE AO
Respondent

Member of Authority: T G Tetitaha

Representatives: D J G Cox, Counsel for Applicant
S J Neville, Counsel for Respondent

Investigation Meeting: Hearing on the papers

Submissions Received: 14 June 2013 from Applicant
13 June 2013 from Respondent

Date of Determination: 23 August 2013

COSTS DETERMINATION OF THE AUTHORITY

A. Allied Workforce Limited shall pay Ms Te Ao costs of \$10,416.96.

[1] Ms Te Ao has applied for costs following her successful defence of an application for injunctive relief.¹ Ms Te Ao seeks full indemnity costs of \$37,675.00. She refers to Calderbank offers made prior to preparation for a two day hearing.

[2] Allied Workforce (AWF) submits costs should lie where they fall. It submits the Authority erred in not considering modification of the restraint of trade and payment of damages irrespective and there were good grounds to bring the claim. Alternatively, the Authority's notional daily tariff of \$3,500 per day should apply. The Authority ought to take account of Ms Te Ao's actions by knowingly breaching

¹ *Allied Workforce Ltd t/a Tradeforce Recruitment v Te Ao* [2013] NZERA Auckland 201

the terms of her individual employment agreement on the chance she might get away with it. No account should be taken of the settlement offers because the undertakings offered were effectively no undertakings at all. It also submits the costs claimed are excessive.

Issues

[3] The following issues are to be determined:

- a. Should Ms Te Ao be awarded costs?
- b. Should Ms Te Ao be awarded indemnity costs?
- c. If no indemnity costs, what is the starting point for assessing costs?
- d. Are there factors that warrant reduction or uplift in costs?

Should Ms Te Ao be awarded costs?

[4] The Authority may order any party to pay such costs and expenses as the Authority thinks reasonable.²

[5] Ms Te Ao was successful in her defence of this application for injunction and enforcement of the restraint of trade provision. Costs would usually follow this event.³

[6] Alleged errors in the Authority's determination are a matter for a higher Court to determine on challenge. It is not a matter for costs.

Should Ms Te Ao be awarded indemnity costs?

[7] Indemnity costs require "*exceptionally bad behaviour*" or may be awarded where a party has behaved very unreasonably.⁴

[8] This case does not meet the threshold required for an award indemnity costs. Other than the Calderbank offers, no other bad behaviour was evidenced by either party. The refusal of settlement offers is insufficient to warrant an award of indemnity costs.

² Clause 15, Schedule 2, Employment Relations Act 2000

³ *PBO Ltd (formerly Rush Security Ltd) v. Da Cruz* [2055] 1 ERNZ 808 (EmpC) at [35]

⁴ *Bradbury & Ors v. Westpac Banking Corporation* [2009] NZCA 234

If no indemnity costs, what is the starting point for assessing costs?

[9] The starting point for costs in the Authority is its notional daily tariff of \$3,500. This matter involved a two day investigation meeting. The starting point for assessing costs is therefore \$7,000.

Are there any factors that warrant adjusting the notional daily tariff?

Factors which warrant a reduction in the notional daily tariff

[10] Ms Te Ao's alleged behaviour in taking a chance she might get away with breaching the restraint of trade is not conduct which is a basis for reducing a costs award. Conduct which increased costs unnecessarily can be taken into account in inflating or reducing an award.⁵ This was not the type of conduct warranting any reduction. There are no other factors which warrant reduction of the daily notional tariff.

Factors which warrant an increase to the notional daily tariff

[11] Ms Te Ao made a Calderbank offer on 20 November 2012 undertaking for a period of three months not persuade or attempt to persuade or solicit business from any AWF client, who was not already a client of her new employer. This offer was rejected on 26 November 2012. She offered to extend the scope of the undertakings to include her not performing services for Foodstuffs Fresh until 28 February 2013. There was no response to this letter.

[12] On 21 December 2012 Ms Te Ao offered to comply with the provisions of the restraint of trade for six months except she would not provide services to Foodstuffs for only 3 months and would continue working for AWF's competitor. There was no response to this offer.

[13] Calderbank offers are a discretionary factor for the Authority in determining an appropriate costs award. The making of such an offer does not automatically result in a more favourable award of costs. An offeror has the burden of persuading the Authority to exercise its costs discretion in her favour.⁶ Public interest in fair and expeditious resolution of disputes would be undermined if a party were able to ignore a Calderbank

⁵ *PBO Ltd (formerly Rush Security Ltd) v. Da Cruz* [2055] 1 ERNZ 808 (EmpC) at [35]

⁶ *Mayne v Polychem Marketing Ltd* [2013] NZEmpC 127 at [16]

offer without consequence on costs.⁷ A “steely” approach to reasonable settlement offers is required.⁸

[14] Ms Te Ao’s settlement offers were not ineffective. They proposed some restraints upon her activity. If AWF was unhappy with the settlement offer it had the opportunity to continue settlement discussions and/or counter-offer. AWF rejected one offer then chose not to respond to later settlement offers.

[15] The settlement offer was made timely and would have averted the costs of preparing for hearing if accepted. The matter was not legally or factually complex. Only one witness (Ms Fleur Board) was extensively examined. There was no expert evidence. No other (mis)conduct in the proceeding has been alleged to warrant any uplift.

[16] An increase in the daily tariff to \$5,000 has been applied by the Authority and approved by the Court where settlement offers are made.⁹ That approach shall be applied here. The daily tariff is increased to \$5,000 per day.

[17] Ms Te Ao seeks recovery of disbursements including \$416.96 comprising photocopying (\$150.96) and witness expenses being an airfare for Ms Roana Carran (\$266.00). These disbursements appear reasonable.

[18] Accordingly AWF shall pay Ms Te Ao costs totalling \$10,416.96.

T G Tetitaha
Member of the Employment Relations Authority

⁷ *Aoraki Corp Ltd v McGavin* [1998] 3 NZLR 276, [1998] 1 ERNZ 601 (CA)

⁸ *Bluestar Print Group (NZ) Ltd v Mitchell* [2010] NZCA 385 at [20]

⁹ *Pickering v Detection Services Ltd* [2013]; *Wood v Board of Trustees of Woodford House School* [2011] NZERA Wellington 87; *Filta Vacuum Products Limited* Judge Travis, 9 July 2009, AC28/09