

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2013] NZERA Auckland 5  
5379541

BETWEEN                      NZ TAX RETURNS LIMITED  
   Applicant  
  
AND                              COLM BUFFINI  
   Respondent

Member of Authority:      R A Monaghan  
  
Representatives:            T Yeoman, advocate for applicant  
   A Goldstone, advocate for respondent  
  
Memoranda received:      6 November 2012 from respondent  
   6 December 2012 from applicant  
  
Determination:              4 January 2013

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**COSTS DETERMINATION OF THE AUTHORITY**

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[1]     The applicant, NZ Tax Returns Limited (TRL) withdrew this employment relationship problem two days before the scheduled investigation meeting was to commence. Mr Buffini seeks costs.

[2]     The problem concerned an allegation of breach of the restraint of trade provisions in the parties' employment agreement. Compliance orders and penalties were sought, and the matter was to be heard on the day after Mr Buffini's personal grievance in respect of his dismissal by reason of redundancy. The personal grievance went ahead, and is the subject of a determination of the Authority in *Buffini v NZ Tax Returns Limited & Anor.*<sup>1</sup>

**Background**

[3]     The statement of problem, lodged on 30 April 2012, identified various actions of Mr Buffini's which were said to breach the terms of the restraint. Urgency was sought.

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<sup>1</sup> [2013] NZERA Auckland 4

[4] The statement in reply, lodged on 18 May 2012, was substantially concerned with Mr Buffini's personal grievance which was not then before the Authority. It recorded Mr Buffini's understanding that the restraint of trade provisions had been waived, doing so in the context of a claim for remedies in respect of the grievance. It did not otherwise comment on the allegations in the statement of problem. A mediation date of 21 May 2012 had been set to address the grievance, but TRL withdrew as a teleconference with the Authority was pending.

[5] Skirmishing over whether the grievance and the restraint of trade claim should be dealt with separately or together has not assisted the resolution of either claim. However in the teleconference which went ahead on 24 May 2012 I:

- required that a statement in reply addressing the statement of problem be lodged (which duly occurred); and
- directed the parties to mediation.

[6] Regarding the scope of mediation, the Authority cannot make a direction in respect of a matter not before it. I enquired about the grievance, and the advocate advised his instructions extended to mediation but not to any lodging of the matter in the Authority. Accordingly I indicated to the parties that a direction in respect of the restraint of trade - being the matter which was before the Authority – would be made but that did not prevent them from also addressing the grievance in mediation.

[7] Mediation went ahead in June 2012. Neither problem was resolved and a statement of problem in respect of the personal grievance was lodged in July 2012.

[8] Both problems were scheduled for investigation meetings to proceed on consecutive days. A timetable for the lodging of witness statements, and documents in support, was agreed in respect of both and the information was lodged accordingly.

### **The parties' positions on costs**

[9] No figure was cited in the application for costs, and no supporting material was provided. Costs were sought at 'the upper end of the usual scale'. I understand that as a reference to the notional daily rate applied in the Authority.

[10] It was said in support that TRL:

- had made a vexatious claim;
- engaged in tactics designed to delay or deny Mr Buffini the right to have his dispute settled at the earliest possible opportunity; and
- by its approach had caused Mr Buffini stress, as well as greater legal costs than he would otherwise have incurred.

[11] Mr Yeoman provided no response other than to state that the matter was withdrawn because statements Mr Buffini had obtained from certain individuals appeared to contradict the information those same individuals had provided to Mr Yeoman. Mr Yeoman considered it fruitless to proceed.

### **Determination**

[12] Mr Yeoman's response does not amount to a reason to decline the application for costs, and does not adequately explain the lateness of the withdrawal. I accept that Mr Buffini incurred costs in respect of the preparation of statements in reply, the preparation of witness statements and other preparation for the investigation meeting. He is entitled to a contribution to those costs.

[13] Regarding the application of the notional daily rate, while orders for costs have been made on that basis when a matter is withdrawn before the commencement of an investigation meeting, some information about costs actually incurred should be provided. Without this information there is a possibility of an award higher than the costs actually incurred, which is not appropriate.

[14] As to the factors relied on in support of an award at the upper end of the scale, first, I do not accept that TRL's claim was vexatious. The parties' employment agreement included a restraint of trade provision, and TRL made several specific allegations of conduct amounting to a breach of the provision. The parties disputed whether the restraint had been waived, a dispute which the Authority would have had to determine. It transpired that TRL's specific allegations of breach were also denied, and depending on the outcome of the dispute about waiver these could have required

determination. If there was no waiver and TRL's allegations were upheld, it would have been entitled to remedies.

[15] Secondly, the parties had very different views of whether the two problems were related or not, and each considered the opposing position of the other to be weak. Some of this was reflected in the background I have set out, and Mr Buffini's allegations that TRL engaged in tactics designed to delay or deny him the right to have his dispute settled at the earliest opportunity were associated with the same matters. The relevant question now, however, is whether TRL's actions should be reflected in an order for costs against it in respect of its withdrawal of the claim in respect of the restraint of trade.

[16] In that context there is nothing to support any allegation that TRL's conduct added unnecessarily to Mr Buffini's costs in respect of that claim.

[17] This finding also disposes of the third of the points relied on in support, although I add that I do not consider stress to be a relevant consideration in the present claim for costs.

[18] Returning to the notional daily rate, I proceed with reference to that factor despite my reservations about the lack of information about costs actually incurred. I am not satisfied that it is appropriate to consider the current rate of \$3,500 as a starting point. Judging by the material available and the parties' conduct of the grievance I consider it unlikely that an investigation meeting would have lasted beyond one half day, and reduce that amount further to reflect the fact that no costs were incurred in respect of any meeting time.

[19] For the reasons set out above I do not adjust the resulting figure.

[20] TRL is therefore ordered to contribute to Mr Buffini's costs in respect of the restraint of trade claim in the sum of \$875.

R A Monaghan

Member of the Employment Relations Authority