IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON

[2014] NZERA Wellington 59
5395080

	BETWEEN	TAG OIL (NZ) LIMITED Applicant
	AND	JAMES WINSTON WATCHORN Respondent

Member of Authority:	Trish MacKinnon
Representatives:	Julian Miles QC, and Tim Clarke, Counsel for the Applicant Susan Hughes QC, Counsel for the Respondent
Submissions Received:	5 April 2013 and 17 January 2014 for the Applicant 20 December 2013 for the Respondent
Investigation Meeting:	On the papers
Determination:	30 May 2014

COSTS DETERMINATION OF THE AUTHORITY

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[1] This matter concerns an application withdrawn by TAG Oil (NZ) Limited (TAG Oil) approximately one week before the scheduled investigation meeting. The respondent, Mr Watchorn, seeks a contribution to his costs in the sum of $10,000. TAG Oil acknowledges an award of costs is appropriate but says $2,000 is an appropriate award.

Relevant Facts

[2] The applicant filed a statement of problem on 13 September 2012 seeking damages of $2,500,000, penalties of $50,000, and interest in respect of a number of specified breaches by the respondent of express and implied terms of his employment agreement. The alleged breaches related to actions allegedly taken by Mr Watchorn in the course of carrying out his duties as Production/Facility Manager for the applicant before his resignation on 31 July 2012.

[3] Counsel for Mr Watchorn filed a statement in reply on 5 October 2012, having been granted an extension to the normal 14 day reply period. In the course of a telephone conference with the parties on 26 November 2012 the Authority consolidated this matter (the current matter) with a previously filed application by TAG Oil against Mr Watchorn (the first matter). The two matters were to be the subject of an investigation meeting scheduled for four days from 19 to 22 March 2013 inclusive.

[4] Mr Clarke filed TAG Oil's briefs of evidence for seven witnesses on 5 February 2013 and, on behalf of Mr Watchorn, Ms Hughes filed briefs for three witnesses on 5 March 2013. The briefs of evidence of most witnesses related to both matters before the Authority.

[5] On 8 March 2013 Mr Clarke emailed a letter (wrongly dated 5 February 2013) to the Authority and Ms Hughes notifying the discontinuation of the current matter. Mr Clarke suggested both parties revise their briefs of evidence, and correctly estimated the duration of the investigation meeting would now be reduced to two days. The discontinuation, which was initially not recognised by the respondent, was confirmed in a telephone conference on 13 March 2013, during which I reserved the matter of costs.

[6] Both parties filed revised briefs of evidence for the first matter which was heard on 19 and 20 March 2013: five for TAG Oil and two for Mr Watchorn. One short brief by one of Mr Watchorn's witnesses required no amendment. The short brief of evidence of another witness related solely to the current matter and was withdrawn. Mr Watchorn's own brief had originally consisted of 65 pages of evidence addressing the issues raised in both statements of problem and in the seven briefs of evidence initially filed by the applicant. His brief was reduced to 19 pages after the withdrawal of the current matter.

Submissions

[7] Mr Clarke in his submissions for TAG Oil noted the right of an applicant to withdraw proceedings at any time[1], and cited the well-known principles[2] applicable to awards of costs in the Authority. These include that costs:

[1] As provided in the Employment Relations Act 2000, clause 14(1).

a. generally follow the event;

b. will be modest;

c. are awarded on a contribution basis and frequently judged against a notional daily rate;

d. are not to be used as a punishment or expression of disapproval of the unsuccessful party's conduct although conduct that increased costs unnecessarily can be taken into account in inflating or reducing an award.

[8] He submitted that, if Mr Watchorn had successfully defended the current matter, he might have received a contribution to his costs to a maximum of around $7,000 based on a two day investigation, applying the Authority's current daily tariff of $3,500. Mr Watchorn should not, in Mr Clarke's submission, be awarded costs at this level. His reasons were that no investigation meeting had taken place, the matter had been discontinued very shortly after the applicant had the opportunity to consider the respondent's evidence, and no legal submissions had been prepared in relation to the matter.

[9] Ms Hughes took no issue with the principles applicable to awards of costs in the Authority but had a different view of their application to the particular circumstances of the withdrawn application. She noted the "*ruinous*" sum of damages sought against Mr Watchorn. In her submission, this had required careful preparation. Ms Hughes also cited the late withdrawal, and the lack of merit of the application as reasons in support of a contribution of $10,000 to Mr Watchorn's costs.

[10] Substantial effort had been made in preparation for the hearing before the current matter was withdrawn. That included interviewing Mr Watchorn, preparing the statement in reply, reviewing the evidence of the TAG Oil witnesses, preparing Mr Watchorn's brief of evidence, and preparing cross examination. Ms Hughes estimated she had spent 50 hours, which represented $17,500 in legal fees.

[11] Mr Clarke in his reply submissions observed that the brief of evidence prepared for Mr Watchorn related to both proceedings and therefore the preparation could not be attributed solely to the withdrawn matter. He rejected Ms Hughes' description of the case as lacking merit and said the quantum of TAG Oil's claim was not relevant to an award of costs.

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[2] Those principles were set out in *PBO Ltd (formerly Rush Security Ltd) v Da Cruz* [2005] ERNZ 808

Discussion and conclusions

[12] The Authority's ability to award costs is discretionary and the discretion is to be exercised in accordance with principle rather than arbitrarily. That is one of the principles referred to with approval by the Full Court in the *Da Cruz* case cited by Mr Clarke in his submissions. I have taken those principles and the parties' submissions into account in determining this matter.

[13] I agree with the parties that it is appropriate to award costs to Mr Watchorn in relation to the withdrawn application in light of the significant legal costs he incurred for a matter that the applicant chose not to pursue. I have not taken into account submissions about the merits of the withdrawn application as the evidence was untested. I accept Mr Clarke's submission that TAG Oil acted responsibly in discontinuing the matter soon after receiving Mr Watchorn's briefs of evidence. However, this was very close to the date of the investigation meeting and after much preparation for the withdrawn matter had been undertaken.

[14] While the size of the damages claim against Mr Watchorn is not directly relevant in the award of costs, I accept the thrust of Ms Hughes' submission that a respondent faced with a claim in excess of $2,500,000 would require particularly thorough preparation from his counsel. That impacts on my consideration of whether the costs incurred by Mr Watchorn were unnecessary or unreasonable, which is one of the factors relevant to an award of costs in the Authority.

[15] I note Mr Clarke's point that the work carried out by the respondent's counsel in preparing to defend the claim would have overlapped with her preparation for the investigation of the matter that did proceed. While there may have been some overlap, I am satisfied that Ms Hughes' submissions referred to the time expended in preparing for the current matter and not for both.

[16] I am also satisfied the fees were not unreasonable or unnecessary in relation to the significance of the allegations against Mr Watchorn and the effort invested in preparing to defend them. The 46 page reduction in his brief of evidence after the withdrawal of the current matter indicates the extent of effort that had been spent on defending that matter.

[17] I have considered Mr Clarke's submissions regarding the Authority's nominal daily tariff and the appropriateness of a smaller award, but am not persuaded that an

award of costs at the level he proposes would be fair to the respondent. The Court in *Da Cruz* found nothing wrong in principle with the Authority's tariff based approach, "*so long as it is not applied in a rigid manner without regard to the particular characteristics of the case*."[3] It noted the Authority could avoid the unduly rigid approach, without compromising its modest approach to costs, by adjustments either up and down in a principled way.

[18] Applying that approach, and taking into account the factors I have already noted, I find an award based on one day's tariff, adjusted upwards by $3,000 to be a reasonable contribution to Mr Watchorn's costs. Accordingly, TAG Oil is ordered to pay the sum of $6,500 in costs to Mr Watchorn.

Trish MacKinnon
Member of the Employment Relations Authority

[3] Ibid at [46]