IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON

[2017] NZERA Wellington 22
5584272

	BETWEEN	ADVANCE INTERNATIONAL CLEANING SYSTEMS (NZ) LIMITED Applicant
	AND	LEE BROWN First Respondent
	AND	SOREN HANKANSSON Second Respondent
	AND	WAIWHETU DISTRIBUTORS LIMITED Third Respondent

Member of Authority:	M B Loftus
Representatives:	Jiwa Nadan on behalf of Applicant Gary Tayler, Advocate for First Respondent Paul McBride, Counsel for Second and Third Respondents
Submission received:	24 February and 7 March 2017 from Second and Third Respondents 27 February and 13 March 2017 from Applicant
Determination:	6 April 2017

COSTS DETERMINATION OF
THE EMPLOYMENT RELATIONS AUTHORITY

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[1] On 17 September 2015 the First Respondent, Lee Brown, filed a claim alleging he had been unjustifiably dismissed by the applicant, Advanced International Cleaning Systems (NZ) Limited (AICS).

[2] A statement in reply was filed on 9 October 2015 but in the interim AICS filed an application alleging Mr Brown had breached various provisions contained in his

employment agreement.[1] In particular it was alleged Mr Brown was party to a ... *deliberate and planned effort to discredit and damage our business while sharing confidential information and transfer of customer business which has been trading with us for sometime.*

[3] It was also alleged Mr Hankansson, another ex-employee of AICS, was ... *bound by similar covenants which was principally breached with intent* and the new employer of both, Waiwhetu Distributors Limited, had aided, abetted and induced the breaches. AICS sought an … *urgent interim injunction ... so we can minimise the damage while we pursue legal recovery for damages*.

[4] Mr Brown's response was that AICS's proceedings were misconceived as there was no restraint of trade clause in his employment agreement and no evidence to support AICS's claims.

[5] Mr Hankansson and Waiwhetu Distributors both denied any wrongdoing. Waiwhetu Distributors also argued the Authority lacked jurisdiction with respect to it. In particular issue was taken with claims which purported to be raised pursuant to the Fair Trading Act 1986 and the fact Waiwhetu Distributors could not be have breached a duty of good faith to AICS as one did not exist.[2]

[6] A telephone conference was held on 1 October 2015 during which various deficiencies in AICS's application were discussed. These included a failure to provide supporting affidavits or the required undertaking as to damages. The call was adjourned to allow AICS to consider its position and seek advice.

[7] An amended application followed on 2 November 2015. Again the affidavits and undertaking were absent. Waiwhetu Distributors responded by asking the claim be dismissed as frivolous while Mr Brown was concerned this was delaying consideration of his grievance.

[8] A further conference call was held on 15 December 2015 during which Mr Nadan, AICS's Managing Director, was encouraged to seek legal assistance regarding both the jurisdictional debate and deficiencies in the application. He agreed to do so having acknowledged urgency no longer applied and AICS's claim was now limited to recovering damages. He agreed to advise when he was in a position to advance the

[1] Statement of Problem lodged 25 September 2015
[2] Section 4(2) of the Employment Relations Act 2000

claim but indicated advice would be promptly obtained. The same call led to the scheduling of a meeting to investigate Mr Brown's personal grievance on 3 May 2016 provided it did not settle at mediation on 29 February.

[9] On 15 January 2016 Mr Nadan advised he was yet to contact AICS's advisors as they were away and nothing further was heard till 31 March when Mr Nadan emailed. The e-mail's content indicated he had not obtained advice in the interim. It referred to the fact Mr Brown's grievance had not settled in mediation and expressed a view both that and AICS's claim should both be heard concurrently on 3 May.

[10] The following day Mr McBride filed a submission supporting his earlier application proceedings against Waiwhetu Distributors be struck out on jurisdictional grounds. He had indicated he would do this during the December telephone conference in order to assist AICS understand what he said was the tenuous nature of its application, at least with respect to Waiwhetu Distributors.

[11] AICS was told the two claims would not be heard concurrently given agreement during the December telephone conference they proceed separately. AICS then advised it would await the outcome of Mr Brown's grievance before deciding what to do in relation to its application which was then put on hold.

[12] Mr Brown was successful with his personal grievance[3] but that did not see AICS make any decisions in respect to its claim and nothing happened till early December when Mr McBride asked what was going on. That prompted advice AICS considered the refusal to consolidate the claims meant it's was disposed of and it had ... *moved on* [and] *does not wish to participate in the matter any further.*

[13] While the claim was then withdrawn, the second and third respondents stated they would be pursuing costs. They have now done so. Mr Brown has not.

[14] Mr Hankansson seeks $1,225 plus GST while Waiwhetu Distributors wants a contribution in the order of $4,000. In doing so they rely on the sequence of events and … *the fact that the Applicant (after several iterations) sought to simply walk away from its own misconceived and misguided applications.* They also note AICS was told from the outset its claims were considered vexatious and indemnity costs would be sought.

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[3] *Brown v Advance International Cleaning Systems (NZ) Ltd* [2016] NZERA Wellington 91

[15] Waiwhetu Distributors notes solicitor time of 15 hours spent considering the claims, filing a reply and the submission regarding jurisdiction, participation in the conference calls which were not short and addressing costs. Mr Hankansson was billed approximately five hour with the time being spent on the reply, the conference calls and costs.

[16] The Respondents go on to say the withdrawal suggests AICS either belatedly recognised its claims were misconceived or it was trifling with the process and improperly trying to gain a business advantage by putting the respondents to substantial cost. It is submitted either scenario justifies a substantial contribution not as a punishment but as recognition of the costs imposed by such actions.

[17] Finally note is made of the fact it was not only suggested AICS get advice, the company advised it would do so. Reference is made to *Emergicare Henderson v Engelhard Roos*[4] where Judge Finnigan noted a do-it-yourself philosophy, at least in respect to technical processes as was the issue here, has its perils.

[18] In reply AICS says that as the *investigation meeting did not happen … it was assumed the application was disposed of from the Applicants perspective*. AICS continues to assert it was wronged by the respondents having blatantly ignored the agreements it had with its two ex-employees and claims Mr Hankansson and Waiwhetu Distributors jointly aided, abetted and induced Mr Brown to breach various obligations he owed AICS. It claims to have suffered serious harm as a result.

[19] AICS goes on to say it misunderstood the applications status after not being consolidated with the grievance and understood the matter had come to an end when withdrawn. Here it relies on the Authority's advice it was closing the file.

[20] The Respondents replied by asserting AICS was confusing two separate issues: Mr Brown's personal grievance to which neither were party and AICS's application to which they were. It is also noted withdrawal does not preclude their pursuit of the costs resulting from a requirement they defend AICS's application.

[21] AICS forwarded a further response on 13 March. It says the cases should have been consolidated and claims it was compromised as a result of that not occurring. It asserts its position was further compromised by the passage of time due to its claim

[4] [1991] 3 ERNZ 812

being *put on hold.* It again claims to have suffered damage as a result of the respondent's actions before saying the Authority would have most likely have found in its favour had the matter been heard. AICS closes by submitting an award of costs would be a travesty of justice and send the wrong signal to employers about the enforcement of restraints and non-solicitation clauses.

[22] The problem with AICS's approach is it ignores two fundamental issues. The first is it initiated proceedings with which it did not succeed. To assert it would have been successful had the matter been heard does not assist. The claim was not heard and AICS was not successful. The reasons for the claim not being heard can be attributed to AICS's actions. The delay was the result of AICS failing to address fundamental deficiencies in its application and, more importantly, it was AICS which chose to abandon the claim.

[23] That raises the second issue which is AICS's view it was disadvantaged by the refusal to consolidate its application with Mr Brown's. That is not accepted. The simple fact is AICS's claim could not proceed due to the deficiencies along with significant issues with the way it was pleaded which generated questions about jurisdiction. AICS undertook to seek advice in order to address and rectify the deficiencies but failed to do so. Second AICS accepted that Mr Brown's claim would proceed separately during the telephone conference in December 2015 and here it should be noted the claims involved different parties and very different issues. There was little or no justification for consolidation and by December the need for urgency had passed – the claim was no more than a possible recovery of damages.

[24] That costs may be sought in respect to withdrawn applications is well established.[5] As the court observed in *Kelleher* an applicant is entitled to discontinue but thereafter the starting point cannot, as a point of principle, be that it can do so with immunity from costs.[6] The Court said *the ordinary rule … is … a plaintiff who discontinues a proceeding against a defendant must pay costs to the defendant of and incidental to the proceedings up to and including the discontinuance*.[7]

[25] The question is how much.

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[5] For example *Kelleher v Wiri Pacific Ltd* [2012] ERNZ 406 recently referred to in *New World Market Ltd v Wang* [2017] NZEmpC 20
[6] *Kelleher*, n 2 above, at [11]
[7] *Kelleher* at [9]

[26] Essentially the Respondents are seeking indemnity costs. That ignores the fact that in this jurisdiction a costs award is inevitably a contribution as opposed to full indemnification unless the types of behaviours commented on in *Bradbury v Westpac Banking Corporation*[8] are present. They aren't though there were aspects of AICS's behaviour which unnecessarily increased the respondent's costs. These included its failure to address deficiencies with its claim about which it was made aware thus necessitating repetitive discussion during telephone conferences. This should be recognised.

[27] I also have to note there are aspects of the claim which are not normally recognised such as the preparation of the costs application and questions about how the costs of events such as the telephone conferences which involved counsel representing both respondents simultaneously were split between them.

[28] Having considered the information before me and the parties submissions I conclude it appropriate Mr Harkinsson receive a contribution of $1,000 and Waiwhetu Distributors get $2,500.

[29] I therefore order the applicant, Advanced International Cleaning Systems (NZ) Limited, make the following payments:

a. $1,000.00 (one thousand dollars) as a contribution toward the costs Mr Harkinsson incurred in answering the claim; and a further

b. $2,500.00 (two thousand, five hundred dollars) to the third respondent, Waiwhetu Distributors Limited, as a contribution toward the costs it incurred.

M B Loftus
Member of the Employment Relations Authority

[8] [2009] 3 NZLR 400