

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2018] NZERA Christchurch 58
3023234

BETWEEN RUTHERFORD HOTEL HOLDINGS LIMITED
Applicant

A N D LIAM CLARINGBOLD
First Respondent

A N D MONACO MANAGEMENT LIMITED
Second Respondent

Member of Authority: David Appleton

Representatives: Graeme Malone, Counsel for Applicant
First Respondent in person
Andrew Marsh, Counsel for Second Respondent

Investigation Meeting: Determined on the papers

Submissions Received: 13 and 27 April 2018 from the second respondent
24 April from the applicant
None from the first respondent

Date of Determination: 30 April 2018

COSTS DETERMINATION OF THE AUTHORITY

[1] By way of a determination dated 15 December 2017¹ the Authority declined to issue an interim injunction against Mr Claringbold restraining him from working for the second respondent. The second respondent says that the Authority's determination resolved all remaining matters save for the legal costs of the interim investigation. Mr Claringbold was

¹ [2017] NZERA Christchurch 219

self-represented at the investigation meeting and so did not incur any solicitor/client costs in relation to the meeting.

[2] The applicant says that all matters were not resolved, as there remains live an alleged breach by Mr Claringbold of the employment agreement between the applicant and him when he failed to give contractual notice upon resigning. I agree that that matter remains live, as it was not disposed of in the determination referred to above, but I also note that Mr Malone says that all matters with the second respondent have been resolved, from which I conclude that the applicant does not seek a penalty against the second respondent in relation to the alleged breach by Mr Claringbold pursuant to s 134(2) of the Employment Relations Act 2000 (the Act). The applicant will be directed at the end of this determination to clarify its intentions in regard to pursuing the breach of contract allegation against Mr Claringbold.

[3] However, given that four months have already elapsed since the Authority's investigation meeting, it is appropriate to determine costs in relation to that interim matter on behalf of the second respondent without any further delay.

[4] Mr Marsh states that the second respondent incurred costs of \$5,950 plus GST, and disbursements of \$90, and seeks that the daily tariff of \$4,500 be uplifted to that total amount. His rationale for this submission is effectively that offers to address the concerns of the applicant with regard to its proprietary interests were unreasonably rejected.

[5] Mr Marsh says that he wrote to Mr Malone on 23 November 2017 saying that his client was happy to explore ways of addressing the applicant's concerns, and that his client was aware of Mr Claringbold being subject to ongoing confidentiality obligations. He had also stated that the second respondent was willing to sign an undertaking that it would not seek or encourage Mr Claringbold to breach those obligations at any time. Mr Marsh says he repeated the second respondent's offer to work with the applicant on 5 December.

[6] Mr Marsh says that the failure to accept the offers made on behalf of the second respondent resulted in a hearing that was unnecessary and the applicant ended up in a worse position. He also refers to findings of the Authority that the restraint of trade clause relied on by the applicant went wider than was reasonably necessary, that it was not appropriate to restrain Mr Claringbold as sought, and that it was not likely that the respondent would have been able to have done anything useful with the confidential information in any event.

[7] Mr Malone's position is that no increase in tariff is justified, as the offers by the second respondent did not include a response from Mr Claringbold, so could not be seen as offering to address the protections that the restraint clause sought to protect. Mr Malone also submits that the offer from the second respondent could not mitigate against the risk of innocent or inadvertent breach.

[8] Mr Malone also submits that the first and second respondents ignored the restraints and so "negated any justification for an increase in tariff and instead justified a decrease in any award. Mr Malone relies on the High Court case of *M A Watson Electrical Ltd v Kelling*².

Discussion

[9] The Authority's power to award costs is set out in clause 15 of Schedule 2 of the Act, which provides as follows:

15 Power to award costs

(1) The Authority may order any party to a matter to pay to any other party such costs and expenses (including expenses of witnesses) as the Authority thinks reasonable.

(2) The Authority may apportion any such costs and expenses between the parties or any of them as it thinks fit, and may at any time vary or alter any such order in such manner as it thinks reasonable.

² [1993] 1 ERNZ 9

[10] The Authority is bound by the principles set out in *PBO Ltd v. Da Cruz*³ when setting costs awards. These include:

- a. There is discretion as to whether costs would be awarded and in what amount.
- b. The discretion is to be exercised in accordance with principle and not arbitrarily.
- c. The statutory jurisdiction to award costs is consistent with the equity and good conscience jurisdiction of the Authority.
- d. Equity and good conscience are to be considered on a case by case basis.
- e. Costs are not to be used as a punishment or as an expression of disapproval of the unsuccessful party's conduct although conduct which increased costs unnecessarily can be taken into account in inflating or reducing an award.
- f. It is open to the Authority to consider whether all or any of the parties' costs were unnecessary or unreasonable.
- g. That costs generally follow the event.
- h. That without prejudice offers can be taken into account.
- i. That awards will be modest.
- j. That frequently costs are judged against a notional daily rate.
- k. The nature of the case can also influence costs and this has resulted in the Authority ordering that costs lie where they fall in certain circumstances.

[11] The starting point is that the second respondent was successful in defeating the claim against it for the imposition of a penalty under s 134(2) of the Act, in that the restraint of trade provision relied upon was found to be too wide to be enforceable. Therefore, there cannot have been any breach which the second respondent incited, instigated, aided or abetted.

³ [2005] 1 ERNZ 808

[12] The next point is that the investigation meeting lasted between 09.30 and 15.45, which is around 75% of a full day (assuming a standard full day lasts 6.5 hours, excluding an hour for lunch and other breaks). However, it was necessary to have a telephone conference call to hear further submissions the following day, and I therefore accept that it is appropriate to treat the investigation meeting as having lasted a full day.

[13] Applying the Authority's daily tariff, that means that the second respondent is entitled to a contribution towards its costs in the sum of \$4,500, as a starting point. The question to resolve, therefore, is whether the sum of \$4,500 should be uplifted as submitted by Mr Marsh, or reduced, as submitted by Mr Malone.

[14] Was it unreasonable for the applicant to have rejected the second respondent's overtures to resolve the matter without the need for an investigation meeting? The second respondent was trying to preserve its position that it could employ Mr Claringbold, whilst seeking to assure the applicant that its confidential information would be safeguarded. In an email dated 23 November 2017, Mr Marsh said that the second respondent would sign an undertaking that it would not seek or encourage Mr Claringbold to breach his ongoing confidential obligations. In a second email dated 5 December, Mr Marsh said that the second respondent was prepared to work with the applicant to ensure that the applicant's confidential information could be protected.

[15] In the email of 5 December Mr Marsh also stated "If your client is however determined to press down the path it is taking, then this email correspondence will be exhibited to the Court in relation to the issue of costs and full indemnity costs will be sought from your client in that regard." There is no record before the Authority of any response to that email.

[16] Whilst the email of 5 December was not marked "without prejudice save as to costs", it had the same effect, in that a proposal to avoid litigation was made and a costs warning included as to the consequences of failing to agree to discuss ways of protecting the applicant's confidential information. Was it reasonable for the applicant to have rejected the offer?

[17] The applicant was seeking to prevent Mr Claringbold from working for the second respondent, a competitor, for a period of 18 days. The purpose was solely to prevent Mr Claringbold from disclosing to the second respondent its confidential information, as preventing competition per se is unlawful. Would the offer by the second respondent have reasonably given the applicant the comfort it required?

[18] The offer by the second respondent would not have entirely addressed what the applicant was fearful of, as it did not expressly offer not to use any confidential information that may have been inadvertently disclosed, or disclosed voluntarily by Mr Claringbold. In addition, the applicant had received an aggressive communication from Mr Claringbold which had abusively refused to comply with the non-competition restraint. Indeed, Mr Claringbold had threatened to go to the press.

[19] Furthermore, Mr Claringbold had left his employment with the applicant without honouring his notice period (whilst not either seeking to argue at the time that he had been constructively dismissed, or that the restraint was unenforceable).

[20] In those circumstances, the applicant had legitimate reasons to fear that Mr Claringbold desired to do it damage. However, I do not believe that *MA Watson Electrical* assists the applicant as it was Mr Claringbold who figuratively snubbed his nose at the applicant by declaring he would breach the restraint of trade clause, not the second respondent. Indeed, the evidence was that Mr Claringbold was stood down by the second respondent for a period while the second respondent was trying to resolve the issue with the applicant.

[21] Furthermore, the second respondent had expressly offered, via Mr Marsh, to work with the applicant to ensure that the confidential information was protected. There was no reason to suspect that this was not a genuine offer, and yet Mr Malone did not reply to Mr Marsh's emails on behalf of the applicant. It is quite possible that the second respondent could have given sufficient comfort to the applicant that its confidential information would not be misused even if it was disclosed to it by Mr Claringbold.

[22] On balance, I believe that it was not reasonable for the applicant to have failed to have engaged in dialogue with the second respondent in relation to its offers to resolve the matter. Under such circumstances, I believe that an uplift in the daily tariff is justified.

[23] However, I do not consider that a complete indemnity of the respondent's costs are warranted given the legitimate fears that the applicant faced. I believe that a contribution to the second respondent's legal costs in the sum of \$5,000 is a just award, being 84% of its solicitor to client costs. I take no account of the GST element of the second respondent's costs as it will be registered for GST and will have been able to have set off the GST in Mr Marsh's invoices against its own liability. I also set aside the \$90 office costs disbursement, as that does not appear to relate to an out of pocket expense that has been disbursed by Mr Marsh's firm on behalf of the second respondent.

Order

[24] I order the applicant to make a contribution towards the second respondent's legal costs in the sum of \$5,000. This sum is to be paid by the applicant by no later than 14 days after the date of this determination.

Direction

[25] I direct the applicant to notify Mr Claringbold and the Authority in writing whether it intends to pursue its claim against Mr Claringbold for breach of contract in relation to his leaving the employment of the applicant without giving notice. If it does intend to do so, it should also advise what remedies it seeks. The applicant is to serve and lodge its written notification by no later than 14 days after the date of this determination. If necessary, a case management conference call will then be arranged.

David Appleton
Member of the Employment Relations Authority