

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI  
ŌTAUTAHI ROHE**

**Attention is drawn to the  
order prohibiting publication  
of certain information in this  
determination**

[2020] NZERA 31  
3045413

	BETWEEN	TRADESTAFF GROUP LIMITED Applicant
	AND	CHERYL BAILEY First Respondent
	AND	MOTION RECRUITMENT LIMITED Second Respondent
Member of Authority:	Helen Doyle	
Representatives:	Anna Oberndorfer, advocate for the Applicant John Shingleton, counsel for the Respondents	
Submissions Received:	2 December 2019 from the Applicant 16 December 2019 from the Respondents	
Date of Determination:	27 January 2020	

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**COST DETERMINATION OF THE AUTHORITY**

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- A I order Cheryl Bailey to pay to Tradestaff Group Limited the sum of \$3,300 for costs.**
- B I order Tradestaff Group Limited to pay to Motion Recruitment Limited costs in the sum of \$4,750.**

**Prohibition from publication**

[1] I prohibit from publication under clause 10(1) of the second schedule to the Employment Relations Act 2000 (the Act) the financial information provided by the first respondent for the purposes of costs on this application.

### **Substantive Determination**

[2] The Authority in a substantive determination dated 14 November 2019<sup>1</sup> found that the first respondent had breached provisions of her employment agreement that survived termination with the applicant.<sup>2</sup> The first respondent was ordered to pay penalties and to comply with confidentiality obligations.

[3] The Authority found that the second respondent did not aid or abet breaches of the first respondent's employment agreement.

[4] Costs were reserved and the Authority has received submissions on behalf of the applicant and the first and second respondent.

### **The applicant's submissions**

[5] The applicant refers the Authority to the judgment of the full Court of the Employment Court in *PBO Limited (formerly Rush Security) v Da Cruz*<sup>3</sup> and the factors set out in that judgment that the Authority may take into account when determining costs.

#### *The first respondent*

[6] The applicant seeks in respect to its successful claim against the first respondent a contribution towards its costs in the sum of \$5,000.

#### *The second respondent*

[7] Ms Oberndorfer submits that the second respondent showed blameworthy behaviour in its dealings with the applicant when it was advised about concerns with respect to breaches of its restraint of trade and confidentiality covenants because it did not "*proactively engage*". She submits this was in circumstances where the industry is such that the second respondent should have known that there would have been restrictive covenants.

[8] She submits that a variation of the first respondent's individual employment agreement and working arrangement with the second respondent attached to her statement in reply dated 18 December 2018 was the first time that document was provided to the applicant. A property creations document obtained after the Authority investigation meeting

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<sup>1</sup> *Tradestaff Group Limited v Cheryl Bailey and Motion Recruitment Limited* [2019] NZERA 658.

<sup>2</sup> A breach of the non-solicitation covenant by the first respondent was not established.

<sup>3</sup> *PBO Limited formerly Rush Securities v de Cruz* [2005] 1 ERNZ 808 at [44]

showed that the variation was not created until 29 November 2018 but was backdated and signed on 7 November 2018.

[9] Ms Oberndorfer submits that it was the second respondent's failure to proactively communicate with it about the steps that it was taking to ensure compliance that resulted in the applicant reasonably concluding that there was aiding and abetting.

[10] Ms Oberndorfer submits that costs should lie where they fall in relation to the second respondent.

### **The first and second respondents' submissions about costs**

#### *First respondent*

[11] Mr Shingleton submits that the first respondent should pay some costs but that the usual daily tariff should be discounted by half to take into account her financial position. Mr Shingleton submits the first respondent admitted taking the confidential information in her statement in reply and in her evidence admitted using two of the documents removed.

#### *Second respondent*

[12] Mr Shingleton submits that the applicant should pay increased costs to take into account its unreasonable pursuit of the second respondent.

[13] He submits that the applicant had no evidence that the second respondent was using confidential information but persisted against the second respondent resulting in it incurring legal costs and "*wasting executive time.*"

[14] Mr Shingleton submits there should be an uplift from the usual daily tariff. He submits that some of the submissions on behalf of the applicant are evidential in nature and should be disregarded because they do not reflect the evidence before the Authority.

### **Conclusions and analysis**

#### *The first respondent*

[15] There is no good reason why the costs should not follow the event in respect of the first respondent given the applicant's success.

[16] The investigation meeting occupied a day and a half. The notional daily tariff for a day and a half is \$6,250. The applicant seeks costs from the first respondent in the sum of \$5000.

[17] The claim by the applicant for costs payable by the first respondent is less than the tariff and no doubt takes the following matters into account. The first respondent admitted taking confidential information from the applicant and in evidence agreed she had used two of the removed documents. That saved some investigation time. The applicant was also realistic about an outcome of a penalty award for the confidentiality breach and the focus therefore was on quantum for the penalty award. I conclude however that the financial position of the first respondent is such that she would have very serious difficulty in paying a cost award of \$5000. A further reduction to the tariff for financial reasons to \$3,300 is fair and reasonable.

*The second respondent*

[18] The second respondent was successful. A fundamental principle of costs is that they follow the event.

[19] Ms Oberndorfer submits that costs should lie where they fall. I do not accept that there is a good reason why the usual principle should be departed from in this case. The second respondent incurred costs and was ultimately successful in defending the claim against it. The daily tariff for a day and a half is \$6,250.

[20] Costs are not to be used as a punishment or an expression of disapproval of the unsuccessful party's conduct however conduct that increases costs unnecessarily can be taken into account in inflating or reducing an award.

[21] I have considered in the exercise of my discretion whether there should be an increase or decrease to the daily tariff.

[22] Mr Shingleton maintains that there should be an increase to the daily tariff because the claim against the second respondent that it aided and abetted a breach of confidentiality was "*hopeless from the start.*" He submits that the applicant knew that it was hopeless because they had improperly obtained confidential information belonging to the second

respondent. Further the applicant attempted to rely on the statement of another employee of the second respondent but she did not appear to give evidence.

[23] The circumstances that led to the claim against the second respondent was initially a concern that the first respondent was working for the second respondent in breach of her restraint of trade covenant with the applicant and then the discovery of the removal by her of confidential information and concern about the use of that information. The applicant became very distrustful and suspicious as a result. That is not unusual in these types of cases in the Authority's experience.

[24] I accept Mr Shingleton's submission that there was some information to support that confidential information had not been used by the second respondent. Whilst suspicions lingered for the applicant, no satisfactory evidential basis for those suspicions was ultimately established. I am not minded to increase any award because to do so in the circumstances would amount to an expression of disapproval.

[25] I have then considered whether any award of costs should be reduced. I have not had regard in doing so to any evidence that is inconsistent with the findings in the determination.

[26] I do find that there is a basis for Ms Oberndorfer's submission that a more proactive engagement by the second respondent with the applicant in respect of the 6 month restrictive covenant could have reduced the high level of distrust between the applicant and second respondent.

[27] The variation document which set out the changed work arrangement between the first and second respondent was not provided to the applicant until a much later date. The applicant became concerned as a result that it was not an authentic document and that increased rather than decreased distrust. As it transpired the variation document was backdated. Had there been advice at an early stage about how the second respondent was managing the employment of the first respondent to reduce risk to the applicant it, in all likelihood, would have resulted in the claim for aiding and abetting the restraint breach not being pursued. I cannot be satisfied that would have been the situation with confidentiality concerns although I accept that the level of trust in the second respondent may not have been as damaged as it was because of the lack of earlier engagement.

[28] I find the failure by the second respondent to proactively communicate in all the circumstances at an early stage about the employment of the first respondent objectively assessed increased costs. In the exercise of my discretion as to costs I conclude any award should reflect that and I reduce the daily tariff by \$1500.

[29] I find that a fair and reasonable award for costs in favour of the second respondent is the sum of \$4750.

**Orders**

[30] I order Cheryl Bailey to pay to Tradestaff Group Limited costs in the sum of \$3,300.

[31] I order Tradestaff Group Limited to pay to Motion Recruitment Limited costs in the sum of \$4,750.

**Helen Doyle**  
**Member of the Employment Relations Authority**