IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE

[2020] NZERA 64
3075133

	BETWEEN	STEPHEN DUDDY First Applicant
	AND	BRYAN PRATT Second Applicant
	AND	CHRISTOPHER MACDONALD Third Applicant
	AND	VECTOR LIMITED Respondent

Member of Authority:	Peter van Keulen
Representatives:	Bridget Smith, counsel for the Applicants Stephen Langton, counsel for the Respondent
Investigation Meeting:	On the papers
Submissions Received:	1 November 2019 from the Applicants 18 October 2019 and 13 November 2019 from the Respondent
Date of Determination:	14 February 2020

COST DETERMINATION OF THE AUTHORITY

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[1] The applicants' claim, which was lodged on 16 September 2019, sought a determination from the Authority that the restraints of trade in their respective employment agreements were unenforceable or alternatively, if they were enforceable that their proposed employment with a new employer was not a breach of those restraints of trade.

[2] This determination was sought as the applicants had resigned from Vector Limited and were intending to commence employment with another company, which Vector believed was a competitor meaning the resignations and commencement of employment would be a breach of the restraints of trade in the applicants' employment agreements.

[3] The statement of problem was accompanied by affidavits from the applicants and a request for urgency. I held a telephone conference on 26 September 2019 and set this matter down for an investigation meeting to be held on 16 and 17 October 2019. I made directions dealing with Vector's statement in reply, witness evidence including a direction regarding a possible summons, disclosure of documents, and submissions.

[4] On 3 October 2019 just prior to Vector lodging its statement in reply the applicants lodged and served a notice of discontinuance. This notice recorded that the three applicants would each observe the restraint period set out in the restraint of trade provisions by not commencing employment with their new employer until after those periods and therefore the determinations sought were not required.

[5] In that notice, Ms Smith also submitted that costs should lie where they fall given the circumstances of the claim.

[6] Vector did not accept the applicants' position on costs and in a memorandum from Mr Langton it sought an order that the first, second and third applicants pay the costs it had incurred in this matter.

Application for costs

[7] In seeking an award of costs for Vector, Mr Langton says I should award indemnity costs to Vector, departing from the Authority's usual practice of awarding costs based on a daily tariff, because the applicants' motives for bringing the claim was to inflict commercial damage to Vector and to not award increased costs in these circumstances would deny the successful party proper access to justice. Alternatively, Mr Langton says, if I am not prepared to depart from applying the daily tariff then I should treat each applicant as having made a separate claim and order each applicant to pay $4,500.00 applying the daily tariff for a one day investigation meeting.

[8] Ms Smith on behalf of the applicants says that she accepts that costs may be ordered against a party that discontinues a claim in the Authority. However, in circumstances where

the applicants' claim was properly and reasonably brought by them and then properly and reasonably discontinued there is no basis to depart from the ordinary principles applying to awarding costs i.e. I should apply the daily tariff apportioned on a part day basis to reflect the work done up until the point of discontinuance.

[9] So, the issue for me to determine is whether an order for costs is appropriate and if so what quantum I should award.

Analysis

Costs in the Authority

[10] The power of the Authority to award costs is set out at clause 15 of Schedule 2 of the Act. The principles and approach adopted by the Authority in respect of this power are outlined in *PBO Ltd (formerly Rush Security Ltd) v. Da Cruz*[1] and other relevant Employment Court and Court of Appeal decisions.[2]

[11] I have considered counsel's submissions and applied the principles referred to above in determining this costs application. I have also considered the principles applied in circumstances where an applicant withdraws its claim prior to an investigation meeting being held and the principles related to indemnity costs as these are also relevant considerations here.

Costs for Vector

[12] The first point is that I can make an award of costs in circumstances where a party withdraws a statement of problem before an investigation meeting[3].

[13] The second point is that costs should follow the event.

[14] In this case these two points mean Vector, as essentially the successful party, is entitled to an award of costs.

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[1] *PBO Ltd (formerly Rush Security Ltd) v. Da Cruz* [2005] 1 ERNZ 808.
[2] *Blue Star Print Group (NZ) Ltd v. Mitchell* [2010] NZCA 385; *Booth v. Big Kahuna Holdings Ltd* [2015] NZEmpC 4; *Stevens v. Hapag-Lloyd (NZ) Ltd* [2015] NZEmpC 28; *Davide Fagotti v. Acme & Co Ltd* [2015] NZEmpC 135; *GSTech Limited v A Labour Inspector of MBIE* [2018] NZEmpC 127.
[3] *Eden v Rutherford & Bond Toyota Ltd* [2010] NZEmpC 43.

Daily tariff or indemnity costs

[15] The next question is whether I should follow the normal practice of the Authority when setting costs; applying the daily tariff, which is a set amount for each day of the investigation meeting. Or, whether I should depart from applying the daily tariff because there is some aspect of this case that warrants awarding costs on some other basis, which Mr Langton says should be on an indemnity basis.

[16] In *Bradbury v Westpac Banking Corporation*[4] the Court of Appeal referred to circumstances in which indemnity costs might appropriately be awarded. In my view the circumstances referred to in *Bradbury* and cases applying *Bradbury*[5] means, that in order to award indemnity costs I must be satisfied that there was exceptionally bad or egregious behaviour by the applicants in the conduct of this case.

[17] Mr Langton says that behaviour is found in the applicants' motives for bringing and then withdrawing their claim. Mr Langton says these were:

(a) To cause harm to Vector;

(b) To advance their own self-interest;

(c) To advance their new employer's interests;

(d) To damage Vector's interests.

[18] Mr Langton says these motives can be inferred from various documents and known actions taken in the conduct of this claim.

[19] I have considered Mr Langton's submissions and reviewed the documents and progress of this claim. Based on this I do not conclude that the applicants' motives in bringing this claim and withdrawing it as they did were to cause harm to Vector and to damage its interests. I do accept that one of their motives was to advance their own interests – but that is hardly egregious behaviour, most parties to litigation are participating in order to advance or protect their own interests. And I also accept that their motive was likely to be to

[4] *Bradbury v Westpac Banking Corporation* [2009] NZCA 234.
[5] See for example, *Sawyer v The Vice-Chancellor of Victoria University of Wellington* [2019] NZEmpC 85.

advance the interests of their new employer but again I do not consider this to be egregious behaviour.

[20] At its simplest the applicants had resigned and were intending to commence employment with a new employer. That they wanted to do this at the earliest opportunity and with the comfort of knowing they were not breaching any obligations to Vector is clearly about promoting their own interests and that of their new employer. But this is not poor behaviour – in many respects it is responsible and proactive as they sought to clarify the position rather than simply proceeding and putting Vector to the choice of commencing an action seeking injunctive relief.

[21] And, in any event the applicants were taking a step that Vector had identified as being appropriate and had demanded that they take. In an email of 12 September 2019 from Mr Langton to Ms Smith, Mr Langton stated:

> Therefore, please confirm by return that each of your clients will comply with their restraints of trade and not commence working for their new employer … and if they are not prepared to provide that confirmation, that they will refer their dispute over the restraint to the Authority for a declaration before "breaching" them.

[22] In all of the circumstances I am not satisfied that there was exceptionally bad behaviour by the applicants in bringing this claim or discontinuing it in the manner they did and therefore it is not appropriate to award Vector indemnity costs.

[23] Having eliminated indemnity costs as a basis for awarding costs in this case, I am satisfied that it is appropriate to award costs to Vector on the basis of the daily tariff.

Quantum

[24] Turning to the application of the daily tariff the first consideration is whether I should treat this claim as three claims for the purposes of applying the daily tariff, as submitted by Mr Langton.

[25] Whilst I accept Mr Langton's argument that this claim could rightly have been three claims, one lodged by each applicant, I am not satisfied that it is appropriate to split it into three lots of the daily tariff. The simple reason for this is the single consolidated claim did not represent the work of three separate claims. I accept there was some additional work

given that there was three applicants but this is a matter for an uplift to the daily tariff which I will address below.

[26] The next consideration then is the amount of the daily tariff I should apportion to the work undertaken by Vector.

[27] Ms Smith says I should award one quarter of daily tariff for one day.

[28] I accept that one quarter of the daily tariff represents the appropriate proportion of the daily tariff applicable to the work undertaken by Vector. Vector through its counsel had to analyse the claim and formulate its response to it both in terms of the case management conference and the draft statement of problem it completed. Vector also had to participate in the case management conference, which included dealing with requests for documents and a summons. And given the urgency of this matter I accept Vector would have started considering and drafting its evidence.

[29] So, I assess this work as being one quarter of the work contemplated by the daily tariff but that should be appropriately applied to the total daily tariff that would have applied to this claim i.e. $8,000.00 for a two day investigation meeting. So applying the daily tariff my starting point is $2,000.00.

[30] It is appropriate to consider an uplift to this amount given that there were three applicants rather than one and some additional work given the urgency of this matter. I quantify that as being an additional $1,000.00 per day, which is $2,000.00 over the two days of scheduled investigation meeting. One quarter of this amount is $500.00 and this is the uplift I will apply.

Two other aspects of Vector's application for costs

[31] There are two other aspects of Mr Langton's submissions that I must address. First, Mr Langton's request for additional costs to be awarded for the application for costs. I am not satisfied that, in this case, it is appropriate to award costs for the preparation of the application – that cost is, in my view, covered by the daily tariff which I have applied.

[32] Second, Mr Langton also advanced an "access to justice" argument in support of Vector's claim for indemnity costs. Mr Langton's submission being that when the Authority

exercises its discretion to award costs above the daily tariff rate it appears to be recognising that the tariff approach denies the successful party "access to justice", as they end up having spent more costs and recovering less than is reasonable. Therefore, in Vector's case if I do not exercise my discretion to award increased costs I am denying Vector, the successful party, proper "access to justice".

[33] This is a curious argument. I am not sure that Vector's position in terms of defending its interests in this matter have been or will be compromised by an order for costs which is less than its actual costs. In this case the financial circumstances of a publically listed company boasting an annual net profit in the millions of dollars as that pertains to its ability to pay or recoup $22,000.00 in legal fees, are not relevant to my cost determination.

[34] The only circumstances in which financial considerations have been considered to be relevant to a costs award is when the party being ordered to pay costs is impecunious to such an extent that a reduction is warranted and this is not the argument being advanced.

Conclusion

[35] I have turned my mind to the relevant circumstances in coming to the conclusion I have on the appropriate order for costs in this case.

[36] Vector is entitled to an order for costs. And I am satisfied that $2,500.00 is an appropriate sum.

Costs order

[37] Stephen Duddy, Bryan Pratt and Christopher MacDonald must pay Vector Limited $2,500.00 as a contribution to its costs incurred in this matter.

Peter van Keulen
Member of the Employment Relations Authority