

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2022] NZERA 691
3173482

BETWEEN	CROMBIE LOCKWOOD NZ LIMITED Applicant
AND	DAVID GIBBONS First Respondent
AND	BRETT GERRARD Second Respondent
AND	BMS RISK SOLUTIONS LIMITED Third Respondent

Member of Authority: Antoinette Baker

Representatives: Kylie Dunn for the Applicant
Tim McGinn for the Respondents

Submissions received: 16 November 2022 from Brett Gerrard
30 November 2022 from Crombie Lockwood NZ
Limited

Determination: 22 December 2022

COSTS DETERMINATION OF THE AUTHORITY

[1] Mr Gerrard has made an application for contribution to his costs following Crombie Lockwood NZ Limited (CL) withdrawing its claim against him as second respondent in its original Statement of Problem (SOP) in these proceedings.

[2] CL in its SOP claimed Mr Gerard had breached his contractual obligations to it in relation to non-dealing and non-solicitation in relation to the loss of one of CL's clients, a client specific to facts relating to Mr Gerrard and not the first respondent. CL

sought a declaration that the contractual obligations were enforceable and breached; an order under s 137(1)(a)(i) of the Employment Relations Act 2000 (the Act) that Mr Gerrard comply with his contractual obligations of non-dealing, non-solicitation and confidentiality; unspecified financial damages and a penalty under s 134(1) of the Act.

[3] Following a telephone conference on 4 October 2022 and then Directions of the Authority dated 7 October 2022, CL lodged and filed an Amended Statement of Problem (ASOP) on 18 October 2022. The ASOP did not then include a claim against Mr Gerrard, and he was removed from the intituling as second respondent. This has been taken by the Authority and by Mr Gerrard¹ as a withdrawal of the claim against Mr Gerrard leaving these proceedings alive as to the first respondent, Mr Gibbons and the company, BMS Risk Solutions Limited (BMS).

Costs principles

[4] A party should receive a reasonable contribution to costs incurred in achieving a successful result. Costs are discretionary, modest, and are not a mechanism to punish the other party. Some cases may require costs to lie where they fall.²

[5] The Authority may use a notional daily tariff adjusting this up or down as appropriate depending on the case. Such an adjustment may take into consideration a liable party's means to pay costs, additional preparation required if a case is complex, and any conduct of a party that has unnecessarily increased costs.³ The current tariff applied for a one-day Authority investigation meeting is \$4,500.00 for the first day and \$3,500.00 for subsequent days. This amount is considered a starting point for assessing a reasonable contribution to the costs incurred by a party preparing for and taking part in an investigation meeting.

Mr Gerrard's submission

[6] Mr Gerrard submits that CL brought its claim 'knowing that it had no chance of success or simply not caring whether it had any justification for bringing such a claim beyond attacking Mr Gerrard's business reputation.' Mr Gerrard submits that he should be awarded a 40% share of the actual and reasonable costs he has incurred at his

¹ *Application for Costs for Second Respondent* (Mr Gerrard) dated 16 November 2022 at paragraph 4.

² Employment Relations Act 2000, Schedule 2, clause 15 and *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808, 819-820 and *Fagotti v Acme and Co Limited* [2015] NZEmpC 135 at 106-108.

³ As above.

counsels' rate of \$500.00 per hour. He submits that this would be \$3,480.00 based on preparation of a statement in reply; briefing of witnesses to claims relevant to Mr Gerrard including the preparation of a formal brief of evidence for a witness; a subsequent letter setting out problems with the claim against Mr Gerrard and inviting withdrawal of the same; preparation and attendance at a telephone conference and perusal of the amended statement of claim.

[7] While the above percentage is noted by Mr Gerrard, he submits that he should be awarded \$3,000.00 as a contribution to his costs which he submits is much less than 'indemnity costs' which he submits are justified in this case.

CL's submission

[8] CL submits that based on the Authority's practice costs are typically dealt with once a substantive determination has been made and that if the remaining respondents are ultimately successful in defending the claim there would be a risk of a duplication in any costs award made at a later date. In the alternative CL submits that any award should be modest and no more than \$1,125.00 based on a quarter day for the current tariff guide used by the Authority; that the costs claimed as a 40% share are not a fair split of costs incurred based on the pleadings; that an award of \$3,000.00 is not warranted because it relates to apparent actual costs which are not appropriate; that the briefing of a witness so early in the proceedings is an unnecessary cost that CL ought not to have to contribute towards.

Assessment and finding

[9] I agree that Mr Gerrard should have an award for costs now. The claim against him while based on similar provisions to the first respondent's employment agreement had a discreetly different factual basis. Given the Authority's awards for costs are modest as will be seen below, I find little risk there can be a duplication in the end result if the remaining respondents are successful.

[10] While Mr Gerrard seeks to have included the additional cost he has incurred for briefing a witness and obtaining a formal brief of evidence this was not a requirement at that early stage in the proceedings and I accept CL's submission that this is not something I should consider here.

[11] While Mr Gerrard submits that he should be awarded \$3,000.00, the proceedings had not reached a point where briefs of evidence were required to be lodged and served. By the time CL withdrew its claim against Mr Gerrard he would have incurred as part of the proceedings the cost of initial instruction, lodging a statement in reply (which was one document for Mr Gerrard); then preparation and attendance at a telephone conference. I do however accept the submission that there was little in the way of communication from CL to counsel for Mr Gerrard that it withdrew its claim against Mr Gerrard. I find it likely that Mr Gerrard incurred some further cost after the ASOP was lodged and served when this situation became apparent.

[12] Considering the above I find that an award of \$1,500.00 in costs is appropriate.

Order

[13] Crombie Lockwood (NZ) Limited is to pay \$1,500.00 to Brett Gerrard as a contribution to his costs.

Antoinette Baker
Member of the Employment Relations Authority