

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI  
TĀMAKI MAKĀURAU ROHE**

[2023] NZERA 29  
3148721

BETWEEN                      FREDRICK NELSON  
Applicant

AND                              DYNACO LIMITED  
First Respondent

AND                              SCOTT STEVENS  
Second Respondent

Member of Authority:      Nicola Craig

Representatives:            Simon Davies-Colley, counsel for the applicant  
Sharon Greig, counsel for the first applicant  
Richard Mark, counsel for the second respondent

Submissions Received:     25 November 2022 from the applicant  
9 December 2022 from the first respondent  
9 December 2022 from the second respondent

Date of Determination:     20 January 2023

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**COSTS DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] Fredrick Nelson was employed by Dynaco Limited trading as Tyrepower (Tyrepower or the company). Scott Stevens is the manager of the Tyrepower Kerikeri branch.

[2] In an earlier determination, the Authority found that Tyrepower and Mr Stevens had breached the confidentiality and non-disparagement clauses of a settlement agreement between the company and Mr Nelson.<sup>1</sup> A compliance order was made but no penalties imposed.

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<sup>1</sup> *Fredrick Nelson v Dynaco Limited and Scott Stevens* [2022] NZERA 591.

[3] The parties were encouraged to resolve the question of costs between themselves. That did not happen. Mr Nelson now seeks costs.

### **The parties' submissions**

[4] All parties provided submissions on costs.

[5] For Mr Nelson these included:

- Actual costs of over \$15,000 plus GST were incurred.
- Time for the investigation meeting should be assessed on 1.5 days, to include time for oral submissions and a dispute about mediation evidence, referred to below.
- Uplifts are sought for the lack of co-operation by Tyrepower and/or Mr Stevens in several regards. These included regarding service on Mr Stevens, undertakings sought and the mediation evidence issue.
- Disbursements of the Authority's filing fee and a service fee to arrange service on Mr Stevens are sought.

[6] Tyrepower concludes that costs should lie where they fall – it was not uncooperative, and Mr Nelson was unrealistic in his quantum of monetary claims.

[7] Mr Stevens supports costs lying where they fall. There was a finding of breaches of confidentiality and non-disparagement obligations but no compensation or penalty ordered against him. The result is seen as equating to a without prejudice offer of undertakings Mr Stevens made earlier.

### **Costs principles**

[8] The Authority is empowered to award costs.<sup>2</sup> Its discretion is governed by principles.<sup>3</sup> These include that costs will usually follow the event. The Authority specifies a notional daily tariff system with reductions and uplifts permitted.<sup>4</sup>

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<sup>2</sup> Employment Relations Act 2000, Schedule 2, clause 15.

<sup>3</sup> *PBO Limited (formerly Rush Security Limited) v Da Cruz* [2005] 1 ERNZ 808 and *Fagotti v Acme & Co Limited* [2015] NZEmpC 135.

<sup>4</sup> Employment Relations Authority Practice Note 2 - Costs in the Employment Relations Authority Te Ratonga Ahumana Taimahi, <https://www.era.govt.nz/assets/Uploads/practice-note-2.pdf>.

## **Costs Outcome**

### *Starting point*

[9] The in-person hearing lasted a full day (\$4,500 tariff). The hearing by audio visual link of submissions adds an additional quarter of a day at the second day \$3,500 rate which is \$875. These amounts total \$5,375.

### *Mediation evidence*

[10] The parties were unable to agree regarding the inclusion of material in Mr Nelson's initial witness statement which covered events at mediation. Written submissions were required and a determination issued.<sup>5</sup>

[11] For Mr Nelson it was argued that he could unilaterally waive mediation confidentiality on his own mediation statements. That was rejected in the determination. However, I did find that Tyrepower and Mr Stevens had impliedly consented through their statements in reply to the inclusion of some material about mediation. Roughly half the mediation material was permitted to remain with the rest redacted.

[12] Although this could be seen as mixed success for Mr Nelson, I conclude that pursuing retention of material was the only way he was able to ensure that any of the material was permitted to remain. I therefore consider that an uplift of \$750 should be permitted.

### *Attempts to resolve*

[13] Any attempt to resolve the matter a couple of months before lodging in the Authority was too premature to have an impact on costs relating to the proceeding.

[14] Attempts were made to settle the claim after it was lodged. The applicant made a *Calderbank* offer on 25 November 2021 but does not attempt to rely on it. Tyrepower regards its rejection of that offer as reasonable – due to the substantial monetary amounts involved and its reliance on the statement it sought from Mr Stevens about a situation it had no direct involvement in. I do not take that offer into account.

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<sup>5</sup> *Fredrick Nelson v Dynaco Limited and Scott Stevens* [2022] NZERA 307.

[15] Submissions for Tyrepower refer to a 13 December 2021 “*without prejudice save as to costs*” offer it made to Mr Nelson. That letter rejects Mr Nelson’s offer above, maintaining that his claims are without merit and the company is without fault. There is no offer to resolve as such. Given that Mr Nelson has succeeded in obtaining a determination that the company was in breach and an order for compliance, the letter does not assist Tyrepower’s position.

[16] Mr Stevens relies on an offer made on 7 December 2021 marked “*without prejudice save as to costs*”. In it he denies knowledge of the settlement or breaches, refuses to contribute to costs to date but offers to give undertakings.

[17] There is some basis for suggesting equation of the compliance order determination outcome with Mr Stevens’ offer of undertakings. However, that is not the full picture.

[18] Mr Stevens had provided a written statement to Tyrepower. There, his description of events effectively denies that he breached confidentiality or made disparaging comments about Mr Nelson. That statement was lodged with Tyrepower’s statement in reply.

[19] The involvement of two respondents adds complexity. Mr Nelson could have settled with Mr Stevens for the receipt of undertakings. But Tyrepower did not offer undertakings. Instead it relied on Mr Stevens’ denial of both knowledge of the settlement agreement and any breaches having occurred. Mr Nelson would likely have continued against the company, necessitating Mr Stevens giving evidence. Mr Nelson would have incurred costs for continuing but without being able to pursue costs against Mr Stevens.

[20] In addition the substantive determination provides some vindication for Mr Nelson’s consternation that he had been disparaged, his confidentiality rights infringed and his image stained in his new workplace.

[21] I take the offer from Mr Stevens into account in the apportionment of costs below.

### *Conclusion*

[22] The starting point of \$5,375 with the uplift of \$750 totals \$6,125. I am not persuaded about the other uplifts sought by Mr Nelson, as conduct unreasonably increasing costs is not established or has been dealt with elsewhere.

[23] I have considered proportionality. In light of penalties awarded for breaches of settlement agreements often being less than \$10,000, Mr Nelson incurred costs well above a monetary amount he was likely to obtain. He was not awarded penalties but succeeded in obtaining a finding of breaches and compliance orders.

[24] Mr Stevens' refusal to accept wrongdoing and Tyrepower's support of that version of events, is a significant cause of costs incurred in this matter. As noted in the previous determination, even on Mr Stevens' own evidence he disparaged Mr Nelson. Both parties should contribute to costs.

[25] The Authority has no information on any arrangements between Tyrepower and Mr Stevens regarding costs. Taking into account Mr Stevens' offer of undertakings, he should bear less of the costs burden. In terms of disbursements Tyrepower should pay for the Authority's filing fee and Mr Stevens for the cost of serving the proceedings on him.

[26] The following payments in contribution to his costs are to be paid to Mr Nelson within 28 days of the date of this determination:

- (a) \$4,422.25 and the filing fee of \$71.56 by Dynaco Limited trading as Tyrepower;  
and
- (b) \$1,702.75 and a service fee of \$103.50 by Scott Stevens.

**Nicola Craig**  
**Member of the Employment Relations Authority**