IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE

[2023] NZERA 70
3074714

	BETWEEN	TRADIES LADIES (2016) LIMITED Applicant
	AND	MICHELLE McKAY First Respondent
	AND	DINELLE GERARD Second Respondent
	AND	LISA MAREE HARLAND Third Respondent
	AND	ROYALE COURIERS LIMITED Fourth Respondent
Member of Authority:	Natasha Szeto	
Representatives:	Jeff Goldstein, counsel for the Applicant Robert Thompson, advocate for the First and Second Respondents Michael McDonald, advocate for the Third and Fourth Respondents	
Submissions received:	25 November 2022 from the Applicant 5 December from the First and Second Respondent 5 December 2022 from the Third and Fourth Respondent	
Determination:	16 February 2023	

COSTS DETERMINATION OF THE AUTHORITY

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[1] In a determination dated 22 November 2022, the Authority modified the restraint clauses of the first and second Respondents' employment agreements under section 162 of the Employment Relations Act 2000 (the Act), and section 83 of the Contract and Commercial Law Act 2017. Clause 11.4 relating to carrying on business in competition was modified from 6 months to 3 months, clause 11.5 relating to non-solicitation of clients was modified from 12

months to 3 months, and clause 11.6 relating to non-solicitation of employees was modified from 12 months to 3 months.

[2] The first Respondent Ms McKay was found to have breached the non-competition clause of her employment agreement (clause 11.4) and was ordered to pay damages of $5,000 to the Applicant for the loss it incurred as a result of that breach.

[3] Ms McKay was found not to have breached the non-solicitation clause of her employment agreement (clause 11.5), or the duty of fidelity to her employer in the manner asserted by the Applicant.

[4] The second Respondent Ms Gerard was found to have breached the non-solicitation clause of her employment agreement (clause 11.5), but there was found to be no loss of profit from the breach. Ms Gerard was found not to have breached her duty of fidelity to the Applicant.

[5] The third Respondent Ms Harland and fourth Respondent Royale Couriers Limited were found not to have incited, instigated, aided or abetted the first or second Respondents to breach the surviving restraint provisions of their employment agreements.

[6] The Applicant, first and second Respondents have therefore each had a degree of success in the matter.

[7] The third and fourth Respondents had complete success in defending the allegations against them.

[8] In both the interim and substantive determinations, the issue of costs was reserved. The parties were encouraged to resolve any issue of costs for both the interim and substantive matters between themselves. Unfortunately, they have been unable to do so. All parties have filed submissions in respect of costs within the timetable set down by the Authority.

[9] The Authority signalled that the parties could expect the Authority to apply its usual daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.

[10] The Applicant submits that the interim hearing took approximately one day, and the substantive hearing (while conducted over four days) took three days. The Applicant therefore claims four days' hearing time in terms of its costs. Mr Goldstein, on behalf of the Applicant,

submits that the first and second respondents should be ordered to pay $15,000 plus disbursements of $71.56 (being the filing fee) to the Applicant on a joint and several basis. He also submits that the Applicant should not be ordered to pay the third and fourth respondents any costs.

[11] The first and second Respondents claim three days' hearing time plus a 30 per cent uplift on the basis that the Applicant did not accept a 'without prejudice, save as to costs' offer (Calderbank Offer) from all four Respondents. Mr Thompson, on behalf of the first Respondent, claims costs against the Applicant of $4,500 for the first hearing day, plus a further two days at $3,500 per day. Mr Thompson seeks an uplift of 30 per cent, bringing the total costs claim to $14,950 by the first Respondent.

[12] Mr Thompson, on behalf of the second Respondent, claims costs against the Applicant of $4,500 for the first hearing day, plus a further two days at $3,500 per day. Mr Thompson seeks an uplift of 30 per cent, bringing the total costs claim to $14,950 by the second Respondent.

[13] The third and fourth Respondents also claim three days' hearing time (relating to 21 July, 22 July, and 2 November 2021). They also seek an uplift of 30 per cent on the same basis as the first and second Respondents. Mr McDonald on behalf of the third and fourth respondents, claims costs against the Applicant of $4,500 for the first hearing day, plus a further two days at $3,500 per day. Mr McDonald seeks an uplift of 30 per cent, bringing the total costs claim to $14,950 by the third and fourth Respondents.

The Calderbank Offer

[14] The Respondents made the Applicant a Calderbank Offer[1], that is a "without prejudice save as to costs" offer, by email dated 27 October 2020.

[15] The offer was made following the issue of the determination on the interim issue of restraining orders (11 November 2019) and prior to the first day of the investigation meeting on the substantive issues (first convened on 21 July 2021).

[16] The Calderbank Offer email offered the Applicant either a global payment of $25,500, or a split payment consisting of damages ($18,500) and costs ($7,000 + GST) as full and final

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1 *Calderbank v Calderbank* [1976] Fam 93 (CA).

settlement of all matters between the Applicant and all of the Respondents. The payment terms included a one-off payment of $8,500 within 14 days, and then further monthly payments of $1,000 until fully paid.

[17] The Calderbank Offer remained open for acceptance until 2 November 2020.

[18] The Applicant rejected the offer and on 4 November 2020 counter offered $34,000 in damages, and a contribution towards costs of $23,000 plus GST.

[19] The counter offer remained open for acceptance until 18 November 2020. The Respondents did not accept the counter offer.

[20] As at the date that the Calderbank Offer was made, the Applicant says that it had already incurred $21,104 in costs. Given that the Applicant's actual costs for both hearings were in the vicinity of $51,000, it incurred somewhere in the region of an additional $29,896 in actual costs following the Calderbank Offer.

Submissions of the Applicant

[21] Mr Goldstein submits for the Applicant that the Applicant has been successful in bringing its application and no special circumstances exist to depart from awarding the Applicant the full applicable daily tariff.

[22] In respect of the Calderbank Offer, it is submitted that the Authority ought not exercise its discretion to reduce an award of costs to the Applicant after considering the offer because:

(i) The offer came at a time when the Applicant had already incurred over $20,000 in costs to obtain interim restraining orders;

(ii) The offer was unreasonable because it provided for a lump sum payment followed by monthly instalment payments in the amount of $1,000 per month for 17 months;

(iii) The offer was incomplete as it did not provide a mechanism for the recovery of the balance in the event of a default, or indicate whether the parties were jointly and severally liable;

(iv) The offer was made by the Advocate for the first and second Respondents, and there was no offer made by the third and fourth Respondents.

[23] The Applicant submits that any reduction in the daily tariff will effectively penalise the Applicant for proceeding with its successful claims.

[24] The Applicant submits that it would be inappropriate and unfair to order the Applicant to pay any costs to the third and fourth Respondents, on the basis that the Authority found the third and fourth Respondents were "actively part of the charade that allowed the first respondent to operate, run and maintain the fourth respondent so it could compete with the Applicant".

Submissions of the First and Second Respondents

[25] The first and second Respondents are represented by Mr Thompson. They both dispute that the Applicant is entitled to any costs. They both allege that they incurred their own costs in defending the proceedings and that a number of claims were put to them that they were required to defend.

[26] The first Respondent relies on *Nisha v LSG Sky Chefs New Zealand*[2] by analogy to say that the Applicant had very limited success in its claim, and the first Respondent had overall success in overcoming the number of claims that were presented against her. The 'limited success', is the Authority's finding that Ms McKay breached the non-competition restraint in her individual employment agreement, which was accordingly modified. In respect of this breach, Ms McKay was ordered to pay a penalty of $5,000 in special damages to the Applicant.

[27] For the second Respondent, Mr Thompson submits that while Ms Gerard breached clause 11.5 of her individual employment agreement, there was no finding justifying an award of damages. Further, Ms Gerard did not breach her duty of fidelity.

[28] In terms of the Calderbank Offer, the first and second Respondents submit that the purpose of the offer was to enable the parties to save costs, and had the Applicant accepted the offer, all parties would have been better off in relation to costs. Further, the Respondents would not have been put to the expense of defending a number of complex claims.

[29] Relying on *Booth v Big Kahuna Holdings Limited*,[3] the first and second Respondents say that the Employment Court has made it clear that a robust approach is to be adopted to Calderbank letters. They seek a 30 per cent uplift in recognition of the Calderbank Offer that

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2 *Nisha v LSG Sky Chefs New Zealand (No 1)* [2018] NZEmpC 8.
3 *Booth v Big Kahuna Holdings Limited* [2015] NZEmpC 4.

was made. Alternatively, they submit that the Calderbank Offer effectively offsets the impact of any costs award against the Respondents, and that costs should lie where they fall.

Submissions of the Third and Fourth Respondents

[30] The third and fourth Respondents are represented by Mr McDonald. They submit that the Authority should exercise its discretion to order costs based on the principles set out in *PBO Limited (formerly Rush Security Ltd) v Da Cruz* (Da Cruz).[4]

[31] The third and fourth Respondents refer to, and adopt, the submissions applicable to an uplift as claimed by the first and second Respondents.

[32] The third and fourth Respondents submit that the Authority – in its determination on the substantive matter – rejected the claim that either Ms Harland or Royale Couriers (the fourth Respondent) were a 'front' for Ms McKay or Ms Gerard and rejected the claim that either of the third or fourth Respondents breached section 134 of the Act. The essence of their submission is that the third and fourth Respondents incurred unnecessary cost in defending the claims relating to their being parties to the breaches of the first and second Respondents.

Principles

[33] The power of the Authority to award costs arises from clause 15 of Schedule 2 of the Act which states:

> **15** Power to award costs
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> (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.

[34] Costs are at the discretion of the Authority.[5] The principles and the approach adopted by the Authority on which an award of costs is made, are well settled and outlined in *Da Cruz*. Costs awarded in the Authority generally start from the daily tariff, with adjustments made as appropriate to the circumstances of the case.[6]

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4 *PBO Limited (formerly Rush Security Ltd) v Da Cruz* EMC Auckland AC28/06, 12 May 2006.

5 *NZ Automobile Association Inc v McKay* [1996] 2 ERNZ 622.

6 Practice Note 2: Costs in the Employment Relations Authority Te Ratonga Ahumana Taimahi, 29 April 2022.

[35] It is usual for costs to 'follow the event'[7] with the unsuccessful party paying costs to the successful party.

[36] However, it can be difficult to determine which party has been successful. The Employment Court in *Coomer v J A McCallum and Son* observed that "Where both parties have had a measure of success determining which of them is entitled to costs is often a nuanced assessment of competing considerations".[8]

[37] In these cases of mixed success, the Authority must stand back and look at things "in the round".[9] Part of the consideration is that success – even limited – could not have been achieved without lodging a claim in the Authority.[10]

[38] The Court of Appeal in the case of *Weaver v Auckland Council*[11] noted that "success on more limited terms is still success".[12] A party that was successful only to roughly half the extent of its claims, was still held to be successful. The Court found no proper basis on which to displace the usual rule that the party who fails, should pay costs to the party who succeeds. The costs award was, however, reduced to acknowledge that the respondent's costs were significantly increased by having to meet ultimately unsuccessful arguments.

[39] A robust approach is to be adopted in relation to Calderbank Offers. The Employment Court has noted that such an approach is "consistent with the public interest in encouraging the acceptance of reasonable settlement offers and avoiding unnecessary litigation".[13]

[40] It is a principle set out in *Da Cruz* that costs are not to be used as a punishment. Awards made should be modest, and consistent with the Authority's equity and good conscience jurisdiction.

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7 *Coomer v J A McCallum and Son* [2017] NZEmpC 156.
8 Above n7 at [37].
9 Above n7 at [43].
10 Ibid.
11 *Weaver v Auckland Council* [2017] NZCA 330.
12 Above n11 at [26].
13 *Booth v Big Kahuna Holdings Limited* [2015] NZEmpC 4.

Costs Award

[41] The investigation relating to the Applicant and the first and second Respondents effectively ran for four days. This includes one day for the interim hearing on restraining orders, where the issue of costs was reserved until after the hearing of the substantive matter.

[42] The investigation relating to the Applicant and the third and fourth Respondents effectively ran for three days. Although the third and fourth Respondents were named in the Determination of 11 November 2019 and Ms Harland provided affidavits for the investigation meeting, these Respondents were not separately represented at the interim hearing as the application was for interim restraining orders against the first and second Respondents.

[43] The starting point therefore is that the Authority's usual daily tariff rate would equate to $15,000 in terms of the Applicant and first and second Respondents, and $11,500 in terms of the Applicant and third and fourth Respondents.

[44] In respect of the first and second Respondents, the Applicant's claims were in relation to the breaches of express terms of their respective employment agreements, and their express and implied duties of fidelity.

[45] Although the Authority found that the terms of the restraint of trade clauses were excessive (and accordingly reduced them), the Authority also found that the first and second Respondents had nevertheless breached their individual employment agreements.

[46] As against the first and second Respondents, the Applicant was the successful party in the proceedings, which was reflected in the findings of breaches, and an award of damages to it in respect of the first Respondent. The Applicant's (albeit limited) success could not have been achieved without filing a case in the Authority. However, the first and second Respondents' costs in this case were also significantly increased by having to respond to a number of ultimately unsuccessful claims.

[47] Having considered the issues "in the round" and noting the principle that costs in the Authority should be modest, I consider a costs award against the first and second Respondents in favour of the Applicant of half tariff costs to be appropriate.

[48] The Applicant's claim against the third and fourth Respondents was in respect of inciting, instigating, aiding or abetting the breaches.

[49] I do not accept the Applicant's submission that the Authority found that the third and fourth Respondents were actively part of a charade.

[50] The Authority found that Ms McKay was a key person in the establishment and operation of Royale Couriers during the period that her obligations to Tradies Ladies remained in place following the termination of her employment. However, that issue was appropriately taken into account in terms of Ms McKay's liability to her former employer under the "carrying on business in competition" clause.

[51] The third and fourth Respondents were found not to have aided and abetted the actions of the first and second Respondents. They were wholly successful in defending the claims against them and are entitled to be awarded costs at the tariff rate.

[52] I have carefully considered whether the Calderbank Offer dated 27 October 2020 should be taken into account to revise tariff costs either upwards or downwards.

[53] I accept the Respondents' submission that if the Applicant had accepted the original Calderbank Offer, all parties would have been in a better position with respect to costs than they are now.

[54] However, the Applicant submits that the offer was unreasonable in all the circumstances. It is also relevant that the Applicant did not ignore the Calderbank Offer. While it is questionable whether the Applicant meaningfully engaged with the offer, evidence has been provided to the Authority that the Applicant did respond with a counter offer to the Respondents.

[55] In the circumstances, I find that all parties share some responsibility for the failure of the Calderbank Offer to bring an end to proceedings prior to the investigation meeting on the substantive issues. Accordingly, I consider the Calderbank Offer to be a neutral factor in determining an appropriate award of costs, and I do not take it into account to revise tariff costs.

[56] Standing back and considering the matter in the round, I have had regard to the following in reaching a costs decision in this matter:

(i) principles set out in Da Cruz;

(ii) the time taken for the interim hearing, and Investigation Meeting;

(iii) the Applicant's limited success against the first and second Respondents;

(iv) the third and fourth Respondents' success in defending the claims made against them;

(v) the neutrality of the Calderbank Offer.

[57] I find that the Applicant should receive a costs award from the first and second Respondents, but given the Applicant's limited success against the first and second Respondents I consider half tariff costs of $7,500 to be a reasonable award. The filing fee of $71.56 is also awarded. The first and second Respondents are jointly and severally liable to pay this amount to the Applicant.

[58] I consider that the third and fourth Respondents, being wholly successful in their defence of the allegations against them, should receive a costs award from the Applicant. There is no reason to depart from the tariff. The Applicant is to make a payment of $11,500 to the third and fourth Respondents. This contribution to costs is to be appropriately apportioned between the third and fourth Respondents.

[59] The parties must pay the following:

(i) Michelle McKay and Dinelle Gerard are jointly and severally liable to pay Tradies Ladies (2016) Limited the sum of $7,500 plus $71.56 filing fee as a contribution to its actual costs pursuant to clause 15 of Schedule 2 of the Act; and

(ii) Tradies Ladies (2016) Limited is to pay Lisa Maree Harland and Royale Couriers Limited the sum of $11,500 to be appropriately apportioned between them, as a contribution to their actual costs pursuant to clause 15 of Schedule 2 of the Act.

Natasha Szeto
Member of the Employment Relations Authority