

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2024] NZERA 644
3250799

BETWEEN	COOKRIGHT FILTERING SERVICES LIMITED Applicant
AND	KEITH HILL First Respondent
AND	KAYE THOMAS Second Respondent

Member of Authority:	David G Beck
Representatives:	Megan Inwood, counsel for the Applicant Kaye Thomas, for the first and second Respondents
Investigation Meeting:	On the papers
Submissions Received:	16 September 2024 from the Applicant 27 September 2024 from the Respondents
Date of Determination:	30 October 2024

COSTS DETERMINATION OF THE AUTHORITY

The employment relationship problem

[1] In a preliminary determination of 13 December 2023, Authority Member Baker dealt with an application from Cookright Filtering Services Limited (Cookright), for injunctive relief against their former worker Keith Hill. In an amended application to the Authority of 27

October 2023, Cookright joined Kaye Thomas as an additional respondent but on an interim basis sought no orders against Ms Thomas.

[2] On an interim basis it was ordered:

- a) Until 30 June 2024, Keith Hill is not to directly or indirectly carry on or be interested in any capacity, including employment, in any business that is similar to Cookright's business in the area that is within 100 kilometres from the Richmond, Nelson Cookright base.
- b) Until 30 June 2024, Keith Hill is not to carry out services in any capacity, including employment, that are of the type provided by Cookright for any customers in the Nelson, Marlborough, and Tasman region who Mr Hill has engaged with for Cookright in the 6 months before the end of his employment.
- c) Until 30 June 2024, Keith Hill is not to offer services in any capacity, including employment, that are of the type provided by Cookright for any customers in the Nelson, Marlborough, and Tasman region who he has engaged with for Cookright in the 6 months before the end of his employment.¹

[3] Costs were reserved pending the substantive matter being resolved. Mr Hill and Ms Thomas did not participate in the investigation meeting dealing with the interim issues.

[4] The second investigation meeting was held over two days in Nelson and was followed by timetabled submissions from Cookright and Ms Thomas.

[5] In a further determination of 19 August 2024² I dealt with Cookright's substantive issues of:

1.1 Whether, during his employment with the Applicant (Cookright), the First Respondent (Mr Hill) breached:

- (a) his duty of good faith owed to the Applicant pursuant to the Employment Relations Act 2000 (ER Act), common law, and his Individual Employment

¹ *Cookright Filtering Services Ltd v Keith Hill and Kaye Thomas* [2023] NZERA 746.

² *Cookright Filtering Services Ltd v Keith Hill and Kaye Thomas* [2024] NZERA 495.

Agreement (IEA) by negligently losing / taking / retaining property which belonged to Cookright without Cookright's consent; and

(b) his duties of good faith, fidelity, non-conflict of interest, confidentiality, and non-solicitation owed to Cookright pursuant to the ER Act, common law, and his IEA by approaching customers and offering his services under what was either his own separate business or the business of his new employer.

1.2 Whether, after his employment with Cookright ended, Mr Hill breached:

(a) his duty of confidentiality and his obligation to return Cookright's property in his IEA by retaining property which belonged to Cookright, including customer details and physical property; and

(b) his duties of confidentiality, non-solicitation, and non-competition in his IEA by using his knowledge of Cookright's customer details, customer requirements, and pricing structures to approach Cookright customers and undercut Cookright's pricing to obtain their custom:

(i) for his own benefit and/or the benefit of his new employer; and

(ii) in a manner which has caused, and continues to cause, loss to Cookright.

1.3 Whether the Second Respondent (Ms Thomas) knowingly and deliberately aided and abetted in Mr Hill's breaches in his IEA set out above.

1.4 Whether Cookright should be granted interim and permanent injunctions to prevent further breaches of the duties still owed by Mr Hill pursuant to his IEA.

1.5 Whether Mr Hill should be ordered to return all Cookright's property, which is still in his possession, that he took or retained without Cookright's consent.

1.6 Whether compensatory damages should be awarded to Cookright for the losses caused by Mr Hill's repeated deliberate and flagrant breaches of his IEA.

1.7 Whether exemplary damages should be awarded to Cookright for Mr Hill's repeated deliberate and flagrant breaches of his IEA.

1.8 Whether penalties should be awarded, payable to Cookright by Mr Hill and/or Ms Thomas, pursuant to ss 4A and 134 of the ER Act for Mr Hill's deliberate, serious and sustained breaches of his duty of good faith and his IEA respectively.³

[6] While I did not uphold Cookright's claim against Mr Hill for breaching the non-compete restraint and other identified claims, I did find that despite being placed on notice of his obligations, Mr Hill breached a specific non-solicitation clause of his employment

³ At para 2.

agreement and an implied fidelity obligation both during and after his employment ceased and, that the non-solicitation provision was an enforceable restraint.

[7] In regard to Ms Thomas, I found she had direct awareness of the non-solicitation restraint in question and that she aided and abetted Mr Hill in breaching post-employment obligations.

[8] As a result, I ordered Mr Hill pay compensatory damages to Cookright for their loss of client custom in the sum of \$14,854.36 and I deemed it appropriate that penalties for the identified breaches be awarded against Mr Hill in the sum of \$8,000 and against Ms Thomas, in the sum of \$6,000. I ordered the penalties be paid to Cookright.

[9] Mr Hill took no part in the second investigation meeting but Ms Thomas without engaging a representative, provided written and oral evidence and submissions.

[10] The outstanding issue is the matter of how costs are to be allocated from both proceedings. In the absence of agreement, Cookright, who throughout engaged counsel, have applied for costs.

The application for costs

[11] Cookright's counsel seeks a contribution to costs for their client in the amount of \$11,163.87 from Mr Hill with a claim Ms Thomas should be jointly and severally liable for \$7,447.80 of that total. Disbursements of the Authority filing fee and a service fee were also claimed.

[12] The claimed figure was acknowledged as seeking an uplift to the daily tariff approach the Authority usually adopts on the basis that the matters involved some complexity and that Mr Hill and Ms Thomas engaged in obstructive conduct that unnecessarily increased Cookright's legal costs.

[13] In accepting that the Authority's notional daily rate is \$4,500.00 for the first day of an investigation meeting and \$3,500 for each day thereafter, Cookright claimed:

- a) \$2,250 for the half day interim investigation meeting on 22 November 2023 that was conducted by an audio-visual link and noted Ms Thomas was not the subject of any claim at this point so is not liable for this portion of claimed costs.
- b) \$4,500 for the full meeting day of 16 May 2024 and \$437.50 for the second day (given it was only one hour).
- c) An uplift of 50% on the above.

[14] While acknowledging the starting point is for the Authority to apply their usual daily rate, Cookright's counsel submitted other factors justified an uplift. These in summary were that:

- i) Multiple breaches were alleged involving more than ten customers and this required detailed investigation and submissions.
- ii) Mr Hill had adopted an exceptionally evasive and defiant approach that made the proceedings more difficult, costly, and time-consuming and examples of this were cited.
- iii) Ms Thomas failure to provide timely information as directed by the Authority necessitated the filing of additional submissions.
- iv) Ms Thomas engaged in unnecessarily argumentative and irrelevant correspondence with the Authority that required responses from Cookright's counsel.

The submission opposing costs.

[15] Ms Thomas made a submission for herself and Mr Hill opposing an award of costs and suggested broadly that due to Cookright's conduct of their investigation into Mr Hill that costs lie where they fall. While I do not traverse in detail the arguments presented by Ms Thomas, I accept they are genuinely felt but lacking in contextual relevance to the issue at hand. That is because the alleged conduct described and imputed to Cookright while not corroborated, largely did not occur during my investigation phase of the proceedings and

some of the matters raised more properly relate to the determination outcome that is currently before the Employment Court.

[16] However, I do take cognisance of the modest means of Mr Hill and Ms Thomas and their contention that they were, after initially incurring legal costs, unable to afford ongoing representation. I was also asked to consider the content of a Calderbank offer that Ms Hill considered was legally inappropriate but note that I am unable to consider this specific contention in the context of determining costs.

Assessment

The Authority's costs approach

[17] The Authority's discretion to award costs is well established and arises from Section 15, of Schedule 2 of the Employment Relations Act 2000.

[18] An issue is whether I should adjust the notional daily rate the Authority normally applies after considering Cookright's submissions.

[19] In assessing this matter, I initially dispose of the suggestion that Cookright's success was 'mixed' in the context of how this was dealt with in *William Coomer v JA McCallum and Son Limited* that noted:

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. In *Weaver*, the Court said that the appellants were the only party to have succeeded by any 'realistic appraisal'. That conclusion followed because they obtained a monetary award It was immaterial that they had not succeeded to the full extent of their claim because' ... success on more limited terms is still success.⁴

⁴ *William Coomer v JA McCallum and Son Limited* [2017] NZEmpC at [37] – [43].

[20] Here for the first part, Cookright successfully obtained interim orders against Mr Hill. This success was not partial and although the investigation meeting was short, the Authority recognises that in interim proceedings significant preparation time of obtaining supporting affidavits and legal submissions is required.

[21] Further for the second part the substantive matter, Cookright was not wholly successful from a compensatory standpoint in all of their claims but did obtain significant findings against Mr Hill and Ms Thomas, that led to the imposition of penalties. I do not consider the issues in dispute were legally complex.

Applying the daily rate

[22] As outlined in the determination,⁵ the Authority's approach is to apply a notional daily rate and only adjust this if persuaded that particular circumstances or other factors require an upward or downward movement.⁶

[23] The discretion it is accepted, is guided by principles set out in *PBO Limited (formerly Rush Security Ltd) v Da Cruz*⁷ including costs are not to be used as a punishment or as a reflection on how either party conducted proceedings and that awards are to be made consistent with the equity and good conscience jurisdiction of the Authority.⁸

Assessment

[24] Taking all the factors identified in submissions into account and applying the Authority's discretion I consider that a fair costs award in favour of Cookright to reflect their interim and substantive success in all the circumstances is one of an application of the notional daily rate and legitimate disbursements.

⁵ Ibid at [103].

⁶ For further information about the factors considered in assessing costs see:

www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1

⁷ *PBO Limited (formerly Rush Security Ltd) v Da Cruz* [2005] 1 ERNZ 808.

⁸ Section 160(2) Employment Relations Act 2000.

Orders

[25] Keith Hill is to pay Cookright Filtering Services Limited a contribution to their costs in the amount of \$7,187.50 and disbursements of \$382.62 being a document service fee and \$71.55 for the Authority filing fee. In addition, the Authority orders that Kaye Thomas is jointly and severally liable for a proportion of the costs award in the amount of \$4937.50.

David Beck
Member of the Employment Relations Authority