

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2018] NZERA Christchurch 37
5644196

BETWEEN ADVANCED PERSONNEL
SERVICES LIMITED
Applicant

A N D GRAHAM PITMAN
Respondent

Member of Authority: David Appleton

Representatives: Jeff Goldstein and Linda Ryder, Co-Counsel for
Applicant
Peter McRae, Counsel for Respondent

Investigation Meeting: Determined on the papers

Submissions Received: 31 January 2018 on behalf of Applicant
None received on behalf of Respondent

Date of Determination: 22 March 2018

**COSTS DETERMINATION OF THE
AUTHORITY**

- A. The applicant is entitled to a contribution towards its legal costs from Mr Pitman in relation to the quantum investigation in the sum of \$5,400, plus a further sum of \$152.17 in relation to a disbursement (excluding GST).**

[1] By way of a determination of the Authority dated 8 December 2017¹ the Authority made a number of findings in respect of quantum, following an earlier determination of the Authority, dated 11 September 2017², which found that Mr Pitman was liable to the

¹ [2017] NZERA Christchurch 213. NB, This determination was issued to the parties subject to a blanket prohibition from publication order which remains in place.

² [2017] NZERA Christchurch 151.

applicant in respect of a number of breaches of his employment agreement, and his duty of fidelity and good faith, in relation to assisting a rival business to set up in competition.

[2] In the quantum determination I reserved costs in relation to the investigation into quantum, and gave the parties the opportunity to agree costs if they could. They have been unable to do so and Mr Goldstein and Ms Ryder have lodged submissions in accordance with the Authority's timetable. No submissions have been received from or on behalf of Mr Pitman. This is possibly because he has challenged the Authority's quantum determination in the Employment Court.

[3] The challenge of a substantive determination in the Employment Court does not operate to stay the determination of costs by the Authority.

[4] The Authority's power to award costs is set out in clause 15 of Schedule 2 of the Act, which provides as follows:

15 Power to award costs

(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.

[5] The Authority is bound by the principles set out in *PBO Ltd v. Da Cruz*³ when setting costs awards. These include:

- a. There is discretion as to whether costs would be awarded and in what amount.
- b. The discretion is to be exercised in accordance with principle and not arbitrarily.
- c. The statutory jurisdiction to award costs is consistent with the equity and good conscience jurisdiction of the Authority.
- d. Equity and good conscience are to be considered on a case by case basis.
- e. Costs are not to be used as a punishment or as an expression of disapproval of the unsuccessful party's conduct although conduct which increased costs unnecessarily can be taken into account in inflating or reducing an award.

³ [2005] 1 ERNZ 808

- f. It is open to the Authority to consider whether all or any of the parties' costs were unnecessary or unreasonable.
- g. That costs generally follow the event.
- h. That without prejudice offers can be taken into account.
- i. That awards will be modest.
- j. That frequently costs are judged against a notional daily rate.
- k. The nature of the case can also influence costs and this has resulted in the Authority ordering that costs lie where they fall in certain circumstances.

[6] Mr Goldstein and Ms Ryder submit that the applicant should be awarded a contribution towards its costs on the basis that costs should follow the event, and that the applicant was successful. Whilst the applicant did not recover as much as it was seeking, it was substantially successful in the quantum claim, recovering awards of special damages and interest thereon, an award of general damages, and the recovery of costs and expenses in relation to reasonable costs incurred on an indemnity basis, pursuant to an indemnity clause in Mr Pitman's employment agreement. A penalty was also imposed upon Mr Pitman upon the application of the applicant. I therefore agree that the applicant is entitled to recover a contribution towards its costs.

[7] Mr Goldstein and Ms Ryder say that they billed the applicant a total of \$6,600 plus GST and disbursements of \$175 including GST, having written off unbilled work in progress of a further \$6,182.

[8] Mr Goldstein and Ms Ryder submit that costs should be awarded on an indemnity basis in reliance on a clause in Mr Pitman's employment agreement, clause 26, which stated as follows:

In the event of any failure by the Employee to comply with this clause⁴ the Employee shall indemnify the Employer against all losses, liabilities, costs, claims, charges, expenses, actions or demands which the Employer may incur as a result of any failure to perform these obligations.

[9] In the quantum determination I examined in detail whether this clause could be relied upon by the applicant to recover its reasonable costs on an indemnity basis in

⁴ Which imposed restraint of trade obligations upon Mr Pitman.

respect of pursuing its contractual rights against Mr Pitman. In so doing, I concluded the following:

- a. That the principles of *George v Auckland Council*⁵ did apply to proceedings in the Authority, and so could be relied upon by the Authority to order Mr Pitman to pay solicitor to client costs to the applicant on an indemnity basis;
- b. That the indemnity clause is just one of the factors that the Authority should take into account when applying *PBO v Da Cruz*;
- c. That the indemnity clause in question was wide enough to encompass the applicant's legal costs;
- d. That public policy reasons did not prevent the Authority from ordering costs to be paid on an indemnity basis in reliance upon the indemnity clause; and
- e. That the 'steely approach' that the Authority has been directed to use by the Employment Court when a valid Calderbank offer has been made is also relevant where a party seeks to rely upon an indemnity clause in an employment agreement.

[10] My conclusions have been challenged by Mr Pitman in the Employment Court, but no judgement has yet been issued. Therefore, on the basis of my previous analysis and conclusions, and on the further, unchallenged, basis that the Authority has found that clause 26 had been breached by Mr Pitman, I find that it is appropriate to apply the same principle in respect of the costs incurred by the applicant in taking part in the quantum investigation. Were it not for the breaches of clause 26 by Mr Pitman, those costs would not have been incurred by the applicant as the quantum investigation would not have been necessary.

[11] Are the costs charged to the applicant reasonable? I believe they are. The Authority's quantum investigation meeting took most of a working day, and the matters being investigated were not run of the mill matters usually determined by the Authority. A reasonable amount of evidence had to be presented and submissions on the law made in relation to a number of issues, including:

⁵ [2014] NZEmpC 100

- a. Whether more than a loss of a chance had been incurred;
- b. the calculation of special damages by reference to three clients of the applicant;
- c. the effect on the calculation of special damages of a settlement sum paid to the applicant by the second respondent of earlier proceedings to settle a penalty action against it;
- d. the award of interest;
- e. the award of general damages;
- f. the issue of indemnity costs; and
- g. whether a penalty should be imposed.

[12] However, the invoice for \$6,600 was in relation to all of the work done by Mr Goldstein and Ms Ryder in respect of the quantum investigation, and that included assessing elements of loss and damage arising from breaches of other duties than those set out in clause 26. In my quantum determination, I estimated that two thirds of the work had been in relation to clause 26 and one third in relation to other matters. I therefore reduced the costs sought by one third. I believe that a similar approach should be adopted in relation to the costs of the quantum investigation, as it is impossible to know which losses were attributable to breaches of clause 26 and which to other breaches. I therefore reduce \$6,600 by a third, resulting in costs of \$4,400.

[13] It is therefore appropriate to award to the applicant the sum of \$4,400 by way of costs, plus the disbursement of \$152.17 in relation to the GST exclusive element of the accommodation costs of Ms Ryder and Mr Goldstein which was billed to the applicant. I deduct GST because the applicant, being GST registered, will have been able to have recovered the GST element by way of a set off against its own GST obligations.

[14] Mr Goldstein and Ms Ryder also seek a pro-rata portion of the daily tariff for the quantum findings made in relation to the remaining breaches. I understand this to mean the breaches that the Authority found other than breaches of clause 26 of Mr Pitman's employment agreement. I believe that that is appropriate, but that the approach should be to award one third of the daily tariff attributable to the quantum investigation.

[15] I must disagree with counsel that the appropriate daily tariff is \$4,500. That is the tariff which applies for matters lodged in the Authority from 1 August 2016 for the first day of any matter. The quantum investigation meeting was not the first day of the matter as a liability investigation had already occurred. The correct daily tariff is \$3,500 as the quantum investigation was a 'subsequent day'⁶. One third of that sum is \$1,166. I round it down to \$1,000 as the investigation meeting was not a full working day.

Order

[16] I order Mr Pitman to pay to the applicant within 21 days of the date of this determination the following sums as a contribution towards its costs reasonably incurred:

- a. \$5,400, and
- b. \$152.17.

David Appleton
Member of the Employment Relations Authority

⁶ Practice Note 2 Costs in the Employment Relations Authority, clause 4.