IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

[2013] NZERA Christchurch 27
5295883

BETWEEN	DESIGN ENGINEERING (SI) LIMITED Applicant
A N D	WARWICK JOHN KEARINS Respondent

Member of Authority:	Helen Doyle
Representatives:	Craig O'Connor, Counsel for Applicant Tony Shaw, Counsel for Respondent
Submissions Received:	20 December 2012 from Applicant 23 January 2013 from Respondent
Date of Determination:	5 February 2013

COSTS DETERMINATION OF THE AUTHORITY

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[1] There have been two investigation meetings and two determinations in this matter.

[2] The first investigation meeting was held to determine whether the respondent was bound in his employment agreement by restrictive covenants and a confidentiality provision. The respondent argued that he had resigned from his employment and was then re-employed and not bound by the restrictive covenants in the earlier signed employment agreement. Further he said that the employment agreement produced to the Authority was not in fact the employment agreement he had signed when he commenced his employment originally. In the event that the Authority found that the respondent was not bound by the restrictive covenants then there was an alternative cause of action advanced that there had been a breach of the implied terms of confidentiality and fidelity. In the event it was found that the respondent was so bound there was a challenge to the reasonableness of the covenants. There was only limited evidence provided by the applicant of damage suffered with respect to the loss of one major client.

[3] In its determination dated 17 September 2010, the Authority found that the respondent was bound in his employment agreement by the restrictive covenants and found, subject to modification, the non-solicitation covenant was reasonable. The Authority directed the parties to mediation prior to making any order as to modification and requested that the parties advise the Authority of any progress with respect to the matter. Costs were reserved until the matter was finally determined. The Authority did not determine damages suggesting that that was also a matter for the parties to consider at mediation.

[4] The parties attended mediation on 17 May 2011 but the matter did not settle.

[5] A further investigation meeting was then held to determine the issue of modification of the restrictive covenant, issues of breach and damages. In a determination dated 28 November 2012, the non-solicitation covenant was modified, it was found to have been breached with the breach causative of a loss of work from a large client to the applicant and damages were ordered payable by the respondent to the applicant in the sum of $13,169.23 together with interest. Costs were reserved and a timetable set for the lodging and service of submissions.

[6] Submissions have now been received from both counsel.

The applicant's submissions

[7] Mr O'Connor in his submissions acknowledges that generally comparisons in relation to the general principles of costs in the Employment Relations Authority should not be made with other jurisdictions. Nevertheless he submits that this matter was quite different from a personal grievance being a proven breach of a restraint of trade covenant following the end of the employment relationship.

[8] He submits that the Authority should depart from its usual approach and he provided an alternative approach to costs based on Schedules 2 and 3 of the District Courts Rules. On that basis, excluding the mediation costs, Mr O'Connor set out what the District Court would have found to be the applicable costs calculated on 1A and 2B. For three half days excluding mediation, the applicant would have been awarded under 1A $5,922.50 and under 2B $10,075.

[9] Mr O'Connor submits that the second investigation meeting as to damages was appropriate and necessary and that the Authority's request following that meeting

for further information regarding calculation of damages would not have obviated the need for the damages hearing even if it had been produced at an earlier time.

[10] Mr O'Connor submitted that the central issue at the first investigation meeting could not be regarded as an uncomplicated one. He submits that the total amount of damages would not be an applicable figure to calculate costs from and that costs should fall within the range $6,000-10,000 for what he described as a relatively complex course of action. Mr O'Connor also claims on behalf of the applicant disbursements of $70 for a filing fee, tolls $52.27, faxes/photocopying $185.80.

The respondent's submissions

[11] In his submissions, Mr Shaw does not accept that costs should be calculated on a 2B scale using the District Courts Rules and refers the Authority to the leading judgment regarding costs in the authority in *PBO Ltd v. Da Cruz* [2005] 1 ERNZ 808.

[12] Mr Shaw refers to the principle that awards will be modest in the Authority and that the Authority has often dealt with costs by reference to a daily tariff. The daily tariff is now recognised by the Authority as $3,500. Mr Shaw submits that notwithstanding the daily tariff, there have been a number of cases where costs have been fixed at a lower rate of $2,000-3,000 per day.

[13] Mr Shaw was critical in his submission that the applicant failed to produce evidence as to its losses at the first investigation meeting. He submits that there was no reason why damages could not have been dealt with at the first investigation meeting. Had this occurred he submits that would have meant that a further mediation was not required nor a subsequent hearing as to quantum.

[14] Mr Shaw was also critical that the applicant at the resumed hearing sought to rely on an industry standard rule of thumb for calculation of damages requiring further the Authority to request further information as to loss.

[15] Mr Shaw submits the additional costs of the second mediation, second investigation meeting and the response to the affidavit were unreasonably incurred because the applicant did not provide adequate evidence at the initial hearing as to damages resulting in a straightforward matter becoming drawn out and overly complicated.

[16] Mr Shaw submits that while the applicant should be entitled to costs for the initial hearing, it should not be awarded costs in respect of the second hearing or for providing affidavits. He submits that costs in the second hearing should lie where they fall and at best the first hearing costs should be $1,750 for a half day and further that the quantum of damages awarded justifies only a modest level of costs.

[17] Mr Shaw also submits that Mr O'Connor had failed to advise the Authority of the actual costs incurred by the applicant and on that basis Mr Shaw submits any costs award should be based on a modest daily tariff sum and that $6,000-10,000 is excessive.

Determination

[18] The Authority requested from Mr O'Connor information regarding actual costs incurred by the applicant. Mr O'Connor promptly provided that information and advised that an account for legal services of $3,226.97 which sum included GST and disbursements was rendered to the applicant on 15 April 2010. That account was rendered therefore before the first investigation meeting on 4 June 2010. Mr O'Connor subsequently advised that additionally there was $17,260 recorded as unbilled time together with $190.45 for disbursements.

[19] Mr Shaw was given an opportunity to comment on the actual costs. In an email to the Authority copied to Mr O'Connor he advised that there was still nothing provided to the Authority about actual costs and he requested the Authority take account of a doubling up of costs because there had been a change of solicitors between the first and second investigation meetings.

[20] In *PBO* it was held by the Full Court of the Employment Court that the basic tenets that the Authority has held to since its inception when considering costs are appropriate and consistent with its functions and powers. It recognised that each case had to be considered in light of its own circumstances.

[21] It held at para.[46] that there was nothing wrong in principle with the Authority's tariff-based approach so long as it is not applied in a rigid manner without regard to the particular circumstances of the case. Undue rigidity could therefore be avoided by adjustment either up or down to the tariff in a principled way without compromising the Authority's approach to costs. I do not accept that costs should be determined on the basis of the District Court scale.

[22] I turn to the first investigation meeting. Different counsel represented the parties at that meeting. The meeting was, in effect, a full day. Although there was a slightly earlier finish time, the luncheon adjournment was short. Full and helpful written submissions were received after the meeting. There were elements of complexity. The respondent's unsuccessful argument that he was not bound by the employment agreement as he had resigned and had been re-employed occupied time in the evidence and submissions. It also resulted in two alternative causes of action with respect to alleged breaches of implied terms of confidentiality and fidelity.

[23] It is appropriate to start with the daily tariff of $3,500. Taking into account the complexities of this matter and the lengthy submissions from both counsel at this time, I find an upward adjustment is called for of $800 to the daily tariff.

[24] Costs for the first meeting are therefore $4,300 together with a filing fee of $70.

[25] Both counsel agree that the hearing time for the second investigation meeting was half a day. I have considered Mr Shaw's submission that evidence should have been provided with respect to damages at the first investigation meeting. There was an estimation only of damages. As I recorded in my determination at the time the claim for damages would have to be revised as a result of findings and particularly in respect of any modifications. It would not have been fair to either party to simply have determined damages at that time without sufficient evidence. I am not satisfied that there should be a discount because quantum was revisited at a later stage. That is not an unusual occurrence in matters of this nature.

[26] I am satisfied that it would have been necessary to hold a meeting in any event regardless of whether or not the information that was requested by the Authority after the second investigation meeting was provided. The respondent would have wanted to give evidence as would the applicant and it was helpful to have submissions at that stage.

[27] I do accept, however, that there was what could only be described as a deliberate intention not to provide that evidence at the earlier time and that this did put the respondent to some disadvantage and also some expense in responding to the affidavit. The applicant is not entitled to an adjustment upward with respect to providing that material at the later time.

[28] I intend, therefore, to deal with the matter in this way. I consider that the daily tariff should be applied but reduced to reflect that the meeting was effectively a half day meeting. That is the sum of $1,750. I make no adjustment to that award.

[29] I have already made an award for the disbursement for the filing fee of $70. In relation to the other disbursements, I note the Employment Court generally restricts reimbursement of disbursements to genuine disbursements for payment to third parties. I make no award in terms of photocopying or tolls.

[30] I order Warwick Kearins to pay to Design Engineering (SI) Limited the sum of $6050 being costs and $70 disbursements.

Helen Doyle
Member of the Employment Relations Authority