

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2016] NZERA Auckland 67
5559723

BETWEEN TEX ONSITE LIMITED
Applicant

A N D GRAEME BRETT HILL
Respondent

Member of Authority: Anna Fitzgibbon

Representatives: Maria Dew, Counsel for the Applicant
Garry Pollak, Counsel for the Respondent

Submissions Received: 23 December 2015 from the Applicant
25 February 2016 from the Respondent

Date of Determination: 02 March 2016

COSTS DETERMINATION OF THE AUTHORITY

- A. Graeme Brett Hill is ordered to contribute \$48,236.63 costs and disbursements to Tex Onsite within 21 days of the date of this determination.**

The substantive determination

[1] In a written determination of the Authority dated 21 January 2016¹, the Authority determined, in summary, that:

- Mr Hill breached express clauses of his individual employment agreement with Tex Onsite together with implied duties of fidelity and loyalty to it.

¹ [2016] NZERA Auckland 25

- As a result of Mr Hill's breaches of his employment agreement with and implied duties to Tex Onsite, Mr Hill was liable to pay both special and general damages, together with interest, to Tex Onsite.
- Mr Hill was liable to pay penalties to Tex Onsite under the Employment Relations Act 2000 (the Act).
- Mr Hill was to immediately return any Tex Onsite property in his possession to it.

Costs memoranda filed by the parties

[2] In closing written submissions, on behalf of Tex Onsite, Ms Dew seeks indemnity legal costs and disbursements from Mr Hill totalling \$83,633.

[3] In the alternative, Ms Dew seeks costs at the Authority's notional daily tariff of \$3500 per day for a total of 3 days for the first investigation meeting on 8 June 2015 and the substantive investigation meeting on 16 and 17 December 2015. In addition, Ms Dew seeks the notional daily tariff for 6 days preparation plus disbursements. Legal costs claimed at the notional daily tariff amounts to \$31,500. Disbursements claimed amount to \$19,247.12 including GST. Alternative costs and disbursements total \$50,747.12 including GST.

[4] Ms Dew has provided the Authority with a breakdown of costs and disbursements incurred by Tex Onsite and supporting invoices.

[5] A memorandum of costs in reply was filed by Mr Pollak on behalf of Mr Hill. Mr Pollak does not take issue with Ms Dew's costs. However, Mr Pollak submits the level of costs sought reflect costs sought by a party in the High Court and not in the Authority. Mr Pollak submits that the Authority should award costs in accordance with its normal daily tariff for the 2 day investigation meeting held on 16 and 17 December 2015.

Authority's power to award costs

[6] The Authority's power to award costs arises from Schedule 2, clause 15 of the Act. This confers a wide discretion on the Authority to award costs and expenses as it thinks reasonable.

[7] The principles guiding the Authority's approach to costs are set out by the Full Employment Court in *PBO Ltd (formerly Rush Security Ltd) v. Da Cruz*².

[8] Principles identified in *PBO*³ include:

- *There is a discretion as to whether costs would be awarded and what amount.*
- *The discretion is to be exercised in accordance with principle and not arbitrarily.*
- *The statutory jurisdiction to award costs is consistent with the equity and good conscience jurisdiction of the Authority.*
- *Equity and good conscience is to be considered on a case by case basis.*
- *Costs are not to be used as punishment or 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.*
- *It is open to the Authority to consider whether all or any of the parties costs were unnecessary or unreasonable.*
- *That costs generally follow the event.*
- *That without prejudice offers can be taken into account.*
- *That awards will be modest.*
- *That frequently costs are judged against a notional daily rate.*
- *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.*

² [2005] 1 ERNZ 808

³ Ibid at para.[44]

[9] These principles were recently considered and affirmed by a full Court of the Employment Court in *Fagotti v Acme & Co Limited*⁴.

[10] In *Rodkiss v Carter Holt Harvey Limited*⁵ Judge Ford referred to the following passage from *Fagotti*⁶:

As to the question of the utility and value of a “notional daily rate” for costs, we agree that there is significant value in a commonly applied and well publicised notional daily rate for costs in the Authority. This enables parties and their representatives to assess more accurately from the outset what may be a very important element of the litigation (costs) when undertaking the regular economic analys[is]s that parties and their representatives should undertake during that process. This was put succinctly and recently in the costs judgment in Booth v Big Kahuna Holdings Ltd where it was said that parties who elect to incur costs that are likely to exceed the Authority’s notional daily rate are “entitled to do so it cannot confidently expect to recoup any additional sums.

[11] The general principle is that costs follow the event. Tex Onsite was entirely successful in its claim against Mr Hill and should be awarded costs. This appears to be accepted by Mr Hill. The question is whether indemnity costs or costs in accordance with the Authority’s normal approach are appropriate in the circumstances.

Tex Onsite’s costs

[12] Tex Onsite seeks its actual costs and disbursements of \$83,633 from Mr Hill. Costs comprise legal fees of \$66,866, disbursements of \$630 for parking, hearing fees and similar items and \$16,137 being the costs of deCipher Ltd, the provider of digital forensic expertise.

[13] In her memorandum as to costs, Ms Dew submits that indemnity costs are appropriate because:

- Tex Onsite took reasonable steps to avoid the litigation by sending a letter to Mr Hill’s solicitors on 29 April 2015;
- Mr Hill has engaged in “*exceptionally bad behaviour by his breaches of the employment agreement and behaviour before the Authority ...*”;

⁴ [2015] NZEMPc 135

⁵ [2015] NZ EmpC147 at para.[19]

⁶ Supra at para.[108]

- Mr Hill has conducted a “*hopeless*” defence to Tex Onsite’s claim and has put Tex Onsite to unnecessary costs; and
- Mr Hill has been on notice that indemnity costs have been sought from the outset of the proceeding.

Letter of 29 April 2015

[14] The letter of 29 April 2015 sought undertakings from Mr Hill in respect of his post-employment obligations set out in his employment agreement, the return of Tex Onsite property, the withdrawal from a contract with one of Tex Onsite’s customers and the provision of names and details of Tex Onsite customers he dealt with during his employment by Tex Onsite.

[15] Mr Hill’s response was communicated through his solicitor denying breaching any obligations to Tex Onsite and denying allegations that he had entered into a contract with a Tex Onsite customer.

[16] Tex Onsite commissioned the services of Mr Michael Spence, the Managing Director of, and principal digital forensic specialist at deCipher Limited to conduct an examination of the Samsung Galaxy S4 smart phone and Toshiba Satellite Pro laptop used by Mr Hill while employed by it. Mr Spence’s report identified that an ADATA USB memory device had been attached to the Toshiba laptop.

Filing statement of problem - 29 May 2015

[17] The time line of events which followed is set out in the Authority’s determination⁷. Mr Spence’s report led to the issuing by Tex Onsite of urgent proceedings seeking various orders including a witness summons for Mr Hill to produce, among other things, digital devices to the Authority for inspection.

[18] A statement of problem claiming various breaches by Mr Hill of his employment and post-employment obligations was filed contemporaneously with the application for witness summons.

⁷ [2016] NZERA Auckland 25 at paras.[77]-[87]

Telephone conference – 5 August 2015

[19] Mr Hill instructed Counsel and filed a statement in reply. At a telephone conference held on 5 August 2015 to schedule the Investigation Meeting for the matter including the exchange of witness statements, Mr Hill's Counsel indicated 10 witnesses would be called on his behalf. Counsel agreed that a 5 day investigation meeting was required. The investigation meeting was accordingly scheduled to commence on Tuesday 15 December 2015 and continue until Monday 21 December 2015. Mr Hill subsequently appointed further experienced counsel.

Further telephone conference- 1 December 2015

[20] At a telephone conference on 1 December 2015, to discuss the filing of Mr Hill's witness statements, the Authority was informed that both Mr Hill's counsel no longer had instructions to act and were withdrawing. This was just two weeks before the Authority's investigation meeting was to commence. Consequently, Mr Hill represented himself at the Authority's investigation meeting and called one witness in addition to himself.

Memorandum in reply

[21] In response to Ms Dew's memorandum as to costs, Mr Pollak submits there is no reason for the Authority to depart from its normal approach to costs, that costs sought are considerably in excess of scale costs in the High Court and that Mr Hill was unrepresented and this is a significant factor to be taken into account by the Authority when awarding costs.

Indemnity costs?

[22] The Court of Appeal in *Bradbury v. Westpac Banking Corporation*⁸ considered the broad approaches to standard, increased, and indemnity costs. In summarising indemnity costs, the Court stated:

... Indemnity costs may be ordered where that party has behaved either badly or very unreasonably.

[23] At para.[28] of the decision, the Court of Appeal stated:

⁸ [2009] 3 NZLR 400 at para.[27]

Indemnity costs, which depart from the predictability of the Rules Committee's regime, are exceptional and require exceptionally bad behaviour. That is why to justify an order for such costs the misconduct must be "flagrant": Prebble v. Awatere Huata (No 2) [2005] 2 NZLR 467 at [6] (SC) [29]. We therefore endorse Goddard J's adoption in Hedley v. Kiwi Cooperative Dairies Ltd [2002] 16 PRNZ 694 at [11] (HC) of Sheppard J's summary in Colgate v. Cussons at [24]. While recognising that the categories in respect of which the discretion may be exercised and not closed (see R.14.6(4)(f)), it listed the following circumstances in which indemnity costs have been ordered:

- (a) *The making of allegations of fraud knowing them to be false and the making of irrelevant allegations of fraud;*
- (b) *Particular misconduct that causes loss of time to the Court and to other parties;*
- (c) *Commencing or continuing proceedings for some ulterior motive;*
- (d) *Doing so in wilful disregard of known facts or clearly established law;*
- (e) *Making allegations which ought never to have been made or unduly prolonging a case by groundless contentions, summarised in French J's "hopeless case" test.*

[24] Judge Inglis in *Tomo v Checkmate Precision Cutting Tools Ltd*⁹ stated at para.[9]:

Indemnity costs may be justified in relatively rare cases where a party's conduct is particularly egregious.

[25] The manner in which Mr Hill conducted himself when responding to Tex Onsite's claims against him, as outlined above, caused unnecessary cost to Tex Onsite.

[26] Mr Hill's conduct did not include making allegations of fraud knowing them to be false, which is a category of case identified in *Bradbury* as justifying indemnity costs. Nor was Mr Hill's defence entirely "hopeless" which is another category of case identified in *Bradbury*.

[27] However, Mr Hill acted in a manner before the Authority which increased Tex Onsite's costs. This conduct was noted by the Authority and is recorded above and in

⁹ [2015] NZEmpC 2)

its substantive determination.¹⁰ This is another category of case identified in *Bradbury* which can justify indemnity costs.

[28] Tex Onsite's actual costs and disbursements amounted to \$83,633. An award of indemnity costs would be disproportionate to the remedies claimed by Tex Onsite and to the remedies awarded to it by the Authority in its substantive determination. Remedies awarded by the Authority amounted to \$92,058. Penalties were awarded in addition.

[29] In all the circumstances, the Authority considers an uplift in costs is entirely appropriate rather than an award of indemnity costs.

An uplift of the Authority's daily tariff

[30] The normal starting point for costs in the Authority is \$3,500 per day see *Fifita (aka Bloomfield) v. Dunedin Casinos Ltd*¹¹. This matter involved an investigation meeting of two full days on 16 and 17 December 2015. In addition, an earlier investigation meeting took place on an urgent basis in order for Mr Hill's computer and mobile devices to be analysed by a digital forensic specialist. This meeting took place on 8 June 2015.

[31] Ms Dew seeks costs for the 3 days of Investigation Meeting together with six days for preparation.

[32] In support of her submission that in the event the Authority is not minded to award indemnity costs, that costs should be awarded at the daily tariff for three days' hearing time and six days' preparation, Ms Dew relies on *Chief Executive of the Department of Corrections v. Tawhihirangi*¹².

[33] Ms Dew submits that preparation time is appropriate on the grounds that:

- The urgent application by Tex Onsite in May 2015 for the Employment Relations Authority to issue a witness summons for Mr Hill to produce relevant documents and computer devices required substantial preparation not dissimilar to an interim injunction action;

¹⁰ [2016] NZERA Auckland 25, para.[145]

¹¹ [2012] NZERA Christchurch 219

¹² [2008] ERNZ 73

- The discovery and review of the documents and computer devices produced by Mr Hill to the Authority at the investigation meeting on 8 June 2015 proved incomplete and required further investigation and costs incurred by Tex Onsite;
- Mr Hill's failure to deliver up the ADATA USB memory device required further urgent work and application to the Authority;
- Mr Hill's indication to the Authority and to Tex Onsite that he would be calling a number of witnesses caused increased preparation and costs and the requirement for a five day hearing when ultimately only two days were required.

[34] This was a case which required a great deal of preparation including analysis and understanding of detailed digital forensic reports. Tex Onsite was required to make urgent application to the Authority with supporting affidavits for Mr Hill to deliver up computer and mobile devices for examination.

[35] An investigation meeting was held at the Authority on 8 June 2015 to enable the computer and mobile devices to be examined by a digital forensic specialist. The ADATA USB memory device was not delivered up by Mr Hill despite his use of it on 31 May 2015. Reformatting of the ADATA USB memory device occurred on 9 August 2015 which had the effect of deleting its contents.

[36] Mr Hill's conduct on these occasions was recorded in the Authority's substantive determination. It caused unnecessary costs for Tex Onsite.

Costs Award

[37] For all of these reasons, I order an uplift in costs which includes preparation days.

[38] Accordingly, I order Mr Hill to contribute legal costs at the daily tariff for a total of three days of the investigation meeting together with six days' preparation time. A total of 9 days at the Authority's daily rate totals \$31,500.

Disbursements

[39] Tex Onsite seeks to recover \$16,137.26 disbursements in respect of the digital forensic specialist and disbursements of \$3,109.86. Both sums include GST.

[40] The Authority was provided with details of the disbursements sought. I consider to be recoverable disbursements which were necessary for the conduct of the proceeding and reasonable¹³. The question arises as to whether the disbursements claimed should be inclusive of GST. As a company registered for GST, Tex Onsite can claim GST as a business expense.

[41] The issue of GST on costs and disbursements was considered by Judge Inglis in *Booth v Big Kahuna Holdings Ltd.*¹⁴ Judge Inglis stated:

I see no reason in principle why the Employment Court ought not to take into account the ability of a successful party to recover GST in determining actual and reasonable costs.^[24] To approach the issue otherwise would lead to inequities. The plaintiff was obliged to incur GST on his legal costs. This effectively added 15 percent to his total costs which he is otherwise unable to recover. By way of contrast, the defendant company can offset the GST component of its own legal costs by claiming them as a business expense.

[42] I am satisfied the disbursements sought, exclusive of GST are reasonable. The digital forensic specialist, Mr Michael Spence, was required to examine devices used by Mr Hill whilst employed at Tex Onsite. Mr Spence's report of Mr Hill's usage led to the urgent proceeding in the Authority for a witness summons in May 2015.

[43] Following Mr Hill's failure to produce the ADATA USB memory device, at the investigation meeting on 8 June 2015, Mr Spence undertook an examination of all of the mobile and computer devices delivered by Mr Hill. Mr Hill did not produce the ADATA USB memory device and further cost was incurred to ensure its delivery to the Authority in August 2015. Further examination of the device was required to be done by Mr Spence. I believe these costs to be legitimate and reasonable.

[44] I have been provided with details of all other expenses which were necessary to the conduct of the proceeding and reasonable.

¹³ *Baker v. St John Central Regional Trust Board* [2013] NZEmpC 109 at [43]

¹⁴ [2015] NZEmpC 4 at [51]

[45] I accordingly order Mr Hill to pay to Tex Onsite total disbursements of \$16,736.63 excluding GST.

[46] I order Mr Hill to pay costs and disbursements of \$48,236.63 to Tex Onsite within 21 days of the date of this determination.

Anna Fitzgibbon
Member of the Employment Relations Authority