

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKĀURAU ROHE**

[2019] NZERA 660
3074912

BETWEEN THE TESTING CONSULTANCY
 LIMITED
 Applicant

AND PAUL LEIGHTON
 Respondent

Member of Authority: Anna Fitzgibbon

Representatives: Chris Patterson and Anneke Reid, Counsel for the
 Applicant
 Samuel Moore and Natalie Devery, Counsel for the
 Respondent

Submissions Received: 24 October 2019 from the Applicant
 31 October 2019 from the Respondent

Date of Determination: 18 November 2019

COSTS DETERMINATION OF THE AUTHORITY

A. Mr Paul Leighton is ordered to pay to The Testing Consultancy Company Limited the sum of \$2,250 costs and the filing fee of \$71.56 within 21 days of the date of this determination.

Employment Relationship Problem

[1] The applicant, The Testing Consultancy Limited (Testing Consultancy) is a global software assurance company.

[2] The respondent, Mr Paul Leighton was employed as a Senior Consultant and Continuous Testing Practice Lead. The employment agreement included clauses in respect of confidential information, intellectual property, non-solicitation and restraint of trade.

[3] On around 17 August 2019, Mr Leighton notified Testing Consultancy of his intention to resign with effect from 17 September 2019. There were discussions concerning intellectual property and the ownership of a source code repository (the git repo code).

[4] On 16 September 2019, Testing Consultancy filed a Statement of Problem in the Authority seeking orders that Mr Leighton comply with restrictive covenants including intellectual property, confidentiality and non-compete provisions in the employment agreement. The Statement of Problem also sought an order that Mr Leighton deliver up the git repo code that Testing Consultancy considered was its property. Testing Consultancy sought urgency from the Authority. This was granted.

[5] On 3 October 2019, a case management conference was held with the parties during which time a timetable process was discussed and agreed for the investigation of Testing Consultancy's application for interim and substantive orders against Mr Leighton.

[6] On 9 October 2019, the parties agreed terms of settlement. On 14 October 2019, the parties signed a consent memorandum, save as to costs.

[7] Upon settlement, Testing Consultancy withdrew its application in the Authority.

The application by Testing Consultancy for Costs

[8] Testing Consultancy seeks "*indemnity or increased costs on the grounds that Testing Consultancy incurred significant increases to its costs due to [Mr Leighton's] conduct and exceptionally poor behaviour...*"¹.

[9] Actual costs incurred by Testing Consultancy amounted to \$19,188.32 (not including GST). Copies of invoices from Testing Consultancy's lawyer have been attached to the submissions as to costs.

[10] Counsel for Testing Consultancy relied on five factors in support of its application for increased costs namely:

¹ Applicant's Cost Submissions.

- (a) The matter was urgent;
- (b) Testing Consultancy had no other option due to a lack of a timely substantive response from Mr Leighton;
- (c) Mr Leighton refused to accept reasonable offers of settlement, both before the matter was filed in the Authority and after Testing Consultancy filed its application;
- (d) The respondent failed to comply with two directions of the Authority;
- (e) The key terms of the overall settlement agreed between the parties on 9 October 2019 was not materially different to the original resolution proposed by Testing Consultancy on 9 September 2019.

Mr Leighton's response

[11] Mr Leighton disputes the level of costs being sought by Testing Consultancy and says that this is a case in which costs should lie where they fall. Factors in support of this submission are:

- (a) Testing Consultancy had withdrawn its proceeding, there was “ *no winner or loser*”, both parties were successful and equally unsuccessful;
- (b) The issue before the Authority in terms of IP ownership did not require determination; and
- (c) Costs had arisen due to Testing Consultancy filing the proceeding prematurely.

Principles

[12] The power of the Authority to award costs arises from s 15 of Schedule 2 of the Employment Relations Act 2000 (the Act) which states:

15. Power to award costs

- (1) The Authority may order any party to a matter to pay to any other party such cost 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 a manner as it thinks reasonable.

[13] The principles and the approach adopted by the Authority on which an award of costs is made are well settled and outlined in *PBO Limited (formerly Rush Security Limited) v Da Cruz*² as confirmed in *Fagotti v Acme & Co Limited*.³

[14] The Authority's jurisdiction in respect of costs extends to a situation in which an applicant elects to withdraw a proceeding at any stage prior to the issue of a determination. However, even though the Authority has a discretion in considering whether or not a party's costs were necessary or unreasonable, the question of costs must be dealt with by the Authority in a principled manner and not arbitrarily.

[15] I accept the general principle that where a party withdraws proceedings, it is not entitled to costs and may be the subject of an adverse costs award.⁴

Analysis

[16] I do not consider the reasons advanced by Testing Consultancy as poor behaviour on behalf of Mr Leighton justify its claim to recover from him indemnity costs of \$19,188.32 (not including GST).

[17] Mr Paul Whiston, the Chief Executive Officer of Testing Consultancy filed an affidavit in the Authority in support of its application for costs. Mr Leighton also filed an affidavit in support of his opposition to costs.

[18] From the correspondence and other material attached to the affidavits, it is clear the parties were engaged in discussions about Mr Leighton's resignation and future employment plans, the restrictive provisions in his employment agreement and ownership of the git repo code for a reasonable period of time prior to Mr Leighton's departure from his employment at Testing Consultancy and before the filing by Testing Consultancy of its Statement of Problem in the Authority.

[19] The correspondence between the parties included attempts to settle Testing Consultancy's claims at an early stage and before proceedings were filed in the Authority. However, the matter was not able to be settled within the time frame sought by Testing Consultancy.

² [2005] 1 ERNZ 808

³ [2015] NZempC 135 at [114].

⁴ *Ways Electronics Limited* [2019] NZEmpC150 para [6]

[20] Immediately following the filing of the Statement of Problem in the Authority, Mr Leighton left his employment at Testing Consultancy and travelled to the United Kingdom on a pre-planned trip. This caused some difficulty for his counsel to obtain instructions in respect of filing a Statement in Reply. However, Mr Leighton had instructed counsel who had been communicating with counsel for Testing Consultancy and had been attempting to resolve the issue. In an email of 11 September 2019, from Counsel for Mr Leighton to Counsel for Testing Consultancy, the following is stated:

“...I am confident that we can expedite this file without the need for injunctive relief. However, I’m not available at your proposed meeting time and I will need to have an opportunity to take full instructions, I am sure you will appreciate that. Please advise what alternative times are available for the proposed meeting and/or whether you see any value in having a without prejudice discussion prior to any such meeting.”

[21] The Authority is a forum for the resolution of disputes at a low level and in a speedy manner. Testing Consultancy was understandably concerned over Mr Leighton’s view of his ownership rights in respect of the git repo code. However, that question was ultimately not one that required a determination by the Authority. I consider in the circumstances Testing Consultancy took an unnecessarily litigious approach and as a result incurred considerable costs.

[22] I have reviewed the invoices attached to the memorandum as to costs filed on behalf of Testing Consultancy. Many of the costs incurred relate to time and attendances by counsel on behalf of Testing Consultancy prior to the filing of a Statement of Problem in the Authority. Other costs were incurred in reaching terms of settlement and the drafting and signing off of a Consent Memorandum. The terms of settlement were reached on 9 October 2019, a matter of days after the Authority’s case management call. The Consent Memorandum was signed on 14 October 2019, just under one month following the filing of the Statement of Problem.

[23] I accept that Testing Consultancy did incur expenses in bringing its claim and that Mr Leighton did not take steps once the claim was brought.

[24] Costs awards in the Authority are to be moderate. I consider a contribution by Mr Leighton of Testing Consultancy’s costs in the sum of \$2,250 to be appropriate in the

circumstances. This is half of the Authority's daily rate for the first day of an Investigation Meeting.

[25] I order Mr Leighton to pay Testing Consultancy costs in the sum of \$2,250 in costs and the filing fee of \$71.56 within 21 days of the date of this determination.

Anna Fitzgibbon
Member of the Employment Relations Authority