

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

[2016] NZERA Christchurch 9  
5601277

BETWEEN                      X LIMITED  
                                         Applicant

A N D                              Y  
                                         Respondent

Member of Authority:        Helen Doyle

Representatives:              Tim Mackenzie, Counsel for the Applicant  
                                         Respondent in person

Submissions Received:      13 January 2016 for the Applicant  
                                         28 January 2016 for the Respondent

Date of Determination:      2 February 2016

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**COSTS DETERMINATION OF THE AUTHORITY**

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**A        Y is to pay X Limited costs in the sum of \$3500 and disbursements  
                 in the sum of \$907.78.**

[1]        This matter was the subject of two determinations.

[2]        The first dated 18 December 2015 determined an *ex parte* application by the applicant for an interim injunction restraining the respondent from using, disclosing or copying confidential information of the applicant and seeking an order for its return. Interim injunction orders were made against the respondent in relation to the confidential information and a date was set at short notice for 22 December 2015 to hear further evidence and review the orders following service on the respondent of the determination and proceedings. Costs were reserved.

[3]        The second determination was dated 22 December 2015. After a brief investigation meeting the parties agreed to a consent determination that the respondent

would immediately comply with the confidentiality provisions of his employment agreement. Costs were reserved in that determination.

[4] Submissions have now been received from both parties.

[5] In both determinations I prohibited from publication the names of the applicant and respondent and that prohibition from publication continues for the purposes of this costs determination.

### **The applicant's submissions**

[6] Mr Mackenzie seeks an order against the respondent on a full indemnity basis for total costs of \$15,282.78 incurred by applicant. The fee for Mr Mackenzie's services was \$12,500 exclusive of GST and there were disbursements of a filing fee of \$71.56 and an investigator's fee of \$836.22.

[7] Mr Mackenzie refers to the principles in the full Court judgment in *PBO Ltd (formerly Rush Security Ltd) v. Da Cruz*<sup>1</sup> and the statement at [44] of the judgment that the Authority is able to set its own procedures and has since its inception held to some basic tenets when considering costs.

[8] One of these is that costs in the Authority are frequently judged against a notional daily rate currently recognised as \$3500 per day. Mr Mackenzie submits that the Authority can depart up or down from the daily tariff depending on the complexity of the case and that reasonable settlement offers can lead to increased costs. Further a party proceeding in the absence of valid warning can attract indemnity costs. Mr Mackenzie submits in support of indemnity costs:

- the actions of the respondent entirely caused the proceeding because they were reckless and unlawful;
- the reasonably available inference was that the respondent acted because of financial motivation rather than a genuine privacy concern;
- that there was a justified need for the applicant to respond immediately and thoroughly;

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<sup>1</sup> [2005] 1 ERNZ 808

- there was a failure by the respondent to agree to initial attempts at resolution;
- the proceedings were conducted on an urgent basis;
- two hearings were required, although Mr Mackenzie accepts they were of short duration;
- the applicant offered a settlement by electing not to continue the proceeding for breach of contract which would have most likely resulted in significant liabilities for penalties and costs against the respondent.

[9] Mr Mackenzie seeks a disbursement cost incurred in instructing an investigator because the respondent would not provide any contact details other than an email address.

#### **The respondent's submissions**

[10] The respondent does not accept that the reason for raising the concerns with the applicant was financially motivated. The respondent says that he never asked for anything other than to remedy confidentiality issues and that he advised the police that his intentions were not financially motivated but to raise concerns about the privacy issues. He says that his concerns were that the applicant's clients could be left exposed because of these issues.

[11] The respondent does not accept that the issues were meritless and unfounded and does not accept that it was necessary to engage an investigator to ascertain his address. The respondent says that the reason he communicated by email was so no matter could be misconstrued or open to misinterpretation, and that while he did state email correspondence was preferred, the applicant had contact details from his time in its employment and he was never asked for his address.

[12] The respondent says that costs should be the sole responsibility of the applicant.

**Determination**

[13] The Authority has a discretion as to whether costs are awarded and, if so, in what amount. The discretion is to be exercised in accordance with principle and not arbitrarily. Costs normally follow the event.

[14] The background to the ex parte application for interim orders was that the respondent had sent an email to the applicant giving it 48 hours to respond to concerns regarding confidential information before the email would be forwarded to other named companies and individuals with the attached confidential information.

[15] Before proceeding to lodge an ex parte application for interim orders with the Authority Mr Mackenzie corresponded with the respondent and asked him to undertake that he would refrain from any misuse of confidential information including threats to contact clients and that he would destroy and/or return any confidential information he holds.

[16] The respondent did not provide undertakings in the form requested although he did indicate that he would not be proceeding in the 48 hour window for disclosure or notification to clients. He had earlier stated in an email that it was never his intention to achieve any personal gain in the nature of blackmail from the threat in his email. The email exchanges show that the respondent did not accept he was bound by any confidentiality provision that survived termination in his employment agreement.

[17] The respondent had in his possession confidential information that he was threatening to disclose to clients but he advised the Authority on 22 December 2015 that he had deleted that material held in electronic form. The respondent and applicant by agreeing to a compliance order brought the proceedings to an expeditious end saving both parties further costs.

[18] A fundamental principle applying to costs is that they usually follow the event.

[19] Although the respondent says he had legitimate concerns, his email was taken not unreasonably as a serious threat by the applicant. The respondent took insufficient steps to reassure X Limited that the threat would not be carried out. It was the manner in which the respondent threatened to contact clients of the applicant that was of concern. The email was the first communication for about one year after the end of employment and threatened to disclose confidential information of the

applicant to clients. The applicant was successful in obtaining interim orders on an ex parte basis and then agreed with the respondent to a consent determination for a compliance order. It is entitled to costs that flow from those events.

[20] Mr Mackenzie seeks indemnity costs. The Court of Appeal in *Bradbury v Westpac Banking Corporation*<sup>2</sup> referred at [29] to non-exhaustive categories of circumstance in which indemnity costs have been ordered:

- a. the making of allegations of fraud knowing them to be false and making 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...*

[21] *Bradbury* was a commercial case but in the employment area indemnity costs have been ordered to be paid against a party who made serious fraud allegations about counsel for the other side and his firm<sup>3</sup> and against the same party for misleading conduct towards the Court and the defendant when obtaining an adjournment.<sup>4</sup> Awards have also been made for unsubstantiated allegations relating to the integrity of counsel and where the plaintiff's application was without merit.<sup>5</sup>

[22] The action of the respondent was the cause of the proceedings in this case although that by itself would not normally attract an indemnity award for costs.

[23] Mr Mackenzie submits that the action undertaken by the respondent was due to a financial motivation. I accept there are some odd and concerning features to the timing of the email and the disclosure that the respondent was holding confidential material from the applicant's workplace almost a year after employment ended. There was also some evidence given at the meeting on 22 December about the financial position of the respondent. An allegation that the respondent's motivation was to obtain some financial payment from the applicant is very serious and the respondent

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<sup>2</sup> [2009] NZCA 234, [2009] 3 NZLR 400, (2009) 19 PRNZ 385 at [28].

<sup>3</sup> *Snowdon v Radio New Zealand Limited* [2012] NZEmpC 165 at [19].

<sup>4</sup> *Snowdon v Radio New Zealand Ltd* [2013] NZEmpC 60.

<sup>5</sup> *Postles v Airways Corp of New Zealand Ltd (No 2)* [2002] 2 ERNZ 817.

denies that is the case. I cannot be satisfied of that matter to the required degree necessary for it to be the basis of an application for indemnity costs.

[24] I accept Mr Mackenzie's submission that a party proceeding notwithstanding warning can attract solicitor/client costs. The respondent was warned that proceedings could be lodged if he did not give the required undertakings. The respondent had not however obtained legal advice at that time and I note that he asked for an extension of time to get some legal advice which was not granted because the threat had not been clearly withdrawn. I am not satisfied when considering those circumstances indemnity costs would be appropriate on the basis of a warning.

[25] I also take into account that the respondent confirmed on 22 December 2015 that he had deleted confidential information in his possession and that he agreed to comply with the material provisions in his employment agreement. The proceedings lodged with the Authority on 18 December 2015 were therefore able to be resolved four days later.

[26] In conclusion while there should be costs awarded to the applicant the circumstances of this case do not call for costs to be awarded on an indemnity basis.

[27] I intend to assess costs on the basis of the daily tariff which is currently at the rate of \$3,500 per day. The two investigation meetings were short but I accept that there was preparation required that is not reflected in the time for the investigation meetings because of the urgent nature of the proceedings. I find it would be appropriate and fair to award costs on the basis of the full daily tariff of \$3500 but not to increase that tariff.

[28] There are claims for disbursements. Reimbursement of the filing fee of \$71.56 I accept as appropriate. There is also a claim for reimbursement of a fee for an investigator for locating the respondent's address and attending to service at a property which was outside of the Christchurch urban area.

[29] The respondent says in his submissions that he would have provided his address if asked and it was not necessary for the applicant to go to the expense of instructing Avon Investigations. I accept that the respondent was not asked for his address. Mr Mackenzie did though ask the respondent for a telephone or cell phone number but was advised email correspondence was preferred. Objectively assessed I

find that the tone of the email received by the respondent was such that it was not unreasonable for the applicant to have a third party ascertain the respondent's address for personal service and have service be undertaken by a third party.

[30] I order Y to pay to X Limited costs in the sum of \$3500 and disbursements of \$71.56 for a filing fee and \$836.22 for Avon Investigations.

Helen Doyle  
Member of the Employment Relations Authority