

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2023] NZERA 186
3199119

BETWEEN INVISALIGN NZ LIMITED
Applicant

AND STUART KATH
First Respondent

AND LF ORTHODONTICS NZ LIMITED
Second Respondent

Member of Authority: David G Beck

Representatives: June Hardacre and Eloise Callister-Baker, counsel for the
Applicant
Robert Thompson, advocate for the first Respondent
and the second Respondent

Investigation Meeting: On the papers

Submissions Received: 30 March 2023 from the Applicant
13 April 2023 from the Respondent

Date of Determination: 17 April 2023

COST DETERMINATION OF THE AUTHORITY

The Determination

[1] By way of a determination of 16 March 2023, the Authority dealt with an application by Invisalign NZ Limited (Invisalign) seeking a declaration that that Mr Kath's specific post-employment restraint obligations contained in his employment agreement and a separate Align Protection Agreement (APA) were enforceable. No specific action was pursued against LF Orthodontics NZ Limited (LF Orthodontics).

[2] The Authority found that:

- (i) Invisalign NZ Limited does not have the ability to enforce specific non-solicitation and non-competition restraints contained in Stuart Kath's individual employment agreement and the Align Protection Agreement pertaining to him inducing or soliciting clients, customers and suppliers of Invisalign NZ Limited (clause 21(c)(i));and
- (ii) the specific non-dealing restraint provision contained in Stuart Kath's employment agreement pertaining to him dealing in trade with Invisalign NZ Limited's client, customers and suppliers (clause 21(c)(ii).
- (iii) Invisalign NZ Limited does have the ability to enforce the non-solicitation restraint provision of Mr Kath's employment agreement pertaining to a prohibition on him inducing or soliciting a director, executive, employee, consultant, agent or representative of Invisalign NZ Limited to terminate their employment or breach contractual obligations owed.¹

[3] The parties were asked to explore resolving costs by agreement but failed to do so. The investigation meeting took a full day and a further half day, for submissions.

Invisalign's submission

[4] Counsel in alluding to settled principles the Authority adopts and case law,² suggested that in the circumstances where Invisalign had taken constructive steps to ascertain enforcement options and that neither party was wholly successful, costs should lie where they fall. In support of this contention counsel in summary, asserted that:

- (a) The Authority had not found that the employment agreement restraints had, as Mr Kath claimed, been obtained by improper influence being exerted and that Invisalign acted reasonably in seeking to enforce previously agreed provisions and Mr Kath chose to defend the application.
- (b) The parties had attempted mediation.
- (c) Invisalign was partially successful in establishing the non-solicitation of employees, confidentiality obligations and non-disparagement provisions were enforceable.

¹ *Invisalign NZ Limited v Stuart Kath and LF Orthodontics NZ Limited* [2023] NZERA 133.

² *PBO Limited (formerly Rush Security Ltd) v Da Cruz* [2005] 1 ERNZ 808.

(d) This was essentially an interpretation dispute with Invisalign seeking enforcement and Mr Kath seeking release from previously agreed obligations and neither party was wholly vindicated.

[5] As an alternative, should the Authority remain unconvinced costs should lie where they fall, then the application of the usual Authority daily tariff should prevail noting that the first investigation meeting ended early and submissions that were heard by teleconference took 2 hours.

Stuart Kath's submission

[6] Mr Kath's advocate suggested he was the wholly successful party and tariff-based costs or an uplift on such of 30% was appropriate. In support of an uplift in the tariff it was suggested the Authority consider that Invisalign had sought urgency then produced an amended statement of problem seeking penalties and produced late evidence of an alleged confidentiality breach that required further rebuttal evidence from Mr Kath. Mr Kath's advocate also cited an open settlement offer of post-employment undertakings made on 27 January 2023 with a warning that it would be produced in any cost proceedings. Invisalign rejected the offer and did not make a counter offer. The offer, it was contended, placed Invisalign in a better position than the subsequent Authority determination and would have saved further costs.

[7] In contrast, Counsel for Invisalign claimed the settlement offer was not advanced in a timely fashion (Friday before an investigation meeting on the Monday), Invisalign had too little time to consider it, it was not part of ongoing settlement discussions, the cost of preparing for an investigation meeting had been sunk and the offer did not address costs.

Cost principles

[8] The Authority's discretion to award costs is well established and arises from Section 15 of Schedule 2 of the Employment Relations Act 2000 (the Act). The discretion, it is accepted, is guided by principles set out in *PBO Limited*³ including costs are not to be used as

³ Op cit.

a punishment or as a reflection on how either party conducted proceedings and that awards are to be made consistent with the equity and good conscience jurisdiction of the Authority.⁴

Assessment

[9] A general principle for a successful party is that costs should 'follow the event' and here Invisalign did not make out its predominant assertion that various non-dealing restraints were enforceable. I am thus not convinced by the assertion Mr Kath was partially successful. The non-solicitation of employees' restraint, confidentiality provision and non-disparagement obligation were not particularly in dispute.

[10] Looking at the totality of the proceedings and applying discretion, I consider that Invisalign reasonably sought a declaration on enforceability as a threshold matter, that the settlement offer was too late but given they were unsuccessful, Mr Kath is entitled to a cost contribution. I consider that a tariff approach is appropriate and that for the time spent during the investigation this be on the basis of \$4,500 for the first investigation meeting day (that incidentally finished at 5:15 pm) and \$1,500 for submissions.

Award

[11] I order Invisalign NZ Limited to pay Stuart Kath the sum of \$6,000 as a contribution to legal costs incurred.

David G Beck
Member of the Employment Relations Authority

⁴ Section 160(2) Employment Relations Act 2000.