IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE

[2023] NZERA 546
3225239

	BETWEEN	METROPOLITAN GLASS & GLAZING LIMITED Applicant
	AND	DAVID LAMBOURNE First Respondent
	AND	FMI BUILDING INNOVATION LIMITED Second Respondent

Member of Authority:	Alastair Dumbleton
Representatives:	Jim Roberts, counsel for the Applicant Grace Moore, counsel for the First Respondent Maria Dew KC, counsel for the Second Respondent
Costs submissions received:	27 June, 11, 19 and 21 July 2023
Determination:	21 September 2023

COSTS DETERMINATION OF THE AUTHORITY

---

[1] Awards of costs against Metropolitan Glass & Glazing Ltd (MetroGlass) have been applied for by David Lambourne and FMI Building Innovation Ltd (FMI).

[2] They are sought following an investigation by the Authority beginning in April 2023, when Mr Lambourne and FMI were served with an application by MetroGlass for orders against them. Mr Lambourne was a former employee of

MetroGlass who had resigned intending to commence work as an employee of FMI, a business competitor of MetroGlass in the glass industry.

[3] The employment relationship problem was presented as a threatened or actual breach by Mr Lambourne of a restraint of trade provision (ROT) and an express confidentiality provision in his individual employment agreement (IEA) which was in force when he resigned. Also alleged was a breach by Mr Lambourne of an implied obligation to use his best endeavours to promote and protect the general interest of MetroGlass.

[4] Although no actual breach was alleged against FMI, orders were sought against the possibility of a future or prospective breach in the event FMI aided, abetted, or incited a breach by Mr Lambourne of his IEA.

[5] Before MetroGlass applied to the Authority, the parties attended mediation to try and resolve their differences and before then they tried to settle the problems themselves. MetroGlass sought undertakings from Mr Lambourne and only lodged its application when none was forthcoming by the time his two-month notice period expired. He was on garden leave during that time.

[6] The interim injunction application was granted urgency for investigation and determination, within a time frame set by the Authority in consultation with counsel for the three parties.

Investigation meeting

[7] An investigation meeting opened on Monday 22 May 2023, to determine whether orders should be made and remain in force until a full investigation could take place and the employment relationship problem could be determined substantively.

[8] The meeting unexpectedly did not proceed to conclusion but had to be adjourned, to enable MetroGlass to provide evidence which had only come to its attention shortly before the meeting. This evidence was material to the central issue of the geographical scope of the relevant ROT, under which Mr Lambourne had been employed when he resigned.

[9] On Thursday 25 May 2023 the investigation meeting resumed and was completed within about four hours.

[10] The meeting was a conventional hearing of an application for interim injunctive relief, conducted under the rules of procedure usually followed in the civil jurisdiction. Evidence was presented in affidavit form from all witnesses and submissions were made by counsel as to the legal tests to be applied in determining whether to grant the interim orders sought.

[11] The Authority advised the parties and counsel during the meeting that if the interim applications were to be determined by 29 May, constraints on the Authority's time would allow only the bare outcome of the applications to be notified, on a 'granted' or 'not granted' basis but followed as soon after as possible with reasons. This seemed required in the circumstances because Mr Lambourne and FMI had agreed that performance of their employment relationship could commence on 29 May 2023.

Interim orders declined

[12] On Monday 29 May the Authority advised counsel that the applications against Mr Lambourne and FMI were not granted. The parties were directed to arrange for and undertake further mediation within seven days.

[13] Brief notes prepared by the Authority to accompany its advice to counsel of the outcome of the applications, for technical reasons were not able to be sent as intended after they had been prepared on Monday but were transmitted a few days later.

Application withdrawn from the Authority

[14] The parties complied with the direction to attend mediation but did not reach settlement.

[15] Without further recourse to the Authority, MetroGlass filed a Notice of Discontinuance on 8 June, ending the investigation which began in April.

[16] The Authority's full determination with reasons for declining the interim orders had not been issued by then.

[17] The Authority declined a request to issue it after discontinuance, for reasons given in Directions of 13 June 2023 (under 3225239). In short, the Authority found it has no ability to issue a binding determination following the withdrawal of a substantive application or matter before it. A determination would have served no purpose in those circumstances, having regard to the objectives of the Employment Relations Act 2000 (the ER Act) and the core role of the Authority under the ER Act in employment problem solving.

[18] MetroGlass acknowledged that any costs applications if made were still able to be determined. The Authority confirmed that position in its directions.

[19] Also, the Authority confirmed that the discontinuance had not wiped from the record all the evidence given up to that point, if any of it was material to the question of costs. The Authority was not prevented from considering the actions of the parties while the investigation was live and, if necessary, from holding any party accountable in a costs setting for conduct that had unreasonably increased costs.

The costs applications

[20] Mr Lambourne and FMI have both applied for an award of costs under clause 15 of Schedule 2 of the ER Act.

[21] Mr Lambourne seeks $20,693.00 to compensate him for actual and reasonable costs incurred from the date he and FMI jointly presented a Calderbank offer, 11 May 2023, until discontinuance on 8 June 2023.

[22] FMI seeks $29,682.00 and disbursements, to compensate for a higher amount expended.

Response to the costs applications

[23] MetroGlass opposes the awards sought and submits that costs should either lie where they fall, or alternatively that any awards should not exceed half the Authority's daily rate applicable to the length of the investigation meeting.

Principles of Authority costs awards

[24] The law to be applied by the Authority in determining costs was reviewed by the Employment Court in *PBO Limited (formerly Rush Security Ltd) v Da Cruz*[1].

[25] In summary the Full Court held[2], the Authority has a discretion in awarding costs and fixing the amount of those. Costs will normally be awarded to the party which is successful in the outcome of an Authority investigation, and the amount of costs will usually be modest.

[26] Costs are not to be awarded as punishment or to express disapproval of a party's conduct. Their purpose is to compensate a party who or which has incurred expense in applying to the Authority to have it investigate and determine claims, or has incurred expense in responding to such claims.

[27] It is open to the Authority to question whether all or any costs incurred by a party were necessary or reasonable.

[28] The nature of the particular investigation meeting can influence costs. Attempts by parties to resolve matters themselves by compromise, including the making of without prejudice offers as occurred in this case, may be taken into account.

[29] The Authority has a discretion to award costs based on a daily tariff.

[30] In taking a tariff-based approach, adjustments up or down can be made where necessary, to reflect the conduct of parties, the preparation required in a particularly complex matter, or any other significant features of the individual investigation meeting.

[31] Currently the Authority's tariff, which is publicised and revised periodically, is $4,500 for the first day and $3,500 for each subsequent day of an investigation meeting.

---

[1] [2005] ERNZ 808
[2] *Da Cruz* at para [44]

Outcome

[32] The determination of the applications for interim injunctions involved the Authority exercising a discretion, in declining to give the orders sought by MetroGlass against Mr Lambourne and FMI. The notes prepared and sent to counsel after the Authority had given its indication of outcome on 29 May, explain that the indication reflected the Authority's view of the overall justice of the matter.

[33] In this regard the Authority noted as a significant factor the late introduction of and reliance on, the most recent ROT (signed on 2 August 2016 by Mr Lambourne), which MetroGlass had apparently overlooked when applying to the Authority in April 2023. This influenced the Authority's exercise of discretion and gave a pointer to where the overall justice lay.

[34] The direction to return to mediation seemed to the Authority the best course for the parties after the applicant had started out on the wrong footing.

[35] The Authority also noted doubts raised by the 2016 ROT documentation about the manner and form of presentation of it to Mr Lambourne.

[36] In particular, what was described as 'consideration' given for the ROT was Mr Lambourne's acceptance of an invitation to participate in a Discretionary Bonus Scheme. While Mr Lambourne in August 2016 had expressly agreed to be bound by the ROT for the rest of his employment, and for six months after he finished, whenever that occurred, the Bonus Scheme was only to apply for the financial year ending 31 March 2017.

[37] MetroGlass also retained complete discretion whether to 'amend, revoke, or discontinue this Scheme at any time ….. including during a fiscal year'. The scheme could have been revoked or discontinued almost as soon as Mr Lambourne had accepted the invitation to participate in it, and by doing so bound himself indefinitely to a six-month ROT applying to all of New Zealand.

[38] Certainty of consideration is a separate concept from adequacy of consideration. Without resolving any issues about whether there was consideration at all, or consideration of sufficient certainty, or whether unfair advantage was taken from any imbalance of power existing in the employment relationship, the doubts

about these matters were sufficient in the context of interim injunction proceedings to be an indication of the relative strength of the applicant's arguable case and the direction in which the overall justice lay.

[39] The final outcome of a concluded Authority investigation cannot now be predicted with accuracy, but it is enough to say that the impression gained by the Authority from the development occurring just before commencement of the 22 May meeting, was that the introduction of the 2016 ROT somewhat weakened the applicant's position as to whether Mr Lambourne was under an enforceable restraint, and if so the geographical coverage of that.

Should costs be awarded?

[40] The Authority is satisfied that in accordance with general principle, an award of costs should be made to Mr Lambourne and FMI.

[41] They engaged counsel and were put to expense in resisting the injunctions, an exercise in which they were completely successful.

[42] The principle that costs follow the event, unless particular considerations require otherwise, has been described by the Court as the *primary* principle[3].

[43] Allowing costs to lie where they fall as sought by MetroGlass, would be unjust in the circumstances. On the other hand, there are no extreme or exceptional features about the case or its conduct, to warrant awards on the rarely ordered total indemnity basis, as FMI sought.

Should the Authority's daily tariff apply?

[44] The daily tariff approach is a well-established feature and practice of the Authority. It was approved of by the Full Court in its *da Cruz* decision of 2005[4].

[45] It is an approach that allows for the flexibility necessary to take proper account of the particular characteristics of any case. This may be achieved by adjustment up

[3] *Stevens v Hapag-Lloyd (NZ) Ltd* [2015] NZEmpC 28, at para [106]
[4] [2005] ERNZ 808, at para [46]

or down, without compromising the Authority's 'modest approach to costs', as the Court has described it.

[46] Currently the daily tariff is $4,500 for the first day of investigation meeting and $3,500 for each subsequent day.

[47] It is fair that costs should be awarded for one complete day of investigation meeting, spread over the two half days of Monday 22 and Thursday 25 May.

An uplift is justified

[48] There are three reasons why, in the Authority's view, the daily tariff should be substantially uplifted from $4,500 for Mr Lambourne and FMI. First, to recognise the nature of the investigation meeting as the hearing of an application for *interim* injunctive relief. Second, to recognise the Calderbank offer made by the respondents jointly before the hearing. Third, to compensate for the additional time and expense needed for revision by the respondents of their affidavits and legal argument following the introduction, on 22 May of the 2016 ROT that lay at the heart of the application.

(i) Nature of the investigation meeting

[49] The Authority recognised that time was of the essence to the applicant and granted an urgent hearing of the application for interim injunctions, rather than moving to a full investigation meeting and determining the employment relationship problem substantively. The opportunity for the Authority to actively lead an investigation of the factual and legal issues, including the oral examination of witnesses, was thereby limited to an application of orthodox civil procedure for hearing and determining interim injunction applications.

[50] In this respect the hearing was more adversarial than investigative and for this reason the respondents had a greater burden of preparation cast on them, in terms of both the limited time available to prepare and the greater importance attached to the content of affidavit evidence and submissions.

[51] The Authority was referred to the Court's judgment in *Stevens v Hapag-Lloyd (NZ) Ltd*[5] where it was emphasised that proceedings in the Authority are intended to be low level, cost effective, readily accessible and non-technical. The Court observed that the Authority is not intended to be an overly legalistic or costly forum[6].

[52] The Court's decision concerned the investigation of personal grievances with the usual investigation meeting the Authority holds, rather than the hearing of an application for interim reinstatement or interim injunction.

[53] Some allowance should be made for the special nature of the hearing in this case and the reduced opportunity for the Authority to introduce its own evidence and orally question the deponents of affidavits.

[54] The nature of the application was such that the applicant regarded it as important to put considerable resource into seeking the interim orders. It was reasonable to expect both respondents to do the same in opposing the orders.

[55] Interim relief by way of reinstatement or injunction has long been a feature of the Authority's jurisdiction, and as the Court observed in *Steven v Hapag-Lloyd* [7],

> Parties are entitled to adopt a belt-and-braces approach, and may retain the services of legal counsel of their choosing. That is not, however, a choice that can automatically be visited on the unsuccessful party.

[56] It can be expected that the client-care rules were observed by counsel, leaving the respondents sufficiently informed of the likely cost of their representation in the Authority and the Authority's costs ethos as a low-level, cost effective, readily accessible and non-technical legal forum.

(ii) The Calderbank offer

[57] There are no rules or regulations in the Authority to prescribe what a Calderbank offer is or how it should be presented. Whatever name may be given to such offers within the Authority's particular jurisdiction, in substance they are offers

---

[5] [2015] NZEmpC 28
[6] At para [94]
[7] At para [15]

made in good faith to avoid or minimise the risk of delay, uncertainty of outcome and escalating expense, in continuing with legal proceedings. Such offers will usually contain a level of compromise expected of all affected parties. As this one was, they will usually be made without prejudice save as to costs, allowing the Authority to take them into account when it is determining costs.

[58] In *Stevens v Hapag-Lloyd*[8] the Employment Court expressed reservations about the weight the Authority should put on Calderbank offers when fixing awards of costs. The Court's observations were not made in the context of an application for interim injunction by the Authority but the more usual full investigation of a personal grievance claim. The procedural distinctions raised by the Court between it and the Authority, and consequent differences in preparation and hearing procedure, may be less insofar as interim injunction applications are concerned.

[59] The outcome of an interim injunction is usually of critical importance to overall resolution of the employment relationship problem, and to the question of whether the matter will proceed to a substantive hearing. Full and careful preparation is justified against the possibility of avoiding the continuing expense of a further hearing and other attendant risks such as a challenge. For that reason, Calderbank-like offers should be viewed as important in interim injunction cases at least, even if, as the Court considered, there remains uncertainty as to whether in the Authority such offers are to be approached in a 'steely' fashion.

[60] Viewed against the application made to the Authority on 21 April 2023, the Calderbank offer made jointly on 11 May by Mr Lambourne and FMI was sensible and pragmatic. It was made with reasonable time allowed for it to be carefully considered. MetroGlass rejected it the same day.

[61] In bypassing the opportunity to be better off than the eventual outcome, it committed the respondents to further expense. This should be met with a commensurate uplift in the daily tariff to be applied.

[62] The Authority considers MetroGlass in its costs submissions has been over-scrupulous in its assessment of the respondents' joint offer made on 11 May 2023. It is clear from the offer there was to be agreement with some terms the applicant had

[8] [2015] NZEmpC 28, at paras [88] to [92]

earlier proposed on a fully without prejudice basis. Any consensus at all, but the heart of the offer was a compromise position allowing for Mr Lambourne to be restrained from competition throughout New Zealand until 30 June 2023. During that time he could be paid salary by FMI.

[63] After this offer was rejected, the Authority declined to make an interim order restraining Mr Lambourne or FMI. MetroGlass withdrew its application for enforcement on 8 June.

[64] It seems clear even without the exposing to the Authority the applicant's fully without prejudice offer, that MetroGlass would have been better off accepting the respondent's without-prejudice save as to costs offer. That offer and its rejection should carry some weight in awarding costs to the respondents.

[65] MetroGlass in its costs submissions scrutinising the respondents' joint offer, also objected to the offer being expressed as 'subject to all parties executing agreed Record of Settlement'. The Authority does not read this as an agreement to agree. The offers were communicated between experienced employment lawyers who would well understand this as a reference to the formality of recording agreed terms of settlement under s 149 of the ER Act, rather than an indication that further negotiation of substantive terms of settlement was still to occur.

[66] The 11 May Calderbank offer was overtaken on 22 May by the introduction into the proceedings of the 2016 ROT. An offer on the same or very similar terms probably would have been made on 11 May, if the 2016 ROT had been relied on in the application from the beginning. Mediation the parties were directed to on 29 May, was an opportunity for the respondents to consider making a revised Calderbank offer as well as an opportunity for the parties to settle the matter in mediation.

(iii) Introduction of 2016 ROT into the proceedings

[67] The change by the applicant to placing reliance on the 2016 ROT, undid work the respondents had done up to 22 May in preparation for the investigation meeting. The respondents should be compensated in costs for the extra work needed to meet the unexpected development, brought about by the applicant's failure earlier on to identify the ROT alleged to apply when Mr Lambourne resigned.

[68] The respondents had fully prepared for the hearing on 22 May, expecting it would proceed and be concluded that day. About an hour before the meeting, they were advised the applicant had revived its knowledge of the 2016 ROT and intended to rely on it. Attendance at the meeting was only required for less than an hour. Before then substantial preparation would have been required, a significant part of which was wasted in the circumstances.

[69] To put the unexpected development in perspective, the nature of the employment relationship problem did not change. The same principles of law were to be applied to the same employment relationship, but the all-important wording of the applicable ROT, and the circumstances surrounding it becoming an enforceable term of employment as alleged by MetroGlass, suddenly changed. Fresh legal advice was required quickly to meet that event.

[70] The Authority does not accept the applicant's submission that in the circumstances, Mr Lambourne should bear the same responsibility as MetroGlass for the 2016 ROT being left out of the interim injunction application when it was first lodged.

[71] Mr Lambourne knew about the 2016 ROT because he had signed it in August 2016, but he should be penalised in costs for not bringing its existence to the attention of MetroGlass over six years later in 2023.

[72] The circumstances do not suggest that he attempted to mislead or deceive MetroGlass when he resigned on 21 February 2023 and sought a release from the *2014* ROT, but without mentioning the *2016* ROT. He could not have known or expected that MetroGlass would for some reason fail to retrieve from storage in its files the 2016 ROT.

[73] In the Authority's view Mr Lambourne did not decide to deliberately keep quiet about the existence of the 2016 ROT for his own advantage.

[74] Inadvertence led MetroGlass to compound Mr Lambourne's incorrect reference to the 2014 ROT, when it advised him on 27 February 2023 that he would be held to the *2014* ROT.

[75] Also, MetroGlass was a *plaintiff* in proceedings and Mr Lambourne was a *respondent*. The responsibility lay squarely on MetroGlass to assemble and present its case fully and correctly. MetroGlass had the additional burden of showing that the ROT, whichever year it was, 2014 or 2016, was an enforceable provision of Mr Lambourne's IEA.

[76] There is some irony in a suggestion that an employee who, upon entry into an IEA, may have had no real choice but to accept a ROT as a term of it, should later on be held responsible for not helping the employer to try and enforce against them a provision that in law is *prima facie* unenforceable, at least until it can be shown by the employer to be reasonable.

[77] As the Authority noted to counsel after advising the outcome of the application on 29 May, MetroGlass was the party largely responsible for overlooking the 2016 ROT and causing additional cost to the respondents. Proper records keeping and due diligence were for MetroGlass to carry out, not Mr Lambourne.

[78] If it was in doubt about the existence of the 2016 ROT, it would have been open to MetroGlass before seeking interim orders to apply to the Authority for an order requiring Mr Lambourne to disclose all the terms of his employment he was aware of when he resigned. That could have avoided the false start to the investigation meeting.

[79] The late introduction of the 2016 ROT made it almost inevitable that the parties would need to return to mediation. It would have been premature for the Authority to make orders before the parties had had a full opportunity to resolve matters themselves, after the current ROT undertakings agreed to had been exactly identified to them. The parties had recognised the importance of this when they made earlier attempts to resolve matters, before an investigation of the Authority was needed.

[80] It has not been suggested that MetroGlass should responsibly have withdrawn its application when it found the 2016 provisions it had previously been unaware of, but the last-minute discovery did unreasonably commit Mr Lambourne and FMI to incurring greater legal expense by having to reconsider their prepared responses in the light of the new material.

Orders

[81] For the above reasons, in the Authority's view the daily tariff of $4,500 should be increased by a factor of 2.5 to give costs of $11,250 to each respondent. In the circumstances that amount may be seen as modest, in keeping with principle.

[82] Pursuant to clause 15 of Schedule 2 of the ER Act, MetroGlass is ordered to pay costs of $11,250 to Mr Lambourne, and the same amount is to be paid to FMI together with that party's expenses and disbursements of $1,487.50.

[83] Payment by MetroGlass is to be made within 14 days of the date of this determination.

Alastair Dumbleton
Member of the Employment Relations Authority