

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2013] NZERA Auckland 224
5411378

BETWEEN ASIACITI TRUST NEW
ZEALAND LTD
Applicant

A N D LEE HARRIS
Respondent

Member of Authority: Anna Fitzgibbon

Representatives: Emma Butcher and Angela Evans, Counsel for
Applicant
Richard Harrison, Counsel for Respondent

Submissions Received: 14 May 2013 from Respondent
28 May 2013 from Applicant

Date of Determination: 4 June 2013

COSTS DETERMINATION OF THE AUTHORITY

**A. Asiaciti Trust New Zealand Ltd is ordered to contribute \$5,250
towards the legal costs of Ms Lee Harris.**

[1] In a substantive determination dated 30 April 2013¹ the Authority determined the restraint of trade clause, clause 9.1 of Ms Lee Harris' individual employment agreement was unreasonable and unenforceable. The Authority declined to modify the clause under section 8 of the Illegal Contracts Act 1970.

[2] A timetable was set for costs to be dealt with by an exchange of memoranda. Mr Harrison, Counsel for Ms Harris filed a memorandum as to costs which was served on the applicant, Asiaciti Trust New Zealand Ltd ("Asiaciti"). Ms Butcher for Asiaciti filed a memorandum in response.

¹ [2013] NZERA Auckland 154

[3] The Authority's power to award costs arises from Schedule 2, clause 15 of the Employment Relations Act 2000 (the Act). This confers a wide discretion on the Authority to award costs, on a principled basis.

[4] 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* [2005] 1 ERNZ 808. Those principles are so well recognised I do not need to restate them.

[5] The general principle is that costs follow the event, and I see no reason to depart from that in this case. Accordingly, Ms Harris as the successful party is entitled to a contribution towards her legal costs.

[6] The Employment Court in *Carter Holt Harvey v. Eastern Bays Independent Industrial Workers Union & Ors*² observed that a notional daily tariff approach, which was to be adjusted in a principled way, was best suited to the Authority's unique jurisdiction. I adopt that approach.

[7] The normal starting point for costs in the Authority is \$3,500 per day, *Fifita (aka Bloomfield) v. Dunedin Casinos Limited*³.

[8] This matter involved an investigation meeting of 1½ days. I have adopted a notional daily tariff of \$3,500 as my starting point which equates to \$5,250 for a 1½ day investigation meeting. I now consider whether there are any factors which would warrant adjusting that notional tariff.

[9] Mr Harrison seeks an *uplift* in the daily rate because of the way in which he says Asiaciti conducted itself. Mr Harrison's primary submission is that Ms Harris tried to resolve the matter by providing Asiaciti with several undertakings which would have avoided unnecessary litigation.

[10] Ms Butcher resists the *uplift* in costs sought by Mr Harrison. Ms Butcher submits Asiaciti also attempted to avoid proceedings early on by proposing Ms Harris agree to certain undertakings. When Ms Harris refused to provide undertakings that she would not deal with Asiaciti's customers, Ms Butcher submits Asiaciti *felt forced in to a position where it needed to protect its business and rely on the restraint as agreed in the employment agreement*.

² [2011] NZEmpC 13

³ [2012] NZEA Christchurch at p.2019

[11] It is clear Counsel for both parties, both of whom are very experienced, attempted to resolve matters themselves and by way of mediation before the investigation meeting took place but were unsuccessful. Asiaciti then sought a determination from the Authority on the enforceability of the restraint of trade. This is not conduct in my view which warrants an *uplift* in the usual tariff of \$3,500 in costs per hearing day.

[12] I order Asiaciti to contribute the sum of \$5,250 towards Ms Harris' legal costs.

Anna Fitzgibbon
Member of the Employment Relations Authority