IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2016] NZERA Auckland 348
5637874

	BETWEEN	DAWSONS CATERING LIMITED Applicant
	A N D	MATTHEW HAWKE Respondent

Member of Authority:	Rachel Larmer
Representatives:	Andrew Swan, Counsel for Applicant Garry Pollak, Counsel for Respondent
Investigation Meeting:	On the papers
Submissions Received:	15 September 2016 from Respondent 23 September 2016 from Applicant 03 October 2016 from Respondent 05 October 2016 from Applicant
Date of Determination:	14 October 2016

COSTS DETERMINATION OF
THE EMPLOYMENT RELATIONS AUTHORITY

Employment relationship problem

[1] Dawsons Catering Limited (Dawsons) is a catering company which employed Mr Matthew Hawke. Mr Hawke started working for Dawsons in March 2014, when he was 26 years old. Mr Hawke was employed as the Venue Manager and Café Manager of Old Government House cafe at the University on a starting salary of $45,000.

[2] Mr Hawke commenced employment with one of Dawson's competitors on 08 August 2016. Dawsons unsuccessfully sought a declaration from the Authority that

Mr Hawke had breached the restraint of trade clause in his employment agreement and an injunction preventing him from working for his new employer until 27 July 2017. Dawsons also sought damages, a penalty and costs.

[3] Mr Hawke's employment agreement also included a confidentiality clause which restricted his ability to use Dawsons' confidential information even after his employment had ended. Mr Hawke acknowledged his intention to comply with that ongoing obligation.

[4] Dawsons claims were wholly unsuccessful because it failed to establish that the restraint was valid, reasonable or enforceable.

[5] The parties were encouraged to resolve costs by agreement. That did not occur. Mr Hawke now seeks a costs award in his favour. Mr Hawke incurred costs of $15,128.66 GST inclusive.

[6] Mr Hawke seeks (in the alternative):

a. Full solicitor/client (indemnity) costs;

b. The daily tariff for the one day investigation meeting plus $9,000 for two days preparation and "an uplift"[1];

c. $13,500 costs plus $789.59 disbursements.

[7] Mr Swan submits that costs should lie where they fall meaning that, despite Mr Hawke being the successful party, he should not be awarded any costs.

The law

[8] Costs are discretionary. The Authority's discretion is to be exercised on a principled basis. Generally a successful party is entitled to a contribution towards their actual legal costs.

[9] The legal principles that apply to costs in the Authority are so well established that I do not need to set them out – see *PBO Ltd (formerly Rush Security Ltd) v. Da Cruz*[2].

[1] Amount of uplift sought is not specified.
[2] [2005] 1 ERNZ 808

Should indemnity cost be awarded?

[10] Whilst the Court of Appeal in *Bradley v. Westpac Banking Corporation*[3] recognised that indemnity costs may be awarded where a party has behaved very badly or unreasonably, such cases are likely to be rare.

[11] The Authority has a well-established tariff based approach to costs and I consider that factors that may potentially support indemnity costs can be appropriately considered as part of the Authority's usual assessment of costs. I also find that this is not a case which would warrant an award of indemnity costs.

What is the starting point for assessing costs?

[12] The notional daily tariff for cases filed before 01 August 2016 is $3,500. The notional daily tariff increased to $4,500 for the first day of an investigation (subsequent days remain at the rate of $3,500 per day). This matter involved a one day investigation meeting so the notional starting point for assessing costs is $4,500.

[13] I must then go on to consider, on a principled basis, whether there are any factors arising from the particular circumstances of this case which warrant adjusting the notional starting tariff.

Are there any factors which would warrant a reduction in the notional daily tariff?

[14] Mr Swan submits that the notional starting tariff in this case should be reduced to zero. Mr Swan seeks to persuade the Authority that Mr Hawke unreasonably rejected a settlement offer.

[15] That submission cannot stand scrutiny because Mr Hawke gained a more favourable outcome than Dawsons had offered. On that basis Mr Hawke cannot be said to have unreasonably rejected an offer because he knew he could achieve a better outcome if the case was investigated by the Authority, which is what actually occurred.

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[3] [2009] NZCA 234

[16] I find there are no factors that warrant a reduction being made to the notional tarrif.

Are there any factors that warrant an increase being made to the notional tariff?

[17] I consider there are two factors that warrant a significant increase being made to the notional tariff.

[18] The first is that Dawsons unreasonably rejected Mr Hawke's offers to settle this matter on terms that were far more favourable to Dawsons than what they achieved. The second is that I find that the manner in which Dawsons' conducted its case unreasonably and inappropriately extended the time required for an investigation meeting.

[19] Mr Hawke (with his employer's agreement) offered to avoid doing any work for the University (which is the client Dawsons was concerned about securing post Mr Hawke's departure) until 28 October 2016 provided that Dawsons contributed $3,000 towards his actual legal costs.

[20] I consider that was a generous offer in the circumstances because it involved Mr Hawke forgoing his right to work unimpeded for his new employer. I find that Dawsons unreasonably rejected this offer because it was a better outcome than what it could have expected to have achieved through litigation.

[21] While it is open to Dawsons to have rejected it, Dawsons decision to do so meant both parties incurred significant legal costs that could (and in my view should) have been avoided.

[22] I consider it would have been clear from the outset that a 12 month post termination restraint to cover the greater Auckland region placed on an employee in Mr Hawke's situation[4] was not going to be upheld by the Authority. There is no case law that supports a restraint of that nature in similar or comparable circumstances.

[23] Mr Pollak submits that Dawsons pursued litigation against Mr Hawke because it wished to impose an obviously unreasonable restraint for the purposes of being anti-competitive. Mr Pollak also submits that Dawsons used its considerable resources

[4] None or at best very limited ability to influence the University's purchasing decisions, no access to key commercial information such as price setting criteria, no ability to make offers to the University outside what he was specifically instructed to do and employed on a salary of $45,000.

against a single relatively low paid employee who lacked comparable resources. I find these submissions have considerable merit.

[24] Calderbank correspondence Mr Swwn submitted to the Authority states *"My client's only interest in the present proceeding is to ensure that your client does not work for Urban Gourmet at the University of Auckland."*

[25] Mr Hawke was prepared to comprise his legal rights to avoid incurring additional legal costs but he understandably wanted a contribution from Dawsons towards the costs he had incurred up to that point. Dawsons declined to make any payment.

[26] There was discussion between the parties about the Authority investigating costs issues only[5] but as Mr Pollak rightly pointed out in a Calderbank letter to Mr Sawn prior to the Authority's substantive investigation meeting, the Authority's view on costs would depend on whether it held the restraint valid and enforceable or not.

[27] Mr Pollak suggested that Dawsons accept that it could not obtain an injunction and that the parties agree that the Authority determine costs on that basis. Mr Pollak said that approach would be able to confine the Authority's investigation to costs issues only. Dawsons rejected that suggestion.

[28] Mr Pollak subsequently made a further Calderbak offer that Dawsons could either walk away from the substantive investigation meeting with costs lying where they fell or Dawsons could accept Mr Hawke's offer to not do any work for the University until 28 October 2016 provided it contributed $3,000 plus GST towards his actual legal costs. Dawsons also rejected these offers.

[29] I find that Dawsons' decision not to settle on terms that would have been more favourable to it than what the Authority determined should increase the notional tariff.

[30] I further find that Dawsons unreasonably lengthened the investigation meeting because it raised irrelevant matters in its evidence that Mr Hawke and his witnesses were required to respond. Dawsons also failed to provide basic evidence that is expected to be supplied to the Authority by a party seeking to enforce a restraint. That

[5] Dawsons failure to contribute towards Mr Hawke's costs and Mr Hawke's willingness to compromise his legal rights only if a contribution to his actual costs was made meant the parties reached an impasse. The suggestion that the Authority resolve costs only was an attempt to move past that impasse.

omission involved extra investigation meeting time to attempt to obtain this information from Dawsons' witness.

[31] Dawsons' failure to make any concessions about the validity and enforceability of the restraint clause meant the Authority was required to conduct a full investigation into every element relating to restraint of trade clauses. This was despite Mr Swan identifying in his correspondence with Mr Pollak that Dawsons were bringing litigation solely to stop Mr Hawke working for his new employer at the University.

[32] I consider the notional daily tariff in this case should be tripled to adequately reflect the particular circumstances of this case.

[33] While Dawsons is entitled to choose to pursue litigation which (in light of case law from the employment institutes) has no prospect of success, I find that Mr Hawke should not bear the financial burden of Dawsons' decision. Nor should the consequences for the inefficient and unnecessarily lengthy manner in which Dawsons actually conducted its litigation be brought to bear on Mr Hawke.

[34] For those reasons I consider it reasonable, necessary and in the interests of justice to exercise the Authority's discretion to significantly increase the notional daily tariff in order to arrive at an appropriate level of costs to be awarded.

[35] I do not accept Mr Pollak's submission that any of the follow matters should result in the notional tariff being increased:

a. Urgency;

b. Mr Hawke's co-operation with an urgent substantive investigation meeting;

c. Two days preparation time was required;

d. Complexity of the issues[6].

[36] The Authority has set a notional daily tariff to give parties certainty regarding likely awards of costs. This tariff has been set to include cases that may be urgent or

[6] I find there was no complexity. In my view this was a very easy straightforward restraint case involving well established legal principles and supported by considerable amount of case law.

which may proceed to an early (urgent) substantive investigation meeting. The tariff has also been set to include pre investigation preparation time, so it is not usual for the Authority to award the tariff plus extra preparation time at the tariff rate.

[37] I want to make it clear that the uplift to the notional daily tariff I am imposing in this case does not relate to any of the factors in paragraph [34] above. I also want to expressly recognise that an award of costs may not be used to punish a party. I raise this because that was an issue Mr Swan referred to in his submissions.

What if any disbursements should be awarded?

[38] Mr Hawke seeks reimbursements of $789.59 for disbursements. These disbursements have not been specified in Mr Pollak's submissions. I can see from the invoice attached to Mr Pollak's submissions that $13 was incurred by Mr Hawke for courier costs so it is appropriate for that to be reimbursed.

[39] The other items visible on the invoice involve entries for *"photocopying/printing*" but there is no explanation as to whether this was an internal or external costs. In the absence of such information I assume it was an internal office expense. This is not recoverable on the basis it is an ordinary cost of doing business.

Outcome

[40] Within 28 days of the date of this determination Dawsons is ordered to pay Mr Hawke $13,500 towards his actual legal costs together with $13 disbursements to reimburse his courier charges which arose out of the urgency of this matter.

Rachel Larmer
Member of the Employment Relations Authority