

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE**

[2020] NZERA 456
3035854

BETWEEN EMMITT CONSULTANTS
 LIMITED
 Applicant

AND CHRISTOPHER PEEL
 First Respondent

Member of Authority: Vicki Campbell

Representatives: Andrew Schirnack, counsel for Applicant
 Richard Harrison, counsel for Respondent

Submissions received: 7 October 2020 from Applicant
 17 October 2020 from Respondent

Determination: 6 November 2020

COSTS DETERMINATION OF THE AUTHORITY

- A. Mr Peel is ordered to pay to Emmitt Consultants Limited the following costs and disbursements within 28 days of the date of this determination:**
- a) Costs of \$4,875;**
- b) Disbursements (exclusive of GST) of \$7,277.23.**

[1] I have issued two determinations in respect of Emmitt Consultants Limited's application. The first dated 11 October 2019 I held that the restraint of trade provisions contained in Mr Peel's employment agreement were reasonable and enforceable, and

they were breached by Mr Peel.¹ The second determination dated 30 September 2020 dealt with remedies, after the parties had been unable to reach agreement.²

[2] I reserved costs and invited the parties to resolve the issue between them. The parties have been unable to resolve the matter and the successful party, Emmitt Consultants Limited now seeks a contribution toward the costs it incurred dealing with its claims.

[3] The discretion to award costs, while broad, is to be exercised in a principled way. The primary principle is that costs follow the event. The Authority has the power to order any party to pay to any other party such costs and expenses as the Authority thinks' reasonable.³ The principles applying to costs are well settled and do not require repeating.⁴

[4] Emmitt Consultants Limited seeks costs and disbursements. It seeks to recover:

- a) The daily tariff amounting to \$8,000, comprised of \$4,500 for the first investigation meeting and \$3,500 for the second day; and
- b) Disbursements amounting to \$8,368.81, comprised of \$71.56 for the filing fee plus \$8,297.25 for expert witness fees. Both sums include GST.

[5] Mr Peel accepts daily tariff costs apply and submits:

- a) The daily tariff should be adjusted downwards to reflect that neither of the investigation meetings took a full day;
- b) The award of damages amounting to \$46,898.54 was significantly less than the amount claimed (\$157,830.89);
- c) The expenses attributable to the expert used by Emmitt Consultants Limited are not reasonable because a number of assumptions used by the expert were incorrect and his calculations as to the quantum of damages was not accepted in their entirety;

¹ *Emmitt Consultants Limited v Peel* [2019] NZERA 581.

² *Emmitt Consultations Limited v Peel* [2020] NZERA 391.

³ Employment Relations Act 2000, Schedule 2, clause 15.

⁴ *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808, 819-820 and *Fagotti v Acme & Co Limited* [2015] NZEmpC 135 at [106] – [108].

d) Mr Peel had to arrange for his own expert evidence to address the inaccuracies in the expert evidence given on behalf of Emmitt Consultants Limited.

Daily Tariff

[6] An assessment of costs in the Authority will normally start with the notional daily tariff which is \$4,500 for the first day of an investigation meeting and \$3,500 for each subsequent day.⁵

[7] The investigation meeting held on 19 August 2019 took half a day. The starting point for that day is half of the first days' tariff of \$4,500 which amounts to \$2,250. The second investigation meeting held on 7 July 2020 took just over half a day. Assessing this as $\frac{3}{4}$ of a day the starting point for the second day is 75 per cent of the second day's tariff which amounts to \$2,625.

[8] There was no conduct by either party that would justify an uplift in the daily tariff which amounts to \$4,875.

Disbursements

[9] I consider the disbursements sought by Emmitt Consultants Limited to be recoverable. In his evidence, Mr Hussey helpfully provided a comparative table between his assessment of damages and that of Mr Peel's expert. The evidence overall was of assistance in assessing the extent of damages to be awarded. The table helpfully set out each component of damages sought and how that component had been calculated.

[10] I am satisfied the expert expenses incurred by Emmitt Consultants Limited was necessary to the conduct of the proceedings and were reasonable.

[11] However, the inclusion of GST in the disbursements is not appropriate. Emmitt Consultants Limited is a company registered for GST and is able to claim the GST as a business expense.⁶

⁵ Practice Note 2, Costs in the Employment Relations Authority.

⁶ *Booth v Big Kahuna Holdings Ltd* [2015] NZEmpC 4 at [51].

Orders

[12] Mr Peel is ordered to pay to Emmitt Consultants Limited the following costs and disbursements within 28 days of the date of this determination:

- a) Costs of \$4,875;
- b) Disbursements (exclusive of GST) of \$7,277.23.

Vicki Campbell
Member of the Employment Relations Authority

