IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2017] NZERA Auckland 183
5561859

	BETWEEN	GEA PROCESS ENGINEERING LIMITED Applicant
	AND	TONY SCHICKER Respondent

Member of Authority:	Robin Arthur
Representatives:	Stephen Langton, Counsel for the Applicant David Grindle, Counsel for the Respondent Peter Churchman QC, Susan Hornsby-Geluk and David Traylor, Counsel for Kieron Clarke and Scott Clarke
Memoranda lodged:	10 May 2017 from the Respondent, 12 and 19 May 2017 from the Applicant and 12 May and 26 May 2017 from Kieron Clarke and Scott Clarke
Determination:	27 June 2017

DETERMINATION OF THE AUTHORITY

A. The application of GEA Process Engineering Limited (GEA) for findings and orders regarding its former employee Tony Schicker is dismissed without further investigation.

B. An application from Kieron Clarke and Scott Clarke for costs is removed, on the Authority's own motion, to the Employment Court to hear and determine. They seek an order requiring GEA to pay them for legal costs incurred in preparing their responses to a witness summons to provide documents in this proceeding.

[1] This determination explains why an application GEA Process Engineering Limited (GEA) lodged two years ago has been dismissed without the Authority completing an investigation of the claims GEA made against its former employee Tony Schicker. It also explains why an application for costs by two directors of the

company Mr Schicker went to work for after his employment with GEA ended has been removed to the Employment Court to hear and determine.

The employment relationship problem

[2] On 16 June 2015 GEA lodged a statement of problem seeking findings and orders concerning alleged activities of Mr Schicker. He had worked for GEA as a component sales manager from 7 December 2006 to 30 January 2015.

[3] Soon after his employment with GEA ended, Mr Schicker began a new job at Dynaflow Process Services Limited (DPSL). DPSL and another company, Dynaflow New Zealand Limited (DNZL), were part of the Dynaflow business. Dynaflow was a customer of GEA. The two businesses also shared some customers in common. While employed with GEA Mr Schicker's duties had included various business-related contact with Dynaflow.

[4] GEA alleged Mr Schicker, while still its employee, had revealed to Dynaflow some plans GEA had to develop a valve servicing business. It also alleged he took some of GEA's confidential information for use in his new job with Dynaflow. GEA sought orders requiring Mr Schicker to comply with on-going confidentiality obligations under his former employment agreement with GEA, to stop assisting Dynaflow's own valve servicing business, to pay a penalty, and for the Authority to carry out an inquiry into damages caused by the alleged breaches of his contractual obligations to GEA.

[5] In his statement in reply Mr Schicker denied he had breached duties owed to GEA, either before the end of his employment or in his new role with Dynaflow.

[6] The parties attended mediation, without resolving the matter. Mr Schicker also sought but was denied leave to raise a personal grievance against GEA out of time.[1]

Disclosure of documents and subsequent delays

[7] The next significant step in the proceeding was a letter from GEA's counsel, dated 2 September 2015, asking the Authority to hold a case management conference. It advised GEA would seek directions for "discovery of relevant documents" by Mr

[1] *Schicker v GEA Process Engineering Ltd* [2015] NZERA Auckland 384.

Schicker and the Dynaflow business. The letter proposed what it called "two possible means of or processes for ensuring discovery [was] undertaken on a reliable basis".

[8] One means GEA proposed was for the Authority to direct a discovery regime mirroring that operated by the High Court. This would comprise requirements for Mr Schicker and Dynaflow to lodge affidavits listing documents in their control or possession and to identify any documents they considered need not be disclosed due to privilege or confidentiality restrictions. GEA said it and the Authority could then inspect discovered documents and "take a view on whether further more forensic discovery directions [might] be necessary".

[9] The other process GEA referred to was for the Authority to use its discretionary power to issue summonses for Mr Schicker and the directors of the companies comprising the Dynaflow business, Kieron Clarke and Scott Clarke, to attend a preliminary investigation meeting and bring relevant documents.

[10] A non-party to an Authority proceeding may voluntarily participate in a High Court-style discovery regime but the Authority cannot impose such an arrangement by direction. In the absence of willing co-operation by such a non-party, relevant documents in the possession or control of such a person or entity need to be sought, initially at least, by use of the Authority's statutory power to issue a witness summons to produce document or other records.[2]

[11] Disclosure issues were discussed during an Authority case management conference with counsel for GEA and Mr Schicker held on 5 October 2015. Just over a month later, on 9 November 2015, GEA applied for a summons to be issued requiring Kieron Clarke and Scott Clarke (the summonsed witnesses) to provide documents. The Authority issued the requested summons, dated 10 November 2015, along with a notice of an investigation meeting on 11 December 2015 for the summonsed witnesses to attend and produce documents. The summons noted it was issued on the application of GEA and required attendance on 11 December unless some alternative arrangement to provide relevant documents was made meanwhile.

[12] The subject matter of documents sought were set out in some detail over 26 lines of the summons and referred to activity or relationships with four commercial entities other than GEA or Dynaflow. It was not necessary for this determination to

[2] Employment Relations Act 2000 Schedule 2 clause 5.

set out the specific subject matter or names of those entities, except to note a specific emphasis on information about valve servicing activities or plans.

[13] On 4 December 2015 the summonsed witnesses advised, through their counsel, that they had no objection to assisting the Authority by disclosing relevant information, provided the extent of such disclosure was reasonable. They sought some limit on providing information that might give GEA "an unfair insight into Dynaflow's confidential and proprietary information".

[14] Following a case management conference with counsel for the parties and the summonsed witnesses, those two witnesses agreed to a proposal for them to disclose documents by affidavit. The notified 11 December investigation meeting was vacated. Effectively this resulted in a court-style disclosure regime then being in place. Documents in a range of categories or topics were to be identified in a list given by affidavit. The list was to identify documents which were also said to be privileged, confidential or outside the scope of liability issues in the matter between GEA and Mr Schicker.

[15] The summonsed witnesses sought and were granted two extensions of time to prepare and lodge their affidavit. They sought the extensions because they said around 5000 documents had to be reviewed. The Authority also directed access to some documents be restricted to GEA counsel only rather than, without further direction, being immediately available to GEA personnel. This direction was made, after discussion with counsel, to address Dynaflow's concerns about commercial confidentiality of some information to be provided. The scope of disclosure required from the Dynaflow business was also clarified as including documents held by DPSL as well as DNZL.

[16] The summonsed witnesses lodged four affidavits providing a list of document – the first on 22 February 2016, an amended affidavit on 2 March 2016, a supplementary affidavit on 7 April 2016 and a second amended affidavit on 6 May 2016. The list attached to the 6 May 2016 affidavit identified 345 documents as inside the scope of the liability issues, 405 documents out of scope, 64 privileged documents and 1765 documents as commercially confidential.

[17] The summonsed witnesses objected to providing documents they categorised as out of scope, privileged or commercially confidential. Their 6 May affidavit also questioned GEA's motivation:

> We are concerned that GEA is using this proceeding for purposes other than seeking relief sought against Mr Schicker. We suspect Dynaflow is the real target of GEA … and that GEA's purpose is to harm our business by obtaining commercially sensitive information about it. They did not have a valve servicing business in January 2015. If they are developing one now, harming us operating our business will be in their interest.
>
> The categories of documents sought in the witness summons were very wide and captured an enormous number of documents that would be useful to a competitor. From a lay person's perspective, the documents sought appear to be much wider than the issues alleged in the statement of problem. For that reason we consider that GEA is seeking these documents in a "fishing expedition" to either damage us due to the significant time and cost required to compile these documents or to obtain commercially sensitive information for its own benefit.

[18] By this time problems of delay in this proceeding had already led to following observation from me, made in a Member's Minute issued on 30 March 2016:

> This is a matter in the employment relations jurisdiction. It is not commercial litigation. Extended interlocutory and disclosure disputes are not conducive to prompt resolution "according to the substantial merits of the case, without regard to technicalities".[3] An initial indication that the substantive matter might be scheduled for investigation in February 2016 has proved sadly over-optimistic.

[19] The 9 May 2016 affidavit lodged by the summonsed witnesses effectively completed what they considered they needed to do at that stage of the proceeding. The ball was then in GEA's court to seek any further steps necessary to satisfactorily complete provision of relevant documents. Many months of delay followed.

[20] On 26 August 2016 an Authority Officer, at my request, inquired by email what steps GEA's counsel considered were necessary. On 1 September GEA counsel advised they had written to the solicitors of the summonsed witnesses seeking agreement on use of certain documents listed in the confidential and out of scope sections of the summonsed witnesses' affidavit. The message from GEA counsel ended with this sentence: "We will update you when we have heard from Dynaflow's solicitors".

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[3] Employment Relations Act 2000, s 157.

[21] Five months then passed with no further information or contact from GEA counsel. On 9 February 2017 an Authority Officer sent the following query on my behalf:

> I note from the Authority's file that it appears the last message from Applicant's counsel about progress in this matter was received on 1 September 2016. That message was, in turn, sent in response to an Authority query that noted the previous last message from a party had been received on 9 May 2016. Should this Authority file now be closed?

[22] GEA's counsel replied that day:

> … No, this file should not be closed.
>
> The issue of which documents the Dynaflow witnesses consent to being used in this proceeding is still being worked through between the lawyers for Dynaflow and us (Dynaflow has also changed lawyers, now).
>
> We anticipate filing an application with the Authority in respect of documents whose production cannot be agreed, as soon as that is possible, and then to have the matter set down for a Meeting.
>
> I have copied Dynaflow's new lawyers into this email. …

[23] However the next activity in this proceeding was not an application from GEA but a memorandum of counsel for the summonsed witnesses, lodged on 6 March 2017. The memorandum advised new counsel for the summonsed witnesses had been instructed in this matter since 15 August 2016. It referred to a chronology of events attached to a Member's Minute issued in March 2016, almost a year earlier, and the long history of the matter dating back to the lodging of the statement of problem in June 2015. The memorandum said the summonsed witnesses had been put to substantial cost in providing disclosure of documents. Their costs were said to be around $131,742 in fees with both their previous and current representatives. It advised they intended applying for costs. It also referred to an indication given by their previous counsel, by writing in a memorandum lodged on 30 March 2016 and verbally in a case management conference held that day, that they would seek an order for legal costs incurred in complying with directions for disclosure.

[24] The 6 March 2017 memorandum from the summonsed witnesses' counsel sought a further case management conference to timetable "the conclusion of the non-party disclosure process".

[25] Over the following weeks the Authority attempted to arrange a case management conference with counsel on six separate proposed dates: 24 March, 7 April, 13 April, 21 April, 5 May and 12 May. A conference call was eventually able to proceed on 12 May. By Member's Minute of 24 April counsel were given notice of my view of what should happen next in this proceeding:

> I have reached the preliminary view that the appropriate next step is for the Authority to issue a determination dismissing GEA's application for want of progress and to order costs lie where they fall. The Authority has been unable to secure sufficient co-operation from the parties to be able to continue its investigation. Such a determination by the Authority could then be subject to challenge to the Employment Court, probably on a de novo basis, so that if dissatisfied by that conclusion, GEA could pursue its claims against Mr Schicker in the Court and/or the Dynaflow business directors and their employee Mr Schicker could ask the Court to determine any costs issues they may wish to have addressed.[4]

[26] Mr Schicker's counsel lodged a memorandum on 10 May 2017 calling for the Authority to use its "good conscience" jurisdiction to strike out GEA's claim for want of prosecution. He submitted GEA's conduct of the case was not consistent with what the Employment Relations Act envisaged for Authority investigations. Mr Schicker was, he submitted, marginalised by on-going litigation without any hope of resolution in sight while the commercial entities involved continued to explore their discovery obligations and associated arguments. In an affidavit lodged with that memorandum Mr Schicker said that, as a 66 year old who had never before been involved in an employment dispute, he had found the experience sickening and hugely stressful. He had already paid legal costs of $23,771. And, while in excellent health before this litigation began, he said he had since been diagnosed with a stress-related condition and been prescribed anti-depressant medication.

[27] GEA, also by memorandum lodged in advance of the 12 May conference call, opposed dismissal of its claim. It said dismissal would deny GEA the right to have its claim investigated by the Authority "in accordance with its procedures and its substantive right of challenge (if necessary) of any substantive determination to the Employment Court". It said dismissal of its claim would be an unreasonable exercise of the Authority's powers. Further details of its submissions have been considered later in this determination.

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[4] Employment Relations Act 2000, s 160(1)(f), s 173(2) and (3), and s 174D.

[28] The summonsed witnesses lodged a memorandum too. They supported dismissal of GEA's claim and applied for recovery of the legal costs they incurred in responding to their disclosure obligations. They said actual costs and disbursements incurred with their previous and current representatives now totalled $146,167. They provided copies of invoices in support of their costs application.

[29] The issues touched on in those memoranda were discussed at the case management conference held on 12 May 2017. During that discussion counsel for the summonsed witnesses supported the notion, raised by me, that their costs application could be removed to the Employment Court to hear and determine. A timetable was set for counsel to lodge further written submissions on the costs and removal issues.

[30] GEA lodged a memorandum on 19 May 2017 submitting that the Authority should itself determine whether it had the power to award costs to the summonsed witnesses rather than remove the issue for decision by the Court in the first instance. GEA also submitted the Authority did not have the power to award such costs anyway. GEA also raised two technical points over, firstly, whether the Court could deal with the summonsed witnesses' costs application because it arose from the procedure that the Authority had followed and, secondly, whether the summonsed witnesses, as a non-party, would have standing to be heard in any removed proceedings.

[31] In a reply memorandum lodged on 26 May 2017 the summonsed witnesses addressed the legal and technical issues raised in GEA's memorandum. Relevant points from those submissions have been referred to later in this determination.

[32] Against that background, the remainder of this determination has addressed two matters:

(i) Why it was appropriate to now dismiss GEA's application to the Authority without completing an investigation; and

(ii) Why the question of whether costs could and should be awarded to the summonsed witnesses was best removed to the Employment Court to hear and determine.

[33] While the parties and the summonsed witnesses have been given opportunities to be heard on these two matters, both by written submissions and by oral argument

from their respective counsel, it was not necessary to record or summarise all evidence received or submissions made.[5] Conclusions expressed in this determination were reached for the following reasons.

Dismissing GEA's application without completing an investigation

[34] The Authority's role as an investigative body is to resolve employment relationship problems by establishing the facts and making a determination according to the substantial merits of the case, without regard to technicalities.[6] Generally the Authority is expected to deliver relatively speedy and practical justice to the parties to any matter before it.[7] This includes cases where employers, rather than employees, are the applicants. Such applications frequently concern enforcement of obligations owed by employees, or former employees, to an employer under contractual terms regarding restraint of trade and confidentiality information. Sometimes the outcomes of such application are orders about what may or may not be done by a former employee and orders for the payment of damages and penalties. In this way Authority investigations and determinations on such matters enable employers to protect their commercial interests, where it is lawful and just to do so.

[35] In exercising its powers and performing its investigative functions, the Authority must comply with the principles of natural justice, act reasonably and act as it thinks fit in equity and good conscience.[8] This includes ensuring that a matter proceeds without undue delay and that the Authority's process or procedures are not used for purposes unrelated to or unnecessary for the Authority's investigation.

[36] The summonsed witnesses finalised their disclosure of documents in an affidavit dated 6 May 2016. After then GEA effectively sat on its hands for many months. Despite prompting from the Authority in August 2016 and again in February 2017, GEA failed to take steps adequate to indicate any real intention to promptly progress this proceeding. Rather its delay has invited the inference I have made that GEA preferred delay to progress and that its preference was not for reasons related to or necessary for the Authority's investigation.

[5] Employment Relations Act 2000, s 174E.
[6] Employment Relations Act 2000, s 157.
[7] Employment Relations Authority Regulations 2000, r 4(1)(c).
[8] Employment Relations Act 2000, s 157(3) and s 173(1).

[37] Given notice, consistent with the principles of natural justice, of the prospect of dismissal of its application, GEA has advanced a number of arguments why that delay should not result in the Authority declining to continue with an investigation. I have considered those submissions and reached the following conclusions.

[38] GEA submitted it had been seeking to resolve with counsel for the summonsed witnesses whether some documents disclosed on a 'counsel-only' basis could be used in the proceeding. It had taken the view that the Authority would prefer counsel to try and resolve those matters between themselves before resorting to the Authority to intervene. It said it did so because a Minute issued by the Authority in March 2016 suggested that was how issues arising out of disclosure of documents should be addressed in the first instance. I have not accepted that was an adequate explanation for delay that had, from what was apparent to the Authority regarding party activity, lasted almost a year. On 1 September 2016 GEA said it would update the Authority, once it had heard from Dynaflow's solicitors, but did nothing during the following five months to indicate to the Authority there were any problems getting a response. On 9 February 2017, in response to the Authority's next query about progress, GEA said it "anticipated" filing an application about documents on which production could not be agreed. However, GEA had not filed such an application by the time (almost a month later) that the summonsed witnesses lodged their 6 March 2017 memorandum complaining about the delays since they had lodged their May 2016 affidavit.

[39] GEA submitted the summonsed witnesses, not it, were responsible for the delay during the more recent months. GEA said it wrote to counsel for the summonsed witnesses on 1 September 2016 but, due to a change of counsel, got no response until 12 December 2016. GEA said it wrote again to the summonsed witnesses' new counsel on 10 March 2017 and but had since received no substantive response. I have not accepted GEA's submission this showed it was prosecuting its claim in a manner intended to save the Authority time and the delay was because "the ball [was] in the non-parties' court". If GEA was diligently pursuing its claim and there were genuine disclosure issues to resolve, GEA should have alerted the Authority to those concerns when asked about progress in August 2016 and February 2017.

[40] GEA submitted it would be unduly prejudiced if the Authority dismissed its claim without further investigation. Those considerations had to be weighed with the

legitimate interests of Mr Schicker, and, by proxy and by the disclosure obligations imposed on them, the summonsed witnesses and their business. The practical effect of GEA's litigation was to place Mr Schicker's ongoing work for his new employer and that employer's business under the chilling effect of doubt about what could or could not legitimately be done. While GEA might have legitimate concerns about whether Mr Schicker and Dynaflow had and were using its information about valve servicing, there was also the prospect that GEA's claim was wrong. It was not fair to leave that doubt dangling over their activity for so long. Fairness required prompter progress and resolution. The right to pursue a matter in the Authority is not an open-ended opportunity to dally as long as it might suit an applicant to do so. I doubt any prejudice to GEA is so great as to outweigh the prejudice to Mr Schicker and Dynaflow.

[41] GEA can, as a result of this determination, now proceed by way of challenge to have its claim heard by the Employment Court, without having first incurred the time and expense of a full Authority investigation. The outcome in the Authority has determined GEA's substantive rights. It is not merely a conclusion on a procedural matter. It automatically generates a statutory right for GEA to file a challenge in the Employment Court and have the whole matter heard there. In this way GEA still has access to justice, with the right to have its claim decided in an appropriate forum in the employment jurisdiction.

[42] If GEA considers the Authority's conclusion has been arbitrary or unreasonable, a hearing and decision by the Court can correct those errors. There was nothing to suggest GEA was a party with resources so limited that it could not continue to pursue this matter in the Court. If GEA now chooses to exercise its right to have its claim heard in the Court, it will do so without having first incurred the cost of preparing for and participating in an Authority investigation meeting but after having begun a process of disclosure of documents which is still of use in a Court proceeding. This is to GEA's advantage as much as its disadvantage.

[43] The Authority may determine a matter without holding an investigation meeting.[9] In all the circumstances described in this determination, after hearing from counsel for the parties and the summonsed witnesses and in exercise of the

[9] Employment Relations Act 2000, s 174D.

Authority's powers to act reasonably and in equity and good conscience, GEA's application has been dismissed due to GEA's unreasonable delay in pursuing it.

Removing the costs application to the Employment Court

[44] The costs application by the summonsed witnesses raised two questions which do not appear to have arisen previously in an Authority proceeding. Both led me to the opinion that, in all the circumstances, the Court should determine the costs matter.

[45] Firstly, GEA's response to the application has raised a question about the power of the Authority to award costs to a witness compelled by summons to provide evidence for the purposes of an investigation. It is an important question of law. The answer may have important effects both for any person (whether an individual real person or a corporate entity) subject to a summons and for any unsuccessful party to a proceeding, who might have to pay a costs award including costs incurred by summonsed witnesses.

[46] Secondly, the particular arrangements made in this case after the witness summons to produce documents were issued, has raised a further question about the basis on which costs should be awarded, if there is jurisdiction to do so. This question concerns whether the High Court rules could be appropriately applied in awarding costs in the particular circumstances of, and arrangements made with, the summonsed witnesses in this case. It arose because, although they were originally required to respond to an Authority witness summons, alternative arrangements were subsequently made for them to provide documents in a way described by the Authority as being "more akin" to a High Court style discovery regime.

Could High Court costs rules apply to the summonsed witnesses in this case?

[47] The summonsed witnesses' memorandum of 12 May 2017 referred to a letter from GEA counsel dated 17 November 2015. The letter set out two grounds on which GEA would agree to the summonsed witnesses not attending the investigation meeting the Authority had set for 11 December 2015 for them to attend and bring the documents and records required under the summons. One ground was that the summonsed witnesses serve an affidavit of documents in accordance with High Court Rules in a form provided under those rules, "amended as appropriate to take account of the different forum". The other ground was that the Authority consented to the

alternative. GEA's proposal echoed one of the means it had earlier proposed by letter to the Authority on 2 September 2015. The proposal was discussed in a case management conference with counsel for the parties and the summonsed witnesses on 7 December 2015. It was accepted by email from the summonsed witnesses' counsel later that day.

[48] High Court Rule 8.21 allows for the Court to order a person who is not a party to a proceeding to provide an affidavit about relevant documents and to make available for inspection documents in the person's control. This was the regime expected from the arrangements agreed between GEA and the summonsed witnesses and consented to by the Authority.

[49] Having agreed to such an arrangement, the question has now become whether the following High Court Rule consequently also applied to the costs that the summonsed witnesses said they incurred in preparing their affidavit and related attendances as a result of GEA's proceedings against Mr Schicker:

> 8.22 **Costs of discovery**
> …
> (3) If an order is made under rule … 8.21(2), the Judge may, if the Judge thinks it just, order the applicant to pay to the person from whom discovery is sought **the whole or part of that person's expenses (including solicitor and client costs)** incurred in relation to the application and in complying with any order made on the application.

[50] If this rule does apply, the ordinary questions about whether the costs claimed are reasonable are probably best dealt with the Employment Court in this particular case. The Court, by virtue of its own procedures for disclosure, is more familiar with the operation of the High Court style discovery rules and with deciding what awards of costs are appropriately made for participating in such a process. The exercise probably involves, in this case at least, finer consideration of what might result in an award of significantly greater amounts than normally achieved under the Authority's broader-brushed, tariff-based approach to costs. The amount of $146,167 sought by the summonsed witnesses appears very high. The Court may have the better sense of whether the costs said to have been incurred were, under that kind of discovery regime, proportionate in the circumstances and could reasonably be awarded.

[51] And, if GEA exercises its rights to challenge the Authority's substantive determination, dismissing its application, the result of the summonsed witnesses'

disclosure efforts would form part of that proceeding. It then would also make more sense for the question of their costs to be considered by the Court.

An important question of law: can a summonsed witness seek costs?

[52] The more general, and prior, issue is whether the Authority even has the power to make an award of costs to a witness who has sought legal advice and assistance in responding to a summons issued by the Authority. Such a summons might only require attendance at an investigation meeting to answer questions or might also require a person to find and produce documents and other records.

[53] The summons to produce documents and records is an important tool in the exercise of the Authority's role and powers to investigate and determine employment relationship problems. It enables the Authority to make a reluctant party provide and reveal evidence and information that party might, for reasons of self-interest, otherwise not disclose. It also enables the Authority to get relevant evidence and information from a non-party, meaning a person or entity who is not an applicant or respondent to the immediate proceeding. One typical example of such a non-party may be the new employer of an employee being pursued by their former employer in cases regarding restraints of trade or misuse of confidential information. Government agencies are another example of non-parties that, but for a witness summons to produce documents, might not release evidence that could otherwise be protected from disclosure by privacy or official information restrictions. Other typical examples include banks and telecom or internet service providers, clients or customers who may have been part of a discussion or transaction relevant to the issues in a proceeding, and other employees or managers.

[54] Responding to a summons is an imposition on the life and activity of a person or entity. It is, however, a price of citizenship, whether personal or corporate, in a civilised society that provides quasi-judicial and judicial forums to resolve disputes of interest and law between the state and citizens and between citizens. Citizens with relevant information can be called upon to disrupt their lives and private business to provide necessary assistance for that process of resolution.

[55] This case has raised the question of whether the Authority has the power to provide some recompense, by way of costs, to such a non-party person or entity where they have incurred legal expenses in responding to a summons to produce documents.

[56] GEA submitted the Authority did not. While the Authority has wide powers under s 157 and s 160 of the Act to call for evidence and information from any person, and to interview any person, the following two clauses of Schedule 2 of the Act provide what appear to be quite narrow powers to award costs to parties and expenses to witnesses:

> **6 Witnesses' expenses**
>
> (1) Every person attending the Authority on a summons, and every other person giving evidence before the Authority, is entitled, subject to subclause (2), to be paid, by the party calling that person, witnesses' fees, allowances, and travelling expenses according to the scales for the time being prescribed by regulations made under the Criminal Procedure Act 2011, and those regulations apply accordingly.
>
> (2) The Authority may disallow the whole or any part of any sum payable under subclause (1).
>
> **15 Power to award costs**
>
> (1) The Authority may order any party to a matter to pay to any other party such costs and expenses (including expenses of witnesses) as the Authority thinks reasonable.
>
> (2) The Authority may apportion any such costs and expenses between the parties or any of them as it thinks fit, and may at any time vary or alter any such order in such manner as it thinks reasonable.

[57] GEA raised two technical points about the prospect of removal of the costs issue and the ability of the Court to consider the application by the summonsed witnesses. Neither point was an impediment to removal under s 178 of the Act.

[58] Firstly, GEA submitted the requirements for the summonsed witnesses to provide documents (either by responding to the summons issued or by the later agreed means of providing an affidavit listing documents) was part of the procedure being followed by the Authority as part of its investigation. Subsection (6) of s 178 of the Act provides that this section, which allows for matters to be removed to the Court, does not apply to "the procedure that the Authority has followed, is following, or is intending to follow". This provision might reasonably prevent a summonsed witness seeking to have the Court decide some question about the summons regime during the

course of an Authority investigation and before the Authority has determined the substantive matter. The circumstances of the present case are different in the sense that the Authority has now determined the substantive issue between the parties, albeit by way of an incomplete investigation. What remains is whether the summonsed witnesses have a right to seek what they say are their legal costs for the effort and expense they were put to at the behest of GEA. It is a question about a substantive effect of the proceeding on them, not a matter of procedure.[10]

[59] Secondly, GEA submitted the summonsed witnesses had no standing. Kieron Clarke and Scott Clarke were not parties to the proceeding between GEA and Mr Schicker. They were witnesses. GEA submitted those two men therefore lacked standing to apply to remove their costs claim to the Court. If that point were correct, it did not apply to the circumstances on which this matter has been removed to the Court. Removal has not been made on the basis of an application by a party or a non-party. It has occurred on the Authority's own motion. I moved to consider removal because the part of the matter that concerned whether or not costs could be awarded was an important question of law likely to arise other than incidentally and I was, as a result and as noted earlier, of the opinion that in all the circumstances the court should determine the matter.[11]

[60] There are two provisos relevant to the conclusion expressed in the previous paragraph. Firstly, I took the view the summonsed witnesses had standing in the Authority seek costs (but had no concluded view on whether the Authority had the power to award costs or the amount sought was reasonable and should be granted). However, it is for the Court to decide and say if the summonsed witnesses have standing in its forum, not the Authority. Secondly, if my conclusion on removal is ill-founded, the Court has the discretion under s 178(5) of the Act to decide the matter was not properly removed and to then order the Authority to investigate and determine that costs issue.

[61] Whether or not the Authority has the discretionary power to award costs incurred by a witness responding to a summons to produce documents (whether by producing those records at an investigation meeting or by some alternative arrangement) depends on how widely or narrowly the word "expenses" in clauses 6

[10] *H v A Limited* [2014] NZEmpC 92 at [27] and [28].
[11] Employment Relations Act 2000, s 178(2)(a) and (d).

and 15 of Schedule 2 of the Act and the phrase "any other party" in clause 15 may be interpreted. One item of correspondence on the Authority file shows the Authority and, possibly the parties, had not contemplated the summonsed witnesses would have no right to seek reasonably incurred costs. In a memorandum lodged on 7 April 2016 the summonsed witnesses' counsel at the time said they would likely file an application for costs in the following week. An email message sent in reply on my behalf on 8 April 2016, addressing several points in the memorandum, included the following observation:

> … On costs the summons witnesses are free, as they suggest, to make an application now regarding disclosure costs. However it may be useful for them to know that all costs issues (for parties and non-parties) would typically be determined later in the investigation. In the case of the summons witnesses it is possible they could also have other costs questions they would want considered later too, such as witness expenses and their counsel's costs if they were needed to give evidence in the Authority's eventual substantive investigation. …

[62] While this observation did not say such costs would certainly be awarded, it clearly contemplated and did not doubt such an application could be made and considered. It was, it should be noted, an observation that does not appear to have been challenged or queried by GEA at the time. However, dependent on the Court's decision on this removed matter, the observation may have misapprehended what the Authority could legitimately do.

[63] There are some several competing policy concerns that may, or may not be, relevant to interpretation of the relevant clauses. In the context of the parliamentary intention that the Authority's role and powers are to be used to establish facts and determine matters on their substantial merits, it is undesirable to have the prospect of costs applications and awards potentially fettering the free use of summonses, where such compulsion proves necessary for the conduct of the investigation. On the other hand, a person or entity put to the expense of finding and providing documents, and getting legal advice to make sure they get it right, should not suffer a disproportionate financial burden as a result of being (as they might see it) dragged into someone's dispute. However it is also undesirable to have what may be people or entities closely related to the parties using technical or legalistic devices to dissuade one or other party (or the Authority) from taking steps necessary to obtain relevant evidence. Threats or demands about pursuing costs, made in response to receiving a summons,

are such unwelcome devices. Similarly, a party or entity may choose to seek legal advice about how to properly respond to a summons, but it is not desirable they should then necessarily expect to have the costs of that advice met by the unsuccessful party in the proceeding. A person or entity subject to a summons may seek directions from the Authority to limit the extent of what is required and to better focus their response if the request is onerous or unreasonable.

No application for costs from Mr Schicker

[64] Mr Schicker did not apply for costs in the event that the Authority dismissed GEA's proceedings against him. During the Authority case management conference on 12 May 2017 Mr Schicker's counsel advised he was instructed to accept that, for the moment, Mr Schicker's costs in GEA's proceedings against him in the Authority should lie where they fall. If the substantive matter proceeded to the Court, as a result of any challenge by GEA, Mr Schicker reserved his right to seek costs incurred to date as well as whatever resulted from proceedings in the Court. He noted too that Mr Schicker had been unsuccessful in an application for leave to raise a personal grievance out of time, so could not seek costs in relation to that related proceeding.

[65] The matter removed to the Court relates only to the application for costs made by the summonsed witnesses.

Robin Arthur
Member of the Employment Relations Authority