IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE

[2021] NZERA 453
3139061

	BETWEEN	LIFTX LIMITED Applicant
	AND	JONATHON JAMES MUSSON Respondent
Member of Authority:	Philip Cheyne	
Representatives:	Mark Henderson, counsel for the Applicant Paul Brown, advocate for the Respondent	
Submissions Received:	30 July 2021 from the Applicant 9 August 2021 from the Respondent	
Date of Determination:	14 October 2021	

COSTS DETERMINATION OF THE AUTHORITY

A. Jonathon James Musson is to pay Liftx Limited costs of $2,321.56, no later than Monday 15 November 2021.

Employment relationship problem

[1] On 28 May 2021, an interim order was made against Mr Musson requiring him to comply with a restraint of trade provision in an agreement between him and Liftx Limited. I held that Liftx had established an arguable case that Mr Musson, having resigned from Liftx, was a prospective employee of a competitor or it was reasonably imminent that Mr Musson would be employed or engaged by a competitor. While there appeared little strength in an argument that a 6 month restraint was justified as reasonably necessary to protect Liftx's

proprietary interests, I accepted that it was arguable that a lesser period of restraint might be fixed.

[2] Mr Musson's employment with Liftx ended on 28 May and he was restrained from being employed or engaged by a specific competitor, pending further order of the Authority or 31 July 2021, whichever was sooner.

[3] I reserved costs, to be dealt with following final determination of the issues. However, it was not necessary to proceed with a case management conference and an investigation meeting, as the Authority was advised that Liftx's application for a permanent injunction was resolved between the parties. The parties proposed and I agreed to a timetable for submissions on Liftx's application for costs. I now have submissions from both parties. This determination resolves costs.

Claim for costs

[4] Liftx relies on clause 24.1 and clause 25.2 of the employment agreement dated August 2020. Clause 24, headed "Restraint of Trade", prohibited the employee, without the Employer's written consent, during their employment "and for 6 months thereafter", from being employed or engaged by a competitor.

[5] Clause 25 covered "Breach of Restraints". At 25.2 it provided:

> The Employee shall pay all costs and expenses, including legal fees on a full indemnity basis, incurred by the Employer as a result of any action or proceeding commenced to enforce the covenants, undertakings, agreements and obligations in clause relating to … restraint of trade.

[6] I am referred to several cases to establish that a party to an employment agreement may contractually bind themselves to pay costs on a solicitor-client basis to the other party should litigation be necessary. These cases apply principles developed in other legal contexts to employment agreements. I need only mention *Pitman v Advanced Personnel Services Ltd*.[1] There, the employee had been found to have breached restraint of trade and other contractual obligations owed to his employer. Claims included legal costs, based on a clause in the employment agreement by which the employee indemnified the employer against "all losses, liabilities, costs, claims …" in the event of the employee's failure to comply with contractual

[1] *Pitman v Advanced Personnel Services Ltd*.[2019] NZEmpC 83.

obligations, including a restraint of trade provision. The Authority determined final not interim claims,[2] holding that some of the restraint of trade obligations were enforceable against and breached by the employee. The Authority's quantification of the amount recoverable under the contractual indemnity included a discount of actual costs to account for the time spent on elements of the claim that were not upheld. The Employment Court at [55] accepted that the Authority had accurately summarised and applied legal principle.

[7] Here, there has been no final finding that Ms Musson breached obligations he owed to Liftx. When reserving costs, I noted that liability under the contractual indemnity clause pre-supposed the enforceability of the restraint of trade provisions, that point not having been determined at that stage. The proceedings did not continue to a final determination that clause 24 was justified as reasonably necessary to protect Liftx's proprietary interests and in the public interest, and therefore enforceable. For present purposes, I should treat the restraint as unenforceable. It follows that the contractual indemnity does not operate. I need not assess costs in accordance with principles in cases like *George v Auckland Council* and *ITE v ALA*.[3] Instead, costs should be set in accordance with the Authority's statutory power and having regard to the standard practice in the Authority when setting costs.

[8] Costs usually follow the event. There is no reason to depart from that principle. Liftx succeeded with a form of interim injunction and is entitled to an award of costs.

[9] Costs are often fixed by reference to a well-publicised daily tariff. Mr Brown for Mr Musson submitted that a proportion of the daily tariff would be appropriate in this case. The matter took less than a half day investigation time. I round that up to half of the daily tariff for the first day. That results in costs of $2,250.00. There is no reason to either reduce or increase that amount, based on how the cases were conducted. There will also be costs of $71.56 to cover the lodgement fee, so a total of $2,321.56.

Philip Cheyne
Member of the Employment Relations Authority

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[2] *Advanced Personnel Services Ltd v Pitman* [2017] NZERA Christchurch 151.
[3] *George v Auckland Council* [2014] NZEmpC 100 and *ITE v ALA* [2016] NZEmpC 42.