

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI  
ŌTAUTAHI ROHE**

[2022] NZERA 545  
3171524

BETWEEN                   MACDONALD INDUSTRIES LIMITED  
Applicant

AND                         SIMON BESWICK  
Respondent

Member of Authority:     Philip Cheyne

Representatives:         Richard Upton, counsel for the Applicant  
Ian Hunt, counsel for the Respondent

Submissions Received:   8 September 2022 from the Applicant  
24 August 2022 from the Respondent

Date of Determination:   25 October 2022

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**COSTS DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1]     MacDonald Industries Limited (MIL) applied to the Authority for orders, including an interim injunction. MIL sought to stop Simon Beswick, its former employee, from working for a competitor. The application was based on a restraint of trade provision in the employment agreement between MIL and Mr Beswick.

[2]     In my determination dated 15 July 2022 I dismissed the claim for an interim injunction and reserved costs.<sup>1</sup>

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<sup>1</sup> *MacDonald Industries Limited v Simon Beswick* [2022] NZERA 327.

[3] There was a case management conference on 10 August 2022 to timetable steps in advance of the investigation meeting to consider MIL's unresolved claims. During the conference, counsel for Mr Beswick also raised the issue of costs.

[4] I set a timetable for the parties to provide submissions on costs, including whether the order I made on 15 July 2022 left it open for costs to be determined at this point in the investigation.

[5] I now have submissions from both sides. The investigation to resolve the present issue comprises consideration of those submissions, in light of the principles that apply to costs in the Authority. Mr Beswick's present claim for costs is opposed by MIL. This determination resolves the claim for costs.

### **Should costs be set now?**

[6] The Authority's power to award costs is given by clause 15 of Schedule 2 to the Employment Relations Act 2000. To paraphrase, the Authority may order a party to pay reasonable costs to another party. The Authority may apportion costs between parties and may vary or alter such order at any time, as thought fit and as reasonable. The Authority is given wide discretionary powers to do what is reasonable in the circumstances. It is a judicial discretion and must be exercised in accordance with principle.

[7] Guidance about the exercise of the discretion is found in the Authority's practice note on costs. The current practice note was issued on 29 April 2022, but it did not change the earlier guidance on this issue. The note states that the Authority will typically not consider an assessment of costs until the substantive determination has been made.

[8] The submission for MIL is that there is no reason to depart from the Authority's typical approach. Only MIL's interim injunction claim has been resolved. An amended statement of problem was lodged after the August 2022 case management conference, continuing the permanent injunction claim, expanding the penalty claims, adding a special damages claim and seeking the return of property (confidential information and any other property).

[9] MIL says that if it succeeds with its claims, an award of costs at this stage simply creates a "money-go-round". The submission is that this would be inconsistent with the Authority's role that requires it to act as it thinks fit in equity and good conscience. MIL also

considers that an award of costs now would be unlikely to assist with the parties' attempts to resolve the matter overall. MIL says that there is no evidence that Mr Beswick would be prejudiced if costs were not set now.

[10] MIL had indicated a view that the form of the order precluded consideration of costs before then, but I do not agree with that view. The earlier order by which costs were reserved was not limited in any sense. It was open for a party to apply for costs at any stage after that order, including prior to the intended investigation of the unresolved claims.

[11] I consider that there are good grounds to depart from the Authority's typical practice.

[12] Mr Beswick succeeded in defending the interim injunction claim and is entitled to costs for that. The case that remains to be investigated differs significantly from MIL's original claim. It is now a reasonably straightforward exercise to assess costs, as nearly all the costs relate to defending the claim for an interim injunction and only a small amount relates to the reply to MIL's original claims that have not been investigated yet.

[13] My view is that fixing costs now could assist the overall resolution of this problem. While it could not be disputed that Mr Beswick is entitled to costs based on his successful defence of the interim injunction claim, the difference between the parties about the amount of that liability is substantial. Quantifying the liability now would remove that uncertainty and allow them to focus on the unresolved parts of the employment relationship problem. I see this as consistent with the role of the Authority.

[14] The time by which costs must be paid or possible arrangement between the parties about whether costs are enforced pending a later determination is a much less significant issue, so the potential "money-go-round", assuming MIL succeeds in due course, is not a powerful factor at present.

[15] I consider that costs should be set now, in favour of Mr Beswick.

### **Assessing costs**

[16] MIL says if costs are fixed it should be on the basis of the notional daily tariff, taking account of the investigation meeting time (almost three hours) with perhaps a minor uplift, to \$2,250.00. MIL says this is consistent with principle.

[17] Costs in the Authority should generally be modest. However, I should not ignore urgency being sought by MIL and accorded to the claim. Mr Beswick had to respond as a matter of urgency and I accept this affected his costs. I should also have regard to costs caused unnecessarily by the manner in which MIL dealt with its interim injunction claim and I should consider any *Calderbank* offers.

[18] I agree with MIL that assessing costs by applying the Authority's standard daily tariff would generate an award of around \$2,250.00, but an award at that level would fall short of what is reasonable in this case. It would ignore the points about unnecessary costs and *Calderbank* offers in particular. The point about urgency is less persuasive. Respondents typically face time constraints and Mr Beswick's position did not depart materially from what is common.

[19] MIL sought and the matter was accorded urgency when lodged. However, the application did not include supporting affidavits. There was considerable delay (given the context of urgency) and MIL did not meet expected dates, before sworn affidavits were finally lodged. Counsel for Mr Beswick had to obtain instructions initially on the basis of the unsupported statement of problem. Counsel also sought the Authority's intervention at several points. I accept delays caused Mr Beswick unnecessary extra costs.

[20] MIL lodged a further affidavit on 7 July 2022, just before the investigation meeting. I declined to read it in support of the issues then before the Authority. However, the content of and the circumstances in which the affidavit was lodged caused Mr Beswick unnecessary costs regarding instructions to counsel and preparation of submissions.

[21] Counsel for Mr Beswick refers to a series of settlement offers made from 5 April 2022 to 17 June 2022 by which he would adhere to a restraint of trade restriction on a modified basis. The proposals were either open offers or *Calderbank* offers. Iterations of the proposed settlement included various durations of the restraint and its geographical effect. MIL's position on these factors was not upheld in the earlier determination. MIL could have enjoyed some benefit of the restraint, by agreement. Instead, it put Mr Beswick to the cost of resisting its attempt to enforce a restraint that (as drafted) was expressed to apply for a duration that was never even arguably reasonable. The present case is very much one where the public interest in the fair and expeditious resolution of disputes would be undermined if MIL was able to ignore the settlement proposals without any consequences as to costs.

[22] I have been provided with the invoices received by Mr Beswick.

[23] I put aside the invoice dated 3 May 2022 as it preceded the date of the statement of problem. Only costs incurred in defending the claim are relevant for present purposes.

[24] Counsel's invoices dated 29 June and 18 July 2022 total \$22,712.50. The work described in the invoices all relates to steps reasonably necessary to defend MIL's claim. However, I disregard the time taken to prepare for and attend mediation. There was a direction to mediation, but parties are ordinarily expected to participate in mediation without that being a factor if there is a later assessment of costs by the Authority. The information provided does not allow me to assess the cost or time attributable to that work, so I will reduce the assessment of actual costs by \$5,000.00 to avoid that time. That would bring the assessed actual costs to \$17,712.50.

[25] I am asked to award costs of \$16,000.00 (plus GST). I put aside the GST point. Mr Beswick presumably would incur GST but could not recover it as a business input. In any event, it is not for the Authority determine what happens with GST on an award of costs. Costs in the amount sought would meet or exceed an indemnity award of costs. I see no grounds for costs to be assessed on that basis.

[26] Costs fixed at \$6,000.00 would be a reasonable contribution to Mr Beswick's legal costs, in light of the principle of modest awards in the Authority consistent with the daily tariff approach. I get to that figure by taking a full day rather than half a day at the daily tariff figure to recognise the *Calderbank* point and adding \$1,500.00 in recognition of the unnecessary costs point.

### **Summary and order**

[27] It is appropriate to set costs now, in the circumstances of this case. I will allow 28 days for payment, to give time for the parties to further any discussions about resolving their employment relationship problem.

[28] MacDonald Industries Limited is to pay Simon Beswick costs of \$6,000.00 no later than Wednesday 23 November 2022.

Philip Cheyne  
Member of the Employment Relations Authority