IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE

[2021] NZERA 332
3131554

BETWEEN	SPIRAX SARCO LIMITED Applicant	
A N D	SCOTT HEWITT Respondent	

Member of Authority:	Peter van Keulen
Representatives:	Peter Kiely, counsel for the Applicant Henry Holderness, counsel for the Respondent
Investigation Meeting:	On the papers
Submissions Received:	24 June 2021 from the Applicant 7 July 2021 from the Respondent
Date of Determination:	28 July 2021

COSTS DETERMINATION OF THE AUTHORITY

The substantive determinations

[1] In a determination dated 10 March 2021, I granted Spirax Sarco Limited an interim injunction which prevented Scott Hewitt from working for TLV Pty.[1] In a further determination dated 10 June 2021 I found that Mr Hewitt had breached terms of his employment agreement.[2] I issued a permanent injunction in respect of Mr Hewitt not working for TLV until 10 June 2021, ordered Mr Hewitt to comply with clauses 22 and 23.2 of his employment agreement with Spirax, imposed a penalty against Mr Hewitt of $13,500.00 and dismissed Mr Hewitt's personal grievance claim.

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[1] *Spirax Sarco Limited v Scott Hewitt* [2021] NZERA 98.
[2] *Spirax Sarco Limited v Scott Hewitt* [2021] NZERA 246.

[2] I also reserved costs so that the parties could try to agree costs. The parties have been unable to agree and now Spirax seeks costs.

Application for costs

[3] Counsel for the Spirax seeks an award of costs of $23,000.00 plus disbursements of $399.99. Counsel seeks this amount, based on an increase in the normal daily tariff that would otherwise be applied, for three reasons: the interim injunction application was dealt with on an urgent basis, Mr Hewitt failed to comply with timetabling directions for witness evidence, and Mr Hewitt was wholly unsuccessful in his counter-claim.

[4] Counsel for Mr Hewitt submits that costs should lie where they fall because Spirax had limited success in its claim:

(a) The permanent injunction was of no practical benefit because it expired on the day it was issued.

(b) Clause 23.2 of Mr Hewitt's employment agreement was only held to be enforceable with modification by the Authority.

(c) Spirax failed in its claims relating to breach of fidelity and breach of Mr Hewitt's employment agreement in relation to soliciting business and working for TLV prior to 21 January 2021.

(d) Whilst the Authority accepted Mr Hewitt contacted customers in breach of his employment agreement it appeared to accept that this contact was not harmful and only done to update customers regarding Mr Hewitt's circumstances.

(e) The penalty awarded was only 25% of the total penalty amount claimed by Spirax.

[5] Counsel for Mr Hewitt submits further, that if I decide to award costs to Spirax then any uplift is opposed on the basis that:

(a) Whilst the interim injunction application was granted urgency this only had an impact on Mr Hewitt and not Spirax as it was Mr Hewitt and his counsel who had to work under time pressure to meet shortened deadlines.

(b) Any delay in lodging and serving witness evidence arose out of a change in counsel for Mr Hewitt, was of limited consequence, and Spirax suffered no adverse effects from any delay.

(c) The failure of Mr Hewitt's counterclaim is not a factor justifying an uplift in costs as the counterclaim took up very little time in terms of the evidence and submissions.

Analysis

Costs in the Authority

[6] The power of the Authority to award costs is set out at clause 15 of Schedule 2 of the Act. The principles and approach adopted by the Authority in respect of this power are outlined in *PBO Ltd (formerly Rush Security Ltd) v. Da Cruz*[3] and other relevant Employment Court and Court of Appeal decisions.[4] I have applied these principles when determining this costs application.

Costs for Spirax

[7] The first principle I should consider is that costs should follow the event, unless there is some accepted reason why this should not happen, such as a party only having very limited success.

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[3] *PBO Ltd (formerly Rush Security Ltd) v. Da Cruz* [2005] 1 ERNZ 808.

[4] *Blue Star Print Group (NZ) Ltd v. Mitchell* [2010] NZCA 385; *Booth v. Big Kahuna Holdings Ltd* [2015] NZEmpC 4; *Stevens v. Hapag-Lloyd (NZ) Ltd* [2015] NZEmpC 28; *Davide Fagotti v. Acme & Co Ltd* [2015] NZEmpC 135; and *GSTech Limited v A Labour Inspector of MBIE* [2018] NZEmpC 127.

[8] In this case, Spirax had mixed success however applying the principles in *William Coomer v JA McCallum and Son Limited* I am satisfied that Spirax was sufficiently successful for the purposes of costs and therefore is entitled to an award of costs. [5]

Applying the daily tariff

[9] The next question is whether I should follow the normal practice of the Authority when setting costs, which is applying a set amount for each day of the investigation meeting calculating quantum based on the time spent in the investigation meeting; this is applying the daily tariff.

[10] The current daily tariff is $4,500.00 for the first day of an investigation meeting and $3,500.00 for every subsequent day of an investigation meeting.

[11] There is no suggestion that I should depart from the usual practice of applying the daily tariff; the dispute is whether I should adjust the daily tariff so that I award more or less for each day than the current prescribed amounts.

Increasing the daily tariff

[12] I accept counsel for Mr Hewitt's submissions regarding Spirax's claim for an uplift to the daily tariff. In this case the three factors raised do not warrant an increase and I will award cost on the basis of the daily tariff without any increase.

Quantum of costs award

[13] As set out above, the daily tariff is currently $4,500.00 for the first day of the investigation meeting and $3,500.00 for the second and any subsequent days.

[14] The investigation meetings in this matter comprised the following:

(a) A half day meeting for the interim injunction application.

(b) Two half days and one full day for the investigation meeting on the substantive claims.

[5] *William Coomer v JA McCallum and Son Limited* [2017] NZEmpC 156

(c) Written submissions lodged after the investigation meeting, which, from my perspective, is the equivalent of an additional half day of the daily tariff.

[15] Applying the daily tariff rates to this timing I quantify the costs award for Spirax as follows:

(a) One half day for the interim injunction at the rate of $4,500.00 per day - $2,250.00.

(b) Two full days for the substantive claims at the rate of $4,500.00 for the first day and $3,500.00 for the second day - $8,000.00.

(c) An additional half day for written submissions at the rate of $3,500.00 per day - $1,750.00.

[16] On this basis Spirax is entitled to a costs award of $12,000.00. Spirax is also entitled to the disbursements it seeks of $399.99.

Order

[17] Mr Hewitt must pay Spirax Sarco $12,000.00 plus disbursements of $399.99 as a contribution to its costs in this matter.

Peter van Keulen
Member of the Employment Relations Authority