IN THE EMPLOYMENT COURT OF NEW ZEALAND
CHRISTCHURCH

I TE KŌTI TAKE MAHI O AOTEAROA
ŌTAUTAHI

[2019] NZEmpC 83
EMPC 3/2018

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	GRAHAM PITMAN Plaintiff
AND	ADVANCED PERSONNEL SERVICES LIMITED Defendant

EMPC 71/2018

AND IN THE MATTER	of a challenge to a determination of the Employment Relations Authority
BETWEEN	ADVANCED PERSONNEL SERVICES LIMITED Plaintiff
AND	GRAHAM PITMAN Defendant

Hearing:	13-14 February 2019 (Heard at Nelson)
Appearances:	S Zindel, counsel for Mr Pitman J Goldstein and L Ryder, counsel for Advanced Personnel Services Ltd
Judgment:	15 July 2019

JUDGMENT OF JUDGE K G SMITH

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[1] Graham Pitman was employed by Advanced Personnel Services Ltd as a senior recruitment consultant in its Nelson office. In the Employment Relations Authority Advanced Personnel established that Mr Pitman breached his employment agreement by assisting A Temp Ltd to establish a competing business. He was ordered to pay damages, which were assessed as special and general damages, interest and indemnity costs as provided for by his employment agreement.[1]

[2] Both Mr Pitman and Advanced Personnel challenged the Authority's determination claiming that it contained material errors of fact and law.[2] Mr Pitman confined his challenge to the orders that he pay general damages and indemnity costs. He said that Advanced Personnel was compensated by the order of special damages and indemnity costs, so the Authority erred in awarding general damages as well. The Authority was said to have erred by ordering indemnity costs, because the employment agreement under which they were fixed was an unlawful attempt to contract out of the Employment Relations Act 2000 (the Act). A further claimed error was that the Authority failed to take into account, when fixing costs, a settlement offer made by Mr Pitman.

[3] Advanced Personnel says the Authority erred by wrongly deducting from the assessment of special damages money paid by A Temp to settle a penalty action and failed to fix costs for all aspects of its claim.

[4] To place this litigation into context it is necessary to refer to the Authority's undisputed findings about what happened. The Authority issued separate determinations for interim relief by consent restraining Mr Pitman's actions, establishing his liability and dealing with damages and costs.[3] The following narrative was taken from those determinations, supplemented by evidence from Mr Pitman, two Advanced Personnel directors, and the company's former branch manager. The starting point is that Mr Pitman accepted he breached his employment agreement.

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1 *Advanced Personnel Services Ltd v Pitman* [2017] NZERA Christchurch 213.

2 Referred to as non-de novo challenges where each party bears the onus of persuading the Court that the Authority made material errors of fact and law as pleaded.

3 *Advanced Personnel Services Ltd v Pitman* [2016] NZERA Christchurch 192; *Advanced Personnel Services Ltd v Pitman*, above n 1.

Mr Pitman's employment

[5] Advanced Personnel is a recruitment business. Its head office is in Christchurch and it has branches in Nelson, Invercargill and Auckland. Mr Pitman started working in the Nelson branch on 7 March 2016. His employment agreement required him to devote his time and attention to the business, restricted his ability to undertake other work, required him not to have any conflicts of interest, prevented him from misusing confidential information and placed restraints on him once his employment ended. Under that agreement he indemnified the company for all costs and expenses incurred following any breach of it by him.

[6] Mr Pitman resigned on 7 September 2016 to take up a job with A Temp, a company entering into the recruitment business as Advanced Personnel's competitor. Before resigning he took steps to assist A Temp to gain a springboard advantage in establishing its business. That assistance included gaining access to Advanced Personnel's intellectual property such as a budget, profit and loss statement, and certain business plans. He engaged a health and safety consultant for A Temp, arranging for a web designer and media advisor, and organised an accounting software package for it. Significantly, he successfully approached several of Advanced Personnel's customers to encourage them to transfer their business to A Temp.

[7] Not surprisingly, the Authority concluded that Mr Pitman's activities breached the employment agreement, the duty of fidelity and good faith and that he was liable to pay damages. In the first instance the parties were directed to mediation to attempt to agree on them. Settlement was not achieved and on 8 December 2017 the Authority issued a further determination dealing with damages and costs.[4] After taking into account a payment made to Advanced Personnel by A Temp the Authority ordered Mr Pitman to pay special damages of $832.73, with interest at 5 per cent per annum from 28 February 2017 until the date of payment in full and $142.49 as interest on Advanced Personnel's lost revenue from 23 December 2016 until 27 February 2017.[5] It ordered

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4 *Advanced Personnel Services Ltd v Pitman*, above n 1. There is no challenge to the Authority's imposition of a penalty.

5 At [129].

him to pay general damages of $10,000 and indemnity costs including disbursements of $48,983.61.[6]

The issues in these proceedings

[8] The issues raised by these challenges are whether the Authority made errors of fact or law:

(a) in deducting from its award of special damages money paid to Advanced Personnel by A Temp;

(b) in ordering Mr Pitman to pay general damages to Advanced Personnel or, alternatively, in fixing the amount of those damages;

(c) in ordering Mr Pitman to pay indemnity costs;

(d) in not considering a without prejudice settlement offer made by Mr Pitman to Advanced Personnel when fixing costs; and

(e) in fixing the amount of the costs by not taking into account all of Mr Pitman's breaches.

Deduction from special damages

[9] The Authority began its consideration of the claim for damages by stating that Advanced Personnel was entitled to be restored to the position it would have been in had the breaches of contract by Mr Pitman not occurred, so far as money can do that, and so long as the damage was not too remote.[7] It acknowledged that Advanced Personnel could not recover more than its actual loss.

[10] Attention then turned to the lost business. The Authority held that Mr Pitman solicited three of Advanced Personnel's customers to transfer their business to A Temp causing losses to Advanced Personnel. In calculating those losses, the value of the diverted business was ascertained and converted into what would have been earned by

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6 At [130].
7 At [12].

Advanced Personnel for providing the same service. An agreed percentage return was then applied to arrive at the net lost profit. This methodology resulted in an assessment of Advanced Personnel's loss of $15,832.73.[8] The methodology and the dollar value it led to are not disputed.

[11] However, from the $15,832.73 the Authority deducted $15,000 A Temp had already paid Advanced Personnel as part of a separate settlement. Mr Pitman was ordered to pay the outstanding balance of $832.73 as special damages.

[12] Advanced Personnel challenged the deduction as an error of law. It said the effect of the deduction was to treat A Temp's payment as compensatory when it was to settle a penalty action. The Authority's errors were said to be:

(a) not recognising that:

(i) Advanced Personnel did not seek to recover special damages from A Temp and could not do so in this jurisdiction;

(ii) the companies had no contractual relationship with each other and no cause of action was pleaded against A Temp alleging a breach of contract;

(iii) Advanced Personnel could not recover damages from A Temp in the employment jurisdiction;

(iv) there was no jurisdiction for Advanced Personnel to file tort proceedings against A Temp in the employment jurisdiction;

(v) the proceedings against A Temp sought the payment of a penalty and costs, not damages – they are distinct and unrelated remedies from the claim against Mr Pitman;

(vi) Advanced Personnel recovered a penalty and costs; and

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[8] At [38].

(b) in drawing an analogy from a High Court case when that decision was about tortious liability;[9]

(c) by not using the correct analytical approach, which was to consider if A Temp and Mr Pitman were "concurrent wrongdoers". The Authority should have concluded they were not "concurrent wrongdoers" and, therefore, could not be liable to pay the same sum in damages;[10]

(d) by not acknowledging that two distinct claims were involved in the proceeding – one for damages and the other for a penalty.

[13] Advanced Personnel supported its claim that the payment was a penalty by attempting to illustrate the amount was reasonable. That was because, it said, Mr Pitman's breaches and A Temp's behaviour exposed that company to a significant penalty, perhaps in the range of $80,000–$160,000, given the principles in *Labour Inspector v Preet PVT Ltd*.[11]

[14] Advanced Personnel issued proceedings against Mr Pitman and A Temp. Among other claims, Mr Pitman was sued for breaches of the employment agreement. Damages and a penalty were sought. There were no pleadings quantifying the damages or specifying how they should be calculated. In the same proceeding the claim against A Temp was very briefly stated. It was said to have aided, incited and abetted each of Mr Pitman's breaches of his employment agreement without any further information explaining how the company had done so. The relief claimed from it was confined to a penalty of $20,000 for "…each and every breach…" by Mr Pitman.

[15] Advanced Personnel and A Temp settled. They signed an agreement, mis-described as a "Record of Settlement section 149 Employment Relations Act 2000", and as "Agreed Terms of Settlement to Employment Relationship Problems".[12] It is a short agreement. The first paragraph stated that its terms and all matters relating to

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9 *Body Corporate 185960 v North Shore City Council* HC Auckland CIV-2006-004-003535, 28 April 2009.

10 By applying *Rooney Earthmoving v McTague* [2012] NZEmpC 63, [2012] ERNZ 273.

11 *Labour Inspector v Preet PVT Ltd* [2016] NZEmpC 143, [2016] ERNZ 514.

12 The copy provided to the Court was not signed by a mediator, but nothing turns on that.

the "employment relationship problem" remained confidential so far as the law allowed. The second paragraph read:

> This is in full and final settlement of any claims (whether or not yet contemplated) of any nature whatsoever the parties have or may have against the other.

[16] Under this settlement agreement A Temp agreed to pay Advanced Personnel $15,000 in exchange for the proceeding against it being discontinued. The money was paid and the claim against the company came to an end.

[17] The Authority was presented with a difficult situation because of the agreement. That was because a claim for penalties had led to a private agreement without an investigation meeting or any order being made. Furthermore, aside from recording the Authority case file number, and that a full and final agreement had been reached, the parties did not describe what dispute had been resolved. The agreement was broadly drafted and, at face value, captured all unresolved disputes including the penalty action.

[18] Mr Pitman submitted to the Authority that there were circumstances in which a penalty contained an element of compensation. It followed that a successful claimant was only entitled to recover its proved losses and, where compensation had been paid, the amount was relevant.[13] He submitted that it was necessary to examine the terms, and if necessary the circumstances, of the settlement to establish whether it had reduced some relevant part of the loss itself. The Authority was referred to a High Court case, *Body Corporate 185960 v North Shore City Council*, as an example of a situation where sums received by a plaintiff from a defendant in partial settlement must be taken into account when determining the liability of other defendants for the losses that were sustained.[14]

[19] In deciding how to treat A Temp's payment the Authority considered the elements of a penalty drawing largely on comments in *Preet*. It recognised that a penalty entails punishment and deterrence but that there can be, on occasions, an

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13 At [40] and relying on *Labour Inspector v Preet,* above n 11, at [62].
14 At [41].

element of compensation involved, especially where some or all of it is ordered to be paid to the innocent party.[15]

[20] The Authority asked a rhetorical question about whether it was appropriate for a penalty, given what it is, to be "meted out by private organisations".[16] The Authority took comfort from the analogy with *Body Corporate 185960*, and a finding that Mr Pitman and A Temp were involved in concurrent acts of wrongdoing. The determination showed a general reluctance to allow Advanced Personnel to obtain what the Authority considered to be a windfall.[17] It said:[18]

> …there were concurrent acts by Mr Pitman and by A Temp which led to the same damage. Whilst there has been no finding that A Temp had instigated, aided or abetted the breaches of employment agreement by Mr Pitman in breach of s 134(2) of the Act, it has made a payment to [Advanced Personnel] in settlement of the proceedings alleging that it did. One could infer, therefore, that it did accept liability. However, accepting that inference, even though there were separate wrongful acts by Mr Pitman and A Temp, the same damage flowed from those acts; namely, the loss of revenue from its three clients.

[21] In this challenge Advanced Personnel largely repeated its arguments in the Authority's investigation. It maintained the penalty action was settled and that the payment could not be assumed to be compensatory. Mr Goldstein emphasised what was said about the settlement by Advanced Personnel's Managing Director, Mr Geoffrey Densem, and the absence of any contrary evidence. Mr Densem said that Advanced Personnel and A Temp settled following mediation and did not settle any aspect of the claims against Mr Pitman. No-one from A Temp gave evidence and Mr Pitman did not participate in the mediation, where issues between the companies were discussed, or in the subsequent settlement negotiations between them.

[22] I do not accept that the Authority made an error by taking into account A Temp's payment. Advanced Personnel's case was built on an assumption that the payment had to be treated as a penalty because that was what had been claimed and settled.

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15 At [43]–[45], referring to *Labour Inspector v Preet*, above n 11, at [50]–[51] and [62].
16 At [49]–[50]
17 At [58].
18 At [57].

[23] In this case the Authority had full and exclusive jurisdiction to impose a penalty under the Act but, before one could be imposed, it had to be satisfied a breach occurred justifying a sanction. It then had to decide the amount of the penalty.[19] The Act does not empower parties to a dispute to agree to create or impose a penalty and it follows that the companies did not enjoy the lawful right to reach such an agreement.

[24] The inability to reach a private agreement about imposing a penalty is borne out by the fact that, when one is imposed by the Authority, it is payable to the Crown in the first instance. It is only once the Authority exercises the discretion conferred by s 136(2) of the Act that some or all of a penalty may be ordered to be paid to the innocent party. If a private agreement could have the outcome contended for by Advanced Personnel, the Authority's discretion would be circumvented. Until such time as the Authority decided to impose a penalty, and to direct some of it to be paid to Advanced Personnel, the most the company had was a claim and a hope to benefit from it.

[25] The Authority did not need to undertake an inquiry into the nature of a penalty to ascertain if A Temp's payment was compensatory. The payment was not a penalty, and could not be treated as one, because the parties lacked the capacity to reach that conclusion for themselves. Removing that veneer leaves the fact that A Temp agreed to pay money to end the litigation and resolve all claims of any nature whatsoever between it and Advanced Personnel.

[26] The evidence from Mr Densem, about the circumstances leading to the agreement, and his assertion about what the agreement settled, does not lead to a different conclusion. Despite the unfortunate heading and format of the agreement, its terms unequivocally ended all disputes. It was open to the Authority to conclude that the settlement resolved everything between the companies. Despite Mr Densem's evidence, the wording of the agreement was plainly about more than the penalty claim. I conclude that the Authority was correct to treat the payment as compensation that had to be considered in assessing damages.

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[19] See Employment Relations Act, s 133(1)(a) and (b), where the jurisdiction applies to any breach of an employment agreement or of any provision of the Act and *Labour Inspector v Preet*, above n 11, at [41].

[27] That conclusion is enough to deal with this part of the challenge, but a brief comment should be made about the Authority's comments on Mr Pitman and A Temp being involved in concurrent acts making them liable for the same damage.[20] The reference to concurrent acts comes from *Rooney* where the Court dealt with what were described as concurrent wrongdoers. The terminology is slightly different but the determination was dealing with the same concept. In *Rooney* the Court considered the losses caused to an employer by the concerted effort of three employees to divert business to a company they had created and, ultimately, to benefit themselves. Although the roles played by those employees in diverting their employer's business were different the Court held that they were all liable for the same loss.

[28] The Authority's analogy with *Rooney* was not helpful. In *Rooney* each employee owed duties to their employer. It was that relationship and the combined behaviour of the employees that created their liability. In this case, as Mr Goldstein submitted, A Temp could not owe any employment-related duties to Advanced Personnel. The Authority's finding went too far.

[29] While I have analysed A Temp's payment in a different way from the Authority, I have reached the same conclusion. Finally, on this issue, Advanced Personnel argued that the Authority's decision meant Mr Pitman benefited by gaining a subsidy. I disagree. All that happened was, by the time the Authority considered damages, the company's loss had been reduced by the payment.

General damages

[30] Mr Pitman challenged the Authority's decision that he pay $10,000 in general damages. The Authority introduced its discussion of those damages by saying they are to compensate the innocent party for non-monetary aspects of the damage suffered.[21] Without referring to any authority, it said that these damages are usually limited to individuals who suffer distress, physical inconvenience or suffering. In relation to a company, it said these damages may cover the loss of executive time, inconvenience, business interruption and/or a loss of reputation. This was the basis on which the award was made.

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20 Above at [20].
21 *Advanced Personnel Services Ltd v Pitman*, above n 1, at [65].

[31] The Authority rejected a submission for Mr Pitman that the combination of special damages, and indemnity costs, left nothing further to compensate. It held that the company would have had to spend considerable time investigating the breaches and taking steps to mitigate them. The Authority concluded that it would not be possible to quantify the loss of time but that $10,000 fell within a "reasonable range". How that range was derived was not mentioned in the determination, but was reached after rejecting a submission for the company that $30,000 was appropriate.

[32] Mr Pitman claimed two alleged errors by the Authority. The first of them was that an error had been made by concluding that executive time should be dealt with as a claim for damages in this case and, in any event, such orders are rare and one should not have been made. The second error was said to be that the award was excessive.

[33] Mr Zindel relied on the following passage in *Medic Corporation Ltd v Barrett (No 2)* to describe general damages:[22]

> In this context it is relevant to mention two categories into which compensatory damages are sometimes subdivided: general damages and special damages. Both can connote claims to recover actual pecuniary loss but special damages usually consist of items that are capable of being ascertained with great, almost absolute, precision such as loss of wages or of profits or expenses incurred; while general damages, although no less real, tend, by their nature, to be incapable of precise calculation or to tolerate wide variations of opinion in valuation such as general loss of custom, loss of a chance to make a profit, or diminution of goodwill.

[34] In the same judgment the Court said of claims for executive time: "…that is sometimes, but rarely, allowed as an item of costs…but cannot be allowed as special damages…".[23] *Barrett* distinguished between claiming costs of the proceeding including executive time and attempting to recover that time as damages.

[35] The passage from *Barrett* mentioned earlier was followed by an observation that the practical difference between special and general damages is that a plaintiff is expected to plead particulars of special damages but is not required to plead them for general damages.[24] The plaintiff's claim for general damages in *Barrett* was declined

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22 *Medic Corporation Ltd v Barrett (No 2)* [1992] 3 ERNZ 977 at 984.
23 At 987 and relying on *New Zealand Labourers IUOW v Fletcher Challenge Ltd* [1990] 1 NZILR 557.
24 At 984.

on the same basis advanced by Mr Pitman because, after making an order for special damages, there was nothing left to compensate. Mr Zindel also submitted that this case was not a rare one, mentioned in *Barrett*, justifying general damages being awarded.

[36] Mr Goldstein accepted what *Barrett* said about damages including how executive time is rarely awarded. However, he submitted that an allowance for executive time and disbursements was made in that case, to cover overseas travel to meet with suppliers to ameliorate the harm caused to the business. That example was said to justify the Authority's order in this case.

[37] While *Barrett* recognised that damages could include an allowance for executive time, it did not explain why such a claim should be limited to rare situations. It may be difficult to apply such a restriction in practice by attempting to decide what makes a case rare. I consider a plaintiff should not miss out on compensation, to make good a loss caused by a breach of an agreement, merely because it is unable to show that the circumstances are rare. Mr Zindel cautioned against too readily allowing claims for executive time because, if that happened, every proceeding could include such a claim. I disagree. This argument that a flood of claims is possible, and should be avoided, is unpersuasive. The litmus test must be a causal connection between the claimed executive time and the breach.

[38] It is difficult to ascertain from the determination what the Authority considered when making this decision, beyond a broad-brushed assessment that some loss must have been sustained. In this hearing Mr Geoffrey Densem said that all the company's employees in Nelson were involved in assisting with the litigation against Mr Pitman. He named those involved as the (then) branch manager, Mr Pitman's replacement, another employee who dealt with recruitment, and the company's receptionist. He also said Ryan Densem, who is the National Operations Manager, was "heavily involved" and the National IT Manager, Clint Densem, spent time searching and analysing computer records.

[39] There were no records of the time spent by Mr Geoffrey Densem, or the company's staff, to show what work they performed that might be regarded as lost

executive time. Most of the effort was spent preparing for the litigation. Mr Densem spent limited time in Nelson, between driving there from Christchurch on 12 October 2016 and returning home on 15 October 2016. While in Nelson he met two of the three customers Mr Pitman approached. He spoke to one of them for about 30-45 minutes and the other for between 45 minutes and an hour.

[40] Mr Densem was accompanied to those meetings by the Nelson branch manager. The manager did not attempt any further discussions with the customers. Instead, efforts to retain this business were delegated to Mr Pitman's replacement.

[41] Mr Densem mentioned the involvement of Ryan Densem, but when he gave evidence it was apparent that he left efforts to retain the customers to the branch manager. Clint Densem did not give evidence but it appears that his time was spent in searching and analysing records to help with the litigation. There was some evidence, without much detail, that Mr Pitman's replacement, and the branch receptionist, liaised with some of the employees used by Advanced Personnel to fill occasional labour shortages with its customers. They did not give evidence and what was said about their activities lacked specificity.

[42] The overall impression conveyed by Advanced Personnel's evidence was that the company's efforts concentrated heavily on the litigation. Some disruption did occur, but I consider the Authority conflated what might be considered as costs associated with litigation and proved loss of executive time properly attributable to Mr Pitman's actions.

[43] There was considerable force in Mr Zindel's submissions that, once special damages and indemnity costs had been ordered, Advanced Personnel had been fully compensated.[25] I consider the company did not discharge the burden of proving that this loss occurred. What Mr Densem said was insufficient to justify an order for general damages. That conclusion means it is not necessary to comment about Mr Pitman's alternative submission.

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[25] See, for example, *EIL Brigade Road Ltd v Brown* HC Christchurch CIV 2001-409-000733, 5 August 2004.

Indemnity costs

[44] Mr Pitman was ordered to pay indemnity costs of $46,000. He accepted that the indemnity clause in the employment agreement encompassed reimbursement of legal costs but challenged the determination for two reasons. First, because the indemnity in the agreement infringed s 238 of the Act, that prevents contracting out, so the Authority erred in considering costs on a contractual basis. Second, because a settlement offer made by him several months before the substantive investigation meeting, without prejudice except as to costs (a Calderbank offer), should have been taken into account but was not.

[45] The Authority's costs decision considered both Advanced Personnel's claim to be indemnified and the statutory power to award costs.[26] The Authority began its consideration by relying on *George v Auckland Council*.[27] It decided the indemnity clause needed to be assessed to determine:[28]

(a) what costs fall within it and outside of it;

(b) whether there are any public policy reasons preventing reliance on the contractual indemnity; and

(c) whether the costs claimed were objectively reasonable.

[46] The Authority held that *George* did not "override" s 238, because it continued to have a discretion to be exercised in accordance with principle and "the rules of natural justice".[29] It did not explain what was meant by "overriding" the section, but that was probably a reference to submissions about contracting out being prohibited. While undertaking an assessment of Advanced Personnel's costs claim by applying *George*, the Authority held that the indemnity clause was just one of the factors to consider. It reviewed the claimed costs followed by a cross check against the daily tariff normally used by it when fixing costs.

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26 Employment Relations Act 2000, sch 2 cl 15.
27 *George v Auckland Council* [2014] NZEmpC 100, [2014] ERNZ 681.
28 At [71].
29 At [74].

[47] Advanced Personnel's indemnity claim was for legal fees of $81,707, not including fees to be incurred for attendances at the investigation meeting into the amount of damages. The Authority accepted that the costs fell within the ambit of the indemnity clause and that there were no public policy reasons preventing the clause from applying, but made adjustments to reach what it considered to be objectively reasonable fees. Two bills of costs were put aside because they related to attending the mediation with A Temp.[30] A further adjustment was made because the company was represented by two counsel, to address any possible duplication of work.[31] Those adjustments reduced the claimed costs to $70,000.[32] Another adjustment was made by allocating two thirds of the claimed costs to work relating to breaches dealing with the restraints of trade and one third to "other matters".[33] The final figure produced by this review, rounded down, was $46,000.

[48] The Authority's "cross-check" was to look at the conventional factors explained in *PBO Ltd v Da Cruz*.[34] It considered what might have been awarded if the daily tariff had been used, which was $10,250.[35] The Authority noted that the adjusted indemnity costs claim, at $46,000, was about a 350 per cent increase on what might have been awarded by applying the tariff, but concluded the nature of this case would justify an uplift to reach that amount.

[49] I consider the Authority's approach wrongly viewed the contractual indemnity as being just one factor to consider and it blurred the distinction between contractual entitlements and the discretionary power to award costs conferred on it by the Act. That does not mean, however, that the conclusion about the amount payable was wrong.

[50] The indemnity clause was not an unlawful attempt to contract out of the Act prohibited by s 238. It is well settled that parties can enter into an agreement requiring one of them to meet the full costs of the other if there is a breach. In *George* the Court

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30 At [91].
31 At [94].
32 At [95].
33 At [96].
34 *PBO Ltd (formerly Rush Security Ltd) v Da Cruz* [2005] 1 ERNZ 808. See also *Fagotti v Acme & Co Ltd* [2015] NZEmpC 135, [2015] ERNZ 919, (2015) NZELR 1.
35 At [98].

considered a similar claim for contractual indemnity costs and accepted that the parties can agree for one of them to meet the other's solicitor-client costs.

[51] However, the inquiry does not start and stop with the assessment of actual costs.[36] In *George* the Court considered whether a contractual indemnity involved any discretion under cl 19(1) of sch 3 to the Act.[37] Applying the Court of Appeal's decision in *Watson & Son Ltd v Active Manuka Honey Association*, the Court held that no discretion remains where a contractual indemnity is enforced, but there are public policy considerations and an assessment is needed as to whether the amount of solicitor-client costs is objectively reasonable.[38]

[52] In *Active Manuka Honey* the Court of Appeal re-stated the principle from its earlier decision in *ANZ Banking Group (NZ) Ltd v Gibson*.[39] In that case an issue arose about whether guarantors had to meet the solicitor-client costs incurred by the bank. The High Court Judge had concluded that the Court's discretion to award costs contained in the (then) Code of Civil Procedure could not be removed by contract.[40] On appeal, the Court of Appeal concluded that a recovery of solicitor-client costs on a contractual basis was possible. It held that contractual obligations are enforceable, unless they are contrary to public policy.[41] In reaching that conclusion English and Canadian authorities to the same effect were reviewed.[42] In discussing public policy issues, the Court observed that it is important to be careful to recognise a broad distinction between an agreement which tends to divert the course of justice and an agreement that merely regulates the rights of the parties.[43]

[53] In *ANZ Banking Group* the High Court had, nevertheless, exercised its discretion conferred by the Code of Civil Procedure and concluded that the case was one where it was appropriate to award the amount of claimed costs.[44]

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36 *George*, above n 27, at [13] relying on *ANZ Banking Group NZ Ltd v Gibson* [1986] 1 NZLR 556 (CA).
37 The schedule is different from the one containing the Authority's power, but the issue is the same.
38 *Watson & Son Ltd v Active Manuka Honey Assoc* [2009] NZCA 595 at [35].
39 *ANZ Banking Group (NZ) Ltd v Gibson*, above n 36.
40 At 566. Now see High Court Rules 2016, p 14.
41 At 566. The example given was by impeding the administration of justice.
42 At 566.
43 Casey J at 571 quoting from *Prince v Haworth* [1905] 2 KB 768,770.
44 *ANZ Banking Group (NZ) Ltd v Gibson* [1981] 2 NZLR 513.

[54] The same argument used in this proceeding was used unsuccessfully in *ANZ Banking Group*.[45] The same response applies. In this case the Authority was asked to enforce the provisions of an agreement entered into between the parties that regulates their relationship and does not offend public policy. Had it been necessary, for example, a compliance order could have been granted to compel compliance with the agreement.[46] That result is consistent with the common practice in all courts, as was commented on in *ANZ Banking Group*, for parties to litigation to be able to make their own arrangements for costs.

[55] I consider the Authority accurately summarised and applied *George*. Putting aside its attempt to reserve a discretion, and concerns about the necessity to undertake a cross-check, it properly considered if the costs claimed fell within the scope of the indemnity, whether there were any public policy reasons preventing indemnity costs from being ordered and made adjustments to get to the point where the costs were objectively reasonable. The rest of its analysis was not material to that conclusion.

[56] While Mr Zindel raised concerns about whether the costs incurred had been adequately discounted, to address possible duplication, Mr Pitman's challenge did not stand or fall on this submission. What was being referred to were the time records provided by Advanced Personnel's lawyers, indicating that several of their support staff had been involved in recording time and attendances for this work which may have formed part of the fees charged. What Mr Zindel referred to was not sufficient to show that the fees paid by Advanced Personnel, as adjusted by the Authority, had lost their quality of being objectively reasonable. In the end the Authority's assessment was a broad-brushed one, and the fact that I might have made a different decision taking into account what was referred to by Mr Zindel, does not mean the Authority made an error. Inevitably, these sorts of assessments can only be made on a broad-brushed basis and I am satisfied the Authority did not make an error in doing so.

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45 At the time the Code of Civil Procedure did not contain an equivalent to High Court r 14.6(4)(e) but that did not affect the result. See also *Watson & Son Ltd v Active Manuka Honey Assoc*, above n 38; *Black v ASB Banking Group* [2012] NZCA 384; *ITE v ALA* [2016] NZEmpC 147 and *ITE v ALA* [2017] NZCA 126 (application for leave to appeal declined).

46 The Employment Relations Act 2000, s 137.

[57] Even if Mr Pitman had established that the agreement was contrary to s 238, I would not have set aside the Authority's order, because the amount awarded has not been shown to be in error by being excessive. Plainly, Mr Pitman's actions in attempting to give A Temp a springboard advantage resulted in his former employer incurring significant costs in protecting its interests. The steps taken by Advanced Personnel were justified and inevitably attracted considerable expense that it was entitled to seek to recover.

[58] Concluding that the indemnity was binding has a consequence for Mr Pitman's contention that the Authority erred in not taking into account his settlement offer. He made an offer to settle of $15,000 payable in two parts, $10,000 immediately and $5,000 over 12 months. He contended that, when he made the offer, Advanced Personnel's costs were a fraction of what they eventually became. His point was that, had the offer been accepted, both parties could have been spared subsequent expense. At the time the offer was made Advanced Personnel's costs slightly exceeded $15,000 and it had incurred losses. In combination they were substantially more than the offer.

[59] Mr Zindel submitted that the Authority determinations do not mention the Calderbank offer when they should have done because it knew the offer had been made. That omission was said to show the Authority failed to consider it. I accept that the Authority knew an offer had been made and that the determinations do not refer to it, but that is not fatal. A Calderbank offer may be material when the Authority is exercising its discretion about costs under cl 15 of sch 2 to the Act, but that was not the task it was confronted with. Even if that was not the case, the offer fell well short of being a reasonable one in the circumstances. That is because the offer was less than the costs and losses already incurred and payment over time was proposed. The offer did not adequately address both of those subjects and Advanced Personnel was also being invited to accept the business risk associated with payment over time. Those circumstances deprived the offer of any real weight and it fell well short. The company was entitled to reject it without assuming the associated risk of an adverse outcome when costs were determined.

Additional costs

[60] The last issue to address is Advanced Personnel's claim for further costs arising from the Authority's determinations. As has already been discussed, the Authority dealt with fixing costs in its determination addressing damages where it concluded that an award of $46,000 was appropriate.[47] At the conclusion of the determination the Authority reserved for further consideration whether costs should be ordered for attendances for the quantum investigation.[48] Subsequently, on 22 March 2018, it issued a further determination ordering Mr Pitman to pay $5,400 to Advanced Personnel for the costs of that investigation plus $152.17 for disbursements.[49]

[61] Advanced Personnel had sought from the Authority costs for that investigation on an indemnity basis, as it had done previously. The claim was for $6,600 plus GST and disbursements. The Authority held that the costs charged were reasonable, but decided that some adjustments to them were required because the amount claimed included assessing elements of loss and damage arising from breaches other than those emerging from Mr Pitman's breaches of the restraint clause in the employment agreement.[50] The Authority used the same approach as it applied in its damages determination, by estimating that two thirds of the work had been in relation to the restraint clause and one third in relation to "other matters". That assessment led to a conclusion that the costs claimed should be reduced to $4,400.[51] An adjustment was made because Advanced Personnel had the ability to claim GST. The Authority then considered a submission that there should be a pro-rata portion of the daily tariff added to the costs for the quantum findings it had made in relation to the "remaining breaches". The result was to lift the contribution by $1,000 to $5,400.

[62] Mr Goldstein submitted that the Authority had assessed costs against those clauses of the employment agreement dealing with the restraint of trade, but had overlooked awarding them for attendances relating to other breaches of the agreement and for breaches of the duty of good faith and fidelity. An estimate of costs of a further

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47 *Advanced Personnel Services Ltd v Pitman*, above n 1, at [100].
48 At [133].
49 *Advanced Personnel Services Ltd v Pitman* [2018] NZERA Christchurch 37.
50 At [11]–[12].
51 At [12].

$24,000 for those attendances was provided, reduced to $14,000. That amount was reached, effectively, by taking the daily tariff the Authority would use for the second and subsequent days of an investigation and multiplying it by four for the number of hearing days involved.

[63] I am not persuaded that the Authority failed to take into account the totality of the costs incurred by Advanced Personnel when considering the amount to award either on an indemnity basis, or as a result of applying the Authority's tariff. Some confusion is evident in the Authority's March 2018 determination because it involved an assessment of both calculations perhaps repeating the same conflated approach used in the quantum determination. However, when the determinations are read together it is apparent that the Authority dealt with all costs matters. Advanced Personnel has failed to show that an error was made by not adequately addressing costs on all matters before it.

Outcome

[64] For the foregoing reasons:

(a) The special damages were properly calculated by the Authority and Advanced Personnel's challenge to them fails.

(b) General damages should not have been awarded. Mr Pitman's challenge succeeds and the Authority's determination on that subject is set aside.

(c) The Authority did not make an error in ordering indemnity costs and Mr Pitman's challenge to this part of the determination fails.

(d) The Authority did not make an error in its costs determinations and no increase in costs is justified. Advanced Personnel's challenge fails.

[65] Costs are reserved, but two points are relevant. First, Mr Pitman was legally aided so any application seeking costs from him will need to address the Legal Services Act 2011. Second, both parties have had a measure of success which would

ordinarily have a bearing on any costs order. If either party considers costs should be ordered memoranda may be filed and directions will be issued.

K G Smith
Judge

Judgment signed at 11 am on 15 July 2019