

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

AA 30A/09  
5124355

BETWEEN	MARYANN ADLAM Applicant
AND	NATIONAL ADVOCACY TRUST NATIONWIDE HEALTH & DISABILITY ADVOCACY SERVICE First Respondent
AND	THE TRUSTEES OF THE AHIPARA HEALTH AND RESOURCE TRUST Second Respondent
AND	ROSELIN LABAN Third Respondent

Member of Authority: Alastair Dumbleton  
Submissions Received 24 and 25 February, 11 and 12 March 2009  
Determination: 8 May 2009

---

**COSTS DETERMINATION OF THE AUTHORITY**

---

[1] In its determination dated 3 February 2009 issued under AA 30/09, the Authority found against the applicant, Mrs Maryann Adlam, in respect of all the claims she had brought against the three respondents.

[2] Although the Authority found that the third respondent, Ms Roselin Laban, had breached the spirit if not the letter of a mediated settlement entered into between Mrs Adlam and the second respondent trustees of the Ahipara Health and Resource Centre (Ms Laban's employer), no penalty was awarded.

[3] Also determined by the Authority was a counterclaim against Mrs Adlam, alleging she too had breached the mediated settlement. That claim of the second

respondent trustees and Ms Laban was upheld and the Authority awarded a penalty of \$500 against Mrs Adlam, \$400 of which it directed to be paid to Ms Laban.

[4] A question of costs remains outstanding between the parties who have been unable to settle it themselves. On behalf of each of them submissions have been made to enable the Authority now to determine the question.

[5] In respect of participation in the two day investigation meeting and preparation for that, the first respondent National Advocacy Trust incurred actual costs of \$7,684.50 (excluding GST and disbursements) through its retainer of counsel from EMA Legal.

[6] The Trust seeks \$6,000 as a reasonable contribution to those actual costs. Amongst other relevant factors pointed to on behalf of the Trust in support of an order are attempts made by it to settle the matter without an investigation. The Authority has been provided with evidence of a 'without prejudice save as to costs' offer of \$1,500 made to Mrs Adlam. Acceptance of that offer clearly would have left her in a much better position than she is now in, given the outcome of her claims.

[7] Also pointed out for the Trust is the fact that without notice it had to respond at the investigation meeting to an application by Mrs Adlam for leave to submit her grievance out of time, made in anticipation of a possible ruling by the Authority that it had not been raised within the 90 day period. This proved to be the case from the determination.

[8] Ms Laban the third respondent became involved in the case as an employee of the second respondent trustees of the Ahipara Health and Resource Centre. Her costs were met by the employer and therefore she seeks no order. The second respondent seeks costs associated with providing that indemnity and with bringing successfully its claim for a penalty against Mrs Adlam.

[9] Actual costs of over \$10,000 were incurred by the second respondent trustees. This was almost entirely for preparation in advance of the two day investigation meeting, as the trustees and Ms Laban chose not to be represented at that meeting.

[10] As a contribution to the second respondent's costs, \$6,293 is sought against Mrs Adlam.

[11] In support of its claim the second respondent draws attention to ‘without prejudice save as to costs’ offers it too made to Mrs Adlam and which she also declined. The first offer was of a payment of \$1,500 on a tax-free basis (identical to the offer made by the first respondent) and the second offer increased the amount to \$2,000.

[12] In total from the second and third respondents therefore, Mrs Adlam had \$3,500 on offer for her to accept in resolution of all her claims without the need for the investigation meeting.

[13] While this case does not raise a *Calderbank* offer situation in which a successful party may suffer diminishment in the award of costs because of rejection of an offer made of a sum greater than that recovered, it is nevertheless a relevant factor that the respondents made real efforts to settle the proceedings, and did so to an extent that would have provided a much better outcome for Mrs Adlam’s claim than the result she achieved through determination of the Authority.

[14] In submissions made on her behalf, an order is sought by Mrs Adlam that costs lie where they fall or alternatively, if any are to be awarded, the amount should be at the lower end of the scale.

[15] She opposes an award of costs for the main reason that the respondents refused to attend mediation. However she did not obtain or even seek a direction from the Authority requiring the parties to attend mediation, and their non-attendance was therefore not in breach of any order made by the Authority. In the circumstances, where part of the claims arose from allegations of breaches of an earlier mediated settlement, it seemed unlikely to the Authority that mediation would assist to resolve this matter and no direction was made by it under s 159 of the Act.

[16] The leading decision on costs in the Authority is *PBO Ltd v. Da Cruz* [2005] 1 ERNZ 808. Costs may be awarded at the discretion of the Authority, which is to be exercised in accordance with principle.

[17] Costs should follow the event, entitling the first and second respondents to an award as a contribution to their actual legal costs reasonably incurred by them in preparing for and participating in the investigation commenced by Mrs Adlam.

[18] The facts in this case were not seriously in dispute, and it gave rise to no difficult legal issues. The investigation meeting provided at least an opportunity for a good airing of the facts, as well as a wide range of opinions and feelings by various participants. The case was a typical one requiring the application of well established legal principles to largely uncontested facts.

[19] In fixing costs I take into account the accumulation of two awards to be made against Mrs Adlam, who I regard as a person unlikely to have means to pay which are better than ordinary, given that she remains without employment. On this basis awards of about \$3,000 per day of investigation for each of the first and second respondents (\$12,000 in total) must be regarded as excessive. There was nothing so special about the case to justify significantly higher awards than average.

[20] In the exercise of the Authority's discretion I fix costs for the first respondent as \$3,800 (approximately \$1,900 per day of meeting) and for the second respondent as \$1,350 in relation to preparation. These amounts are to be paid by Mrs Adlam to those parties pursuant to clause 15 of Schedule 2 of the Employment Relations Act 2000.

A Dumbleton  
**Member of the Employment Relations Authority**