

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

AA 252/09  
5120622

BETWEEN                      BRIAN WEBB AND BYRON  
   KNIGHT  
   Applicants

AND                              NEW                      ZEALAND  
   TRAMWAYS AND PUBLIC  
   PASSENGER      TRANSPORT  
   EMPLOYEES'      UNION  
   INCORPORATED  
   Respondent

Member of Authority:      Alastair Dumbleton

Submissions Received      25 May, 29 June, 21 and 27 July 2009

Determination:              29 July 2009

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**COSTS DETERMINATION OF THE AUTHORITY**

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[1]      Mr Brian Webb and Mr Byron Knight seek an order requiring the New Zealand Tramways and Public Passenger Transport Employees' Union Incorporated (the Tramways Union) to reimburse costs and expenses incurred by them in relation to the Authority's investigation that concluded with the issue of a determination on 27 June 2008 under AA 221/08.

[2]      From that investigation a principal finding of the Authority, at para.[89], was;

*... the Tramways Union has not acted in accordance with its registered rules for at least the last ten years or more, in that it has failed to hold elections as required every four years for the several positions of National Officer and it has thereby failed to ensure that*

*the union is constitutionally governed or managed by a National Council that includes those Officers. The National Council has also failed to meet at least annually during the period from 1992 to date.*

[3] The Authority found in relation to Mr Gary Froggatt who has been closely involved for many years with the union, at para.[90];

*... in purporting to act on behalf of the Union Mr Froggatt did not act in good faith when he represented himself to be the National Secretary on several occasions, knowing he did not hold that position.*

[4] The Authority held that the actions of Mr Froggatt in this regard were to be regarded as those of the union, a party with whom Mr Webb and Mr Knight as members of the union were in an employment relationship as defined by the Employment Relations Act 2000.

[5] Another principal finding of the Authority, at para.[74], was that Mr Webb had been expelled from membership of the union in breach of his contractual right under the union's rules to be disciplined only by the National Council. The suspension of Mr Knight was also declared, at para.[75] of the determination, to have been an act of the union performed without authority under its rules.

[6] Mr Webb and Mr Knight were successful in obtaining injunctions from the Authority which required the Tramways Union to comply with its rules by providing a National Council upon holding elections in accordance with those rules.

[7] A declaration was given that the expulsion of Mr Webb had been of no effect and that he was to be regarded as having remained a member of the union since the date of his purported expulsion in September 2007. The union was ordered to restore the name of Mr Webb to the union's roll of members and allow him all of the rights and privileges available to a member.

[8] Complaints by Mr Webb and Mr Knight about financial mismanagement including misappropriation of funds, were found not to have any basis in fact and able to be dealt with better under the union's complaints procedure.

[9] In relation to the investigation Mr Carrucan represented to the Authority that his clients Mr Webb and Mr Knight had been invoiced costs and expenses of \$2,649.22 (excluding GST). Mr Carrucan expressly submitted that the amount invoiced was "the actual costs incurred." As a matter of good faith I accept that representation, supported as it was by copies of the GST invoice.

[10] Jointly for Mr Webb and Mr Knight costs are sought in that amount.

[11] The Authority directed that the Tramways Union was to reply to the application for costs within 21 days of its receipt. A reply was received from counsel Mr Mitchell on 29 June, 12 days after 17 June when the period allowed expired. No explanation has been given for the failure to comply with the timetable order.

[12] The leading decision on costs in the Authority's investigative jurisdiction is *PBO Ltd (formerly Rush Security Ltd) v. Da Cruz* [2005] 1 ERNZ 808. In its decision the Employment Court confirmed as correct a number of principles that the Authority had been regularly applying, since its inception in 2000, when considering costs. They included:

- *There is a discretion as to whether costs would be awarded and what amount.*
- *The discretion is to be exercised in accordance with principle and not arbitrarily.*
- *The statutory jurisdiction to award costs is consistent with the equity and good conscience jurisdiction of the Authority.*
- *Equity and good conscience is to be considered on a case by case basis.*
- *Costs are not to be used as a punishment or as an expression of disapproval of the unsuccessful party's conduct although conduct which increased costs unnecessarily can be taken into account in inflating or reducing an award.*
- *It is open to the Authority to consider whether all or any of the party's costs were unnecessary or unreasonable.*
- *That costs generally follow the event.*
- *That without prejudice offers can be taken into account.*
- *That awards will be modest.*
- *That frequently costs are judged against a notional daily rate.*
- *The nature of the case can also influence costs and this has resulted in the Authority ordering that costs lie where they fall in certain circumstances.*

[13] In its decision the Court did not point to any one of the above principles as being of greater importance than any other in the exercise of fixing costs.

[14] In this case I have had particular regard to the principles that costs in both their award and amount are at the discretion of the Authority, that the jurisdiction to award costs is consistent with the equity and good conscience jurisdiction of the Authority, and that the nature of the case can also influence costs.

[15] In this case the Authority takes into account that the employment relationship problem arose as between union members and their union, which is a relatively rare type of case coming to the Authority. The obvious differences between that sort of relationship and the more usual one seen by the Authority between employer and employee, should be given effect to.

[16] The union exists to advance the interests of its members and in that regard officers of the union act on behalf of the membership and in their interests overall.

[17] I consider that Mr Froggatt and other officers of the union failed in their duty to members such as Mr Webb and Mr Knight to manage and govern the union in a constitutional way, in accordance with all the rules and legislative requirements. The union's officers were custodians or trustees appointed to act in the interests of ordinary members but failed, badly, to do so.

[18] In submissions for the union Mr Mitchell acknowledged that the problems experienced by Mr Webb and Mr Knight had arisen from the union's failure to keep its rules up to date.

[19] Mr Webb and Mr Knight in raising their problems with the Authority exposed a serious deficiency threatening the union's existence. Hopefully this has led the union to take corrective steps.

[20] It must have been only a matter of time with the rules in the state they were and without proper governance, before the union could not function any more and would have had to be wound up. Were it not for Mr Webb and Mr Knight the union might by now have ceased to exist or be in serious financial trouble. As a result of their intervention the employment relationship between them and the union, and also of its other members, was improved or strengthened and a determination of costs should recognise that positive outcome and the overall benefit to the both parties.

[21] While the negligence of the union's officers is not something to be punished by an award of costs, it is a matter that is relevant to the awarding of costs as an

exercise of both Authority's discretion and its equity and good conscience jurisdiction conferred by the Employment Relations Act. It is also an aspect of the nature of the case and is therefore relevant under a further principle to be applied when considering costs applications; *PBO Ltd v Da Cruz* (above).

[22] I consider that as a matter of equity and good conscience Mr Webb and Mr Knight should be entitled to recover costs and expenses reasonably incurred in the exercise. By comparison with many cases the Authority sees the overall costs are quite modest for a party to an employment relationship that has succeeded in obtaining injunctions to bring about the results achieved here, including the reinstatement of Mr Webb to his union membership.

[23] The nature of this case involving union members and their union, fundamental rights to continued membership without unlawful action being taken against them, considerations of equity and good conscience and the discretionary aspect of costs, all lead the Authority to determine that an award of 75% of full costs – about \$2,000 (excluding GST) - is appropriate.

[24] Pursuant to clause 15 of Schedule 2 of the Act, the Tramways Union is ordered to pay \$2,000 to Mr Webb and Mr Knight. How it is to be divided up will be a matter for them.

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