

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2012] NZERA Auckland 439  
5367829  
5367855

BETWEEN

LESLEY KAREN HARRIS  
Applicant 5367829

ROY TE RIINI  
Applicant 5367855

AND

KAWERAU SOCIAL  
SERVICES TRUST BOARD

Respondent

Member of Authority: R A Monaghan  
Representatives: L Harris and R Te Riini in person  
E Burke, counsel for respondent  
Memoranda received: 23 November 2012 from applicants  
12 November 2012 from respondent  
Determination: 5 December 2012

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**COSTS DETERMINATION OF THE AUTHORITY**

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[1] In a determination dated 16 October 2012 I declined Ms Harris' and Mr Te Riini's applications for leave to raise their personal grievances out of time.

[2] Costs were reserved, and the parties have filed memoranda on the matter.

**The trust board's position**

[3] Ms Burke recognised the Authority's notional daily rate of \$3,500, with reference to the principles in *PBO Limited v da Cruz*<sup>1</sup>. However she sought a contribution to the trust board's costs in the higher sum of \$5,000 to reflect the applicants' conduct of the matter. She also sought an additional \$500 towards the cost

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<sup>1</sup> [2005] ERNZ 808.

of the present application, because of the failure of Ms Harris and Mr Te Riini to respond to the trust board's attempt to resolve costs.

[4] Factors relied on in respect of the applicants' conduct of the matter were:

- they pursued a case that stood little chance of success; and
- the matter was not conducted efficiently, with voluminous material being produced, as well as several amendments to the statement of problem which required further reply.

[5] In commenting on the applicants' pursuit of claims that stood little chance of success, Ms Burke also commented on the effect of the applicants' representing themselves. In doing so she referred to a decision of the Employment Court in *Order of St John Midland Regional Trust Board v Greig*<sup>2</sup>. Although decided before *da Cruz*, the decision remains significant because the court reiterated that awards of costs are made to compensate a successful party for expending money to achieve that success, and are not made to punish an unsuccessful party for electing a particular form of representation. Ms Burke acknowledged this, but suggested that the unmeritorious nature of the applicants' claims might have been explained to them if they had sought professional advice.

[6] That suggestion is speculative and does not affect the assessment of costs. Regarding any broader submission based on the merits of the claims, as discussed later in this determination I am not able to say the substantive claims were without merit. As for the application for leave to raise the grievances I accept that the applicants' delay in progressing that matter created a significant difficulty for them, although the initial delay was not their fault. I would not go as far as to say there was so little merit in their position on that point as to warrant an increase in costs.

[7] The more significant factor is whether the applicants' conduct of the matter here was inefficient and added unnecessarily to the trust board's costs.

[8] Ms Harris' statement of problem in particular was voluminous, in that it attached a large number of documents in support of the merits of the grievances. The

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<sup>2</sup> [2004] 2 ERNZ 137

statement in reply was relatively brief, and sought a ruling on whether the grievances were raised within the required 90 days. That preliminary matter was the subject of a routine teleconference between the Authority and the parties, in which the likely witnesses were discussed, statements of evidence timetabled, and an investigation meeting was scheduled. The need for an application for leave to raise a grievance out of time was noted, and an amended statement of problem making such application was later lodged. A more detailed statement in reply followed in respect of the application. The statements of evidence were brief and focussed appropriately, and the number of witnesses was limited.

[9] None of the activity regarding the preliminary matter was out of the ordinary. The investigation was confined to the preliminary matter at a very early stage, in turn limiting the extent to which the trust board needed to prepare to address the substantive claims. I accept that reading through the documentation may have been time-consuming, but while the documentation suggested a risk of inefficiency if the substantive claims proceeded there was no inefficiency which should sound in costs in respect of the preliminary matter.

[10] Finally, in respect of the failure to respond to the attempt to resolve costs, Ms Harris said she did not receive the relevant emailed approach from Ms Burke. It was deleted by someone else who uses the email account to which it was sent. Ms Harris said she would not in any event have agreed to make a contribution in the sum of \$4,000 which was sought. I do not consider those circumstances should sound further in costs.

[11] For these reasons I do not increase the notional daily rate.

### **The applicants' position**

[12] Ms Harris submitted on behalf of both applicants that costs should lie where they fall. In support she sought to offset the amount now sought by the trust board against amounts to which she said the applicants would otherwise have been entitled, namely:

- the limited remedies the applicants would have received had their personal grievances been upheld, which the applicants understood from the determination would have been the outcome if the grievances proceeded; and
- payments in lieu of notice, and a payment of holiday pay in respect of service leave, which were admittedly were not part of the employment relationship problem before the Authority and were not sought.

[13] The offsetting approach Ms Harris has adopted is not available to her and I do not adopt it. The focus must be on the matter that was before the Authority, namely whether the grievances could proceed.

[14] Factors that may be taken into account include: the parties' conduct of the matter; the degree to which the parties were successful in the arguments they raised; the unsuccessful party's ability to meet an order to pay costs; and the parties' attempts to settle the matter. Accordingly the trust board relied on the factors discussed. Some of Ms Harris' additional comments were relevant to the parties' respective degree of success, and on the applicants' ability to pay.

[15] Ms Harris' comment on the applicants' degree of success involved a misunderstanding of a passage in the substantive determination regarding the merits of the grievances.<sup>3</sup> The passage commented in a preliminary way on whether the grievances had merit but was not and could not be a final determination of the merits. It was made in the context of the wider question of whether it was in the interests of justice to allow the grievances to proceed, on which the trust board was successful.

[16] Ms Harris' comment on ability to pay concerned the applicants' ability to pay costs that would have been incurred had they engaged a paid representative, rather than their ability to make a contribution to the trust board's costs. In that respect I note Ms Harris at least is in permanent employment, and I understand Mr Te Riini has obtained work sporadically.

[17] For these reasons I do not reduce the notional daily rate.

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<sup>3</sup> At [40]

## **Order for costs**

[18] The trust board was the successful party and is entitled to a contribution to its costs.

[19] I have not found any reason to adjust the notional daily rate. Ms Harris and Mr Te Riini are therefore ordered to contribute to the trust board's costs jointly and severally in the sum of \$3,500 for an investigation meeting of one day.

R A Monaghan

Member of the Employment Relations Authority