

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

[2014] NZERA Christchurch 135  
5140642

BETWEEN	KAREN PIVOTT First Applicant
A N D	PATRICK O’SULLIVAN Second Applicant
A N D	SOUTHERN ADULT LITERACY INCORPORATED formerly SOUTHLAND ADULT LEARNING PROGRAMME First Respondent
A N D	LITERACY AOTEAROA INC Second Respondent

Member of Authority: James Crichton

Representatives: Patrick O’Sullivan, Advocate for Applicants  
Miriam Sinclair, Counsel for First Respondent  
Prue Kapua, Counsel for Second Respondent

Submissions Received: 24 July 2014 from Second Applicant  
2 August 2010 from Second Respondent

Date of Determination: 3 September 2014

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**COSTS DETERMINATION OF THE AUTHORITY**

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**History**

[1] This matter has been the subject of three determinations of the Authority, the first issued on 5 May 2010, the second issued on 24 September 2010 and the third issued on 17 October 2012. It is necessary to recite some of the history of this matter in order to put the present costs application in context.

[2] An initial Statement of Problem was filed on 21 December 2009 in which the first and second applicants alleged that they had suffered personal grievances as a consequence of their employment by the first respondent. I note at this point that the first respondent was originally described in the earlier two determinations as “*Southland Adult Learning Programme*” but in the third determination was described as “*Southern Adult Literacy Incorporated*”. I have satisfied myself that the party is one and the same and has simply had a name change during the relevant period.

[3] In addition to straightforward personal grievance claims, the first and second applicants also sought to bring claims against the second respondent (Literacy Aotearoa).

[4] That application for joinder was considered by the Authority first and resulted in the first determination dated 5 May 2010.

[5] The Authority took the view in that determination that there was no cause of action between the applicants on the one hand and Literacy Aotearoa on the other and accordingly declined the applicants’ claim for joinder and reserved costs for Literacy Aotearoa. I had determined that Literacy Aotearoa be struck from the proceedings and ought not to have any further part. Literacy Aotearoa is recorded in the intituling to this present costs determination simply because the costs matter remains alive as a function of that initial determination.

[6] The second of the two determinations on this matter issued on 24 September 2010 and it is concerned principally with another attempt by the applicants to involve Literacy Aotearoa in their litigation. By submissions filed by the applicants erroneously dated 9 May 2008 (actually 2010), it was argued that Ms Pivott (the first applicant) was in an employment relationship with both the first respondent and the second respondent and that the grievances that Ms Pivott had were “*interconnected*”.

[7] Later, submissions for Ms Pivott dated 23 May 2010 sought to join Literacy Aotearoa to the proceedings on foot alleging that Literacy Aotearoa was in breach of s.134(2) of the Employment Relations Act 2000 (the Act). That of course is the subsection which creates a civil wrong of inciting a breach of an employment agreement.

[8] Because of the conviction the Authority was not interested in joining Literacy Aotearoa to the proceedings then on foot, Ms Pivott also caused an application for removal to the Court to be made.

[9] It was the application for removal to the Employment Court and the second application for joinder that was the subject of the second determination issued on 24 September 2010.

[10] In the second determination, the Authority again refused to join Literacy Aotearoa to the extant proceedings unless and until it had heard evidence sufficiently compelling to identify that Literacy Aotearoa had a case to answer. I indicated in that determination that I considered that evidence (if any) would come out as a consequence of the Authority's investigation of the employment relationship problem identified as between the applicant, Ms Pivott, and the first respondent where, by common consent, there had been an employment relationship.

[11] The application to remove the whole matter to the Employment Court was also denied by the Authority on the footing that there was not a novel question of law involved; in effect, the Authority had been confronted with first an application for joinder of parties (the determination of 5 May 2010) and second an application for joinder of actions (the determination of 24 September 2010) and that there was nothing particularly novel in law about such applications.

[12] Again, with the second determination, costs were reserved.

[13] In the third and final determination in this matter, issued by my colleague Member Appleton on 17 October 2012, Literacy Aotearoa did not feature at all. It is not a party to the proceedings and it plays no part in Member Appleton's decision.

### **The claim for costs**

[14] This is a claim for costs by Literacy Aotearoa against the second applicant, Mr O'Sullivan, counsel for Literacy Aotearoa having advised the Authority that it had settled its costs claim with the first applicant, Ms Pivott.

[15] The submissions as to costs filed on behalf of Literacy Aotearoa date from 2010 and at that time, there was an extant claim for costs against both Mr O'Sullivan

and Ms Pivott. As I have just mentioned, the claim against Ms Pivott has now been settled.

[16] Literacy Aotearoa claims costs of \$1,500. Its recent email exchange with my support officer, in acknowledgment of the fact that it has settled with Ms Pivott, proposes that the amount claimed be reduced by 50% to \$750.

### **The response**

[17] The response from Mr O'Sullivan proceeds on the footing that the application is out of time, that the costs claimed are not reasonable, that there is a disproportionate claim against Mr O'Sullivan, that there is a set-off which is relevant and that the arrangements made to settle costs as between Mr O'Sullivan and Ms Pivott are relevant to the fixing of costs sought by Literacy Aotearoa. I deal with each of these matters in turn.

[18] I reject the suggestion that the application for costs is out of time. Aside entirely from the point that costs submissions are never dealt with on a "*time being of the essence*" basis, the fact of the matter is that the costs application was made on 2 August 2010 and has been languishing since, through no fault of Literacy Aotearoa.

[19] Next is the issue of reasonableness. Essentially the claim is that the global figure of \$1,500 is excessive for dealing with matters on the papers, when set against the usual daily tariff approach which at that time would have been \$3,000. Moreover, it is contended that the lead counsel in the matter was counsel for the employer and that counsel for Literacy Aotearoa took a subsidiary role.

[20] Certainly it is true that the lead counsel for resisting the claim by the applicants was counsel for the employer, but counsel for Literacy Aotearoa still had a role. Mr O'Sullivan's argument would have had more force on this point if the only matter in contention was one issue dealt with on the papers, but the reality was that Literacy Aotearoa was regularly dragged back into the dispute, despite the Authority's early decision to remove it from the proceedings.

[21] Next, Mr O'Sullivan argues that a 50/50 split between himself and Ms Pivott is unfair. I agree. Amongst other things, Mr O'Sullivan's hours of work were dramatically less than Ms Pivott's, and the bulk of the case before the Authority, certainly as I discerned it, was about Ms Pivott rather than about Mr O'Sullivan.

Indeed, that view seems to have been accepted by the respondents, judging from various of their contentions in the pleadings.

[22] It would be wrong for the Authority to take into account Mr O'Sullivan's colourful style of advocacy (which it is accepted may be an irritant to parties on the other side) in fixing costs in this matter. The claim for costs, if any, must be a claim that rests squarely on Mr O'Sullivan's shoulders as a party and not as a representative. As a party, I am satisfied his involvement was significantly less than Ms Pivott's although, of course, as he acted for both himself and Ms Pivott, his influence on the proceedings may have been somewhat magnified.

[23] Next, the Authority is told that there was an attempt to set-off the respective costs claim in relation to the various proceedings involving the parties and that I should take that into account as well. It is true that the parties tried to settle costs between them and in doing that, sought to set off costs in one proceeding against costs in the other. I think I am entitled to take judicial notice of the fact that Literacy Aotearoa seemed to accept that Ms Pivott's claim was the principal one. It follows that they cannot now expect to have costs fixed with Mr O'Sullivan on an equal footing with Ms Pivott.

[24] Finally, Mr O'Sullivan produces a copy of an agreement between his advocacy service and Ms Pivott which resolves the issue of the costs that she owed to him for his services and which he suggests is relevant to the question of whether he is liable to Literacy Aotearoa in costs. I am not persuaded by that argument. It seems to me that in settling with Ms Pivott on the costs that she owed him, all that Mr O'Sullivan has done is resolve costs as between the two applicants and I cannot read that agreement between those parties as somehow being relevant to the question whether he ought to contribute to the costs of Literacy Aotearoa.

### **Determination**

[25] In all the circumstances, this matter has been left too long by the Authority. That is a consequence of the Christchurch earthquakes and my transfer to the Auckland office of the Authority after my home in Christchurch became unliveable because of the earthquakes. Those events have unreasonably delayed the Authority in attending to this and that is regretted.

[26] That said, I have been persuaded by some but not all of the arguments advanced by Mr O'Sullivan in resisting a costs award in favour of Literacy Aotearoa. My sense of the issue is that Literacy Aotearoa was more irritated by Mr O'Sullivan's advocacy style than it was by his claim as a party and it is only as a party that he can have any requirement to contribute to the costs it expended in successfully resisting claims against it in the Authority.

[27] In all the circumstances, I am particularly drawn to Mr O'Sullivan's claim that he was not the major applicant party and on that footing I think the 50% claim cannot stand. As I have noted, I suspect that much of the heat in this matter is directed not at Mr O'Sullivan the party but at Mr O'Sullivan the advocate and that is not a basis on which costs can be fixed.

[28] Having considered all of these aspects carefully, I think Mr O'Sullivan should contribute the sum of \$250 to Literacy Aotearoa as a contribution to the costs it incurred in successfully resisting his claim for joinder against it in respect of his employment by the entity now known as Southern Adult Literacy Incorporated.

James Crichton  
Member of the Employment Relations Authority