

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2014] NZERA Auckland 277  
5386729

BETWEEN	GRANT PHIBBS and ROSALIND WILSON Applicants
A N D	POUTIRI COMMUNITY PRACTICES LIMITED First Respondent
A N D	POUTIRI TRUST Second Respondent
A N D	RINGAKAHA PRIME CARE LIMITED Third Respondent
A N D	DR JOHN ARMSTRONG Fourth Defendant

Member of Authority: James Crichton

Representatives: Fraser Wood, Counsel for Applicants  
Richard Harrison, Counsel for First and Second Respondents  
Miharo Armstrong, Counsel for Third and Fourth Respondents

Submissions Received: 4 June 2014 from Applicants  
20 May 2014 from Third and Fourth Respondents

Date of Determination: 1 July 2014

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**COSTS DETERMINATION OF THE AUTHORITY**

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**The substantive determination**

[1] In the substantive determination described as a “first” determination of the Authority issued on 28 January 2014 as [2014] NZERA Auckland 28, I determined

that Drs Phibbs and Wilson were employed by the first respondent, Poutiri Community Practices Limited, I confirmed that the claim against the third respondent (Ringakaha) was withdrawn but that issues of costs arose, and I dismissed the applicants' claims against Dr Armstrong for want of jurisdiction but reserved costs in respect of that aspect as well.

[2] Since that substantive determination of the Authority, the issues between Drs Phibbs and Wilson and the first and second respondents have been dealt with in their entirety and there is no issue as to costs between the first and second respondent and Drs Phibbs and Wilson.

[3] In respect of the issue of costs as between the applicants and the third and fourth respondents, I am advised that attempts were made to resolve matters by agreement that those attempts were unsuccessful, and accordingly costs need to be fixed in the Authority.

#### **The claim for costs**

[4] Ringakaha and Dr Armstrong seek full indemnity costs on the footing that Drs Phibbs and Wilson's claim against Ringakaha and Dr Armstrong were devoid of merit because, in particular, Ringakaha and Dr Armstrong or either of them were never in an employment relationship with Drs Phibbs and Wilson and so were never in a position where the Authority had any jurisdiction to deal with a claim brought by Drs Phibbs and Wilson against either or both of Ringakaha and Dr Armstrong.

[5] It is suggested for Ringakaha and Dr Armstrong that, in consequence, the claims brought by Drs Phibbs and Wilson were speculative, frivolous and vexatious.

[6] Certainly it is true that throughout the proceeding in the Authority, the other parties involved, and I myself, sought to make clear to counsel for Drs Phibbs and Wilson that there was no prospect of a successful outcome.

[7] The essence of the argument for Ringakaha and Dr Armstrong is that they have been put to legal cost entirely unnecessarily because the claims made against them had no prospect whatever of being successful effectively for want of jurisdiction and yet both Ringakaha and Dr Armstrong were put to the trouble and expense of defending their position.

[8] Costs totalling \$987.50 are sought by Ringakaha and costs totalling \$5,937.50 are sought by Dr Armstrong. Counsel makes the point in the submissions that because Ringakaha and Dr Armstrong instructed the same counsel, costs have been split evenly up to the point at which the proceeding against Ringakaha was discontinued. Thereafter, costs were only incurred by Dr Armstrong.

### **The response**

[9] Submissions for Drs Phibbs and Wilson proceed on the footing that there is no justification for full indemnity costs to be sought and indeed that the interests of justice do not require a costs award at all.

[10] However, if the Authority is minded to make a cost award, the submission is that such an award ought to be modest and, if anything, based on the daily tariff approach.

[11] Moreover, submissions for Drs Phibbs and Wilson maintain that the costs claimed by Ringakaha and Dr Armstrong are unreasonable, first because the attendances should have been more modest, and second because the claims against both Ringakaha and Dr Armstrong were ultimately withdrawn and therefore costs should lie where they fall.

[12] Underpinning the submissions for Drs Phibbs and Wilson is the contention that they are effectively the victims in all of this, their original employment agreements providing for substantial redundancy compensation which through no fault of their own was lost to them when they were in fact made redundant but their employer could not pay the redundancy entitlement.

### **Discussion**

[13] The law relating to costs fixing in the Authority is well settled. Both parties have referred to the leading case of *PBO Ltd v. Da Cruz* [2005] 1 ERNZ 808 which sets out the principles that the Authority ought to apply in the costs fixing environment.

[14] In addition, I have often applied the principles enunciated by the former Chief of the Authority in *Graham v. Airways Corporation of NZ Ltd* (ERA Auckland, AA39/04, 28 January 2004). In that decision, the Authority postulated three steps in

evaluating applications for costs. These are, first a consideration of the actual legal costs and expenses of the successful party; second a decision about whether those costs are reasonable; and finally a determination of what proportion of those costs ought to be met by the unsuccessful party.

[15] It is common ground that Dr Armstrong anyway is entitled to a contribution to his costs from Drs Phibbs and Wilson, although the latter maintain that the costs incurred by Ringakaha ought to lie where they fall.

[16] The submission in respect of Ringakaha proceeds on the footing that the applicants acknowledged at an early stage that their claim against Ringakaha was withdrawn and that, in any event, prior to that notification, Ringakaha had done little to justify the costs it now says it incurred.

[17] That submission from Drs Phibbs and Wilson goes to the reasonableness of the fees charged to Ringakaha. I confess that I am not persuaded that the fees charged are unreasonable. The matter was hardly straightforward, either in terms of the way in which it was pleaded or in terms of the various attendances that would have been necessary from the point at which the claim was originally filed down to the point at which it was discontinued. The elapsed time between those two dates is about a year and it seems to me attendances of the magnitude identified within that period of time are absolutely reasonable. Accordingly, for the avoidance of doubt, I am satisfied that the attendances by counsel on Ringakaha are reasonable in all the circumstances.

[18] Drs Phibbs and Wilson also object to the reasonableness of the attendances on Dr Armstrong who bore a half share in counsel's attendances for the first year after the pleadings were filed and then all of the costs after 5 June 2013 down to the end of the 2013 calendar year when the applicants advised they were withdrawing their claim against Dr Armstrong.

[19] Arguably, the earliest date that could be identified as the conclusion of the claim against Dr Armstrong is 23 December 2013, the date the submissions in reply from Drs Phibbs and Wilson were filed and served, in which document the applicants advise their claim against Dr Armstrong was at an end.

[20] In fact, there appears to have been only one subsequent attendance by counsel for Dr Armstrong after that date and before the issue of the Authority's first determination at the end of January 2014.

[21] Again, looking at the reasonableness of the fees charged, I find myself satisfied that the fees charged to Dr Armstrong are within the normal range of fees for a matter of this kind. As the narration for the fee invoice makes clear, there were a number of attendances from counsel in the second half of calendar 2013 including all of the work necessary to protect Dr Armstrong's position in anticipation of the Authority's determination.

[22] While it is true that Drs Phibbs and Wilson quite properly withdrew their claim against Dr Armstrong in their submissions in reply dated 23 December 2013, by then the bulk of counsel's work was done and so the bulk of the costs was already incurred.

[23] The principal thrust of the submissions for Drs Phibbs and Wilson though rests on their contention that this is a case which should be decided on ordinary principles such as the application of the daily tariff approach and that there is no justification for full indemnity costs to be awarded.

[24] Conversely, counsel for Dr Armstrong and for Ringakaha says that whatever the dispute between Drs Phibbs and Wilson on the one hand and his clients on the other, there simply was no legal basis on which that claim could be prosecuted in the Authority and that has to be correct. I went to some lengths to endeavour to make that point in the telephone conference with the parties' representatives and that view was reiterated by counsel for the first and second respondents as well as counsel for the third and fourth respondents.

[25] It ought to have been self-evident that, whatever the dispute between the parties, the Authority, as a creature of statute, had no ability whatever to address arguments between parties in the absence of an employment relationship. In that sense, the whole proceeding in this forum against Ringakaha and Dr Armstrong was misconceived.

[26] I accept without reservation that Drs Phibbs and Wilson may feel aggrieved about what has happened to them, but there is no basis on which the Authority can deal with their grievances because there is no employment relationship between them on the one hand and either Dr Armstrong or Ringakaha on the other.

[27] Because they brought proceedings in this jurisdiction against the third and fourth respondents, the third and fourth respondents were put to cost which they ought not to have had to bear.

[28] Despite the submissions for Drs Phibbs and Wilson and the attempts by counsel to encourage me to take a less straightforward view of the matter, it seems to me axiomatic that these proceedings were misconceived from the outset, as against Ringakaha and Dr Armstrong, and therefore this is an appropriate case for the Authority to exercise its discretion and allow the provision of full indemnity costs.

[29] The law on costs fixing in the Authority vests a discretion in the Authority and that discretion, to increase or take away from the daily tariff approach that is often used as a basis for costs fixing, includes consideration of matters such as the conduct of the parties.

[30] Here, the allegation put at its simplest is that because Drs Phibbs and Wilson chose to bring proceedings against persons with whom they had no employment relationship, they put those persons to costs which on any reasonable assessment of the position required the expenditure of legal resources without any prospect whatever of the applicants succeeding in this jurisdiction.

[31] That said, I think the proper exercise of my discretion is to award full indemnity costs and I propose to do so.

### **Determination**

[32] Counsel for Ringakaha and Dr Armstrong has identified the costs that those parties have incurred in defending themselves in this proceeding and I have satisfied myself that those costs are reasonable in all the circumstances. Because I consider that the proceedings brought by Drs Phibbs and Wilson against Ringakaha and Dr Armstrong were always misconceived because the Authority had no jurisdiction to consider the claim that the applicants were making against either the third or fourth respondent, I am satisfied that the proper exercise of my discretion is to require the applicants to pay the totality of the costs identified by Ringakaha and Dr Armstrong respectively.

[33] Accordingly, the applicants are jointly and severally liable to pay the costs of first Ringakaha in the sum of \$987.50 and second in respect of Dr Armstrong in the sum of \$5,937.50.

James Crichton  
Member of the Employment Relations Authority