

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2015] NZERA Christchurch 67
5401969

BETWEEN MURRY THORNLEY AND
CAROLYN BROWN
Applicants

A N D MARLBOROUGH BOYS'
COLLEGE BOARD OF
TRUSTS
Respondent

Member of Authority: David Appleton

Representatives: Dzintra King, Counsel for Applicants
Peter Hall, Advocate for Respondent

Submissions Received: 4 May 2015 from Applicant
18 May 2015 from Respondent

Date of Determination: 21 May 2015

COSTS DETERMINATION OF THE AUTHORITY

- A. Whilst the applicants are entitled in principle to be awarded a contribution to the costs incurred by the NZPPTA in representing them, no details of those costs have been provided, so costs are declined. Disbursements in the sum of \$1,157.56 are to be paid to the applicants by the respondent.**

[1] By way of a determination dated 6 March 2015¹ the Authority found that the respondent had unlawfully removed salary units from each applicant, and had unjustifiably disadvantaged them. Costs were reserved.

¹ [2015] NZERA Christchurch 31

[2] The parties have been unable to agree as to how costs are to be dealt with between them. Accordingly, Ms King, on behalf of the applicants, has applied to the Authority for an order that costs be awarded to the applicants in the sum of \$7,000, together with disbursements in the sum of \$1,086.

[3] Mr Hall, on behalf of the respondent, resists the award of costs.

The law and principles of awarding costs in the Authority

[4] The Authority's power to award costs is set out in clause 15 of Schedule 2 of the Act, which provides as follows:

15 Power to award costs

(1) The Authority may order any party to a matter to pay to any other party such costs and expenses (including expenses of witnesses) as the Authority thinks reasonable.

(2) The Authority may apportion any such costs and expenses between the parties or any of them as it thinks fit, and may at any time vary or alter any such order in such manner as it thinks reasonable.

[5] The Authority must follow the principles set out in *PBO Ltd v Da Cruz*, [2005] 1 ERNZ 808 when setting costs awards. These include:

- a. There is discretion as to whether costs would be awarded and in what amount.
- b. The discretion is to be exercised in accordance with principle and not arbitrarily.
- c. The statutory jurisdiction to award costs is consistent with the equity and good conscience jurisdiction of the Authority.
- d. Equity and good conscience are to be considered on a case by case basis.
- e. 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.

- f. It is open to the Authority to consider whether all or any of the parties' costs were unnecessary or unreasonable.
- g. That costs generally follow the event.
- h. That without prejudice offers can be taken into account.
- i. That awards will be modest.
- j. That frequently costs are judged against a notional daily rate.
- k. 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.

The parties' respective arguments

[6] Ms King, who (it is understood) is a paid employee of the NZ Post Primary Teachers' Association (the NZPPTA), relies on the Employment Court case of *O'Malley v Vision Aluminium Ltd (No 3)*² to support her argument that costs should be awarded to a successful applicant even when he or she was represented by counsel directly employed by a union that stands behind the applicant. At page 1045 of *O'Malley* His Honour Judge Palmer states:

What I am simply saying is that just as in my view Mr O'Malley, having succeeded in the proceedings, is entitled, in a costs and expenses setting, to seek an order as to costs which will justly reimburse the engineers union for the considerable expense incurred on the plaintiffs behalf, so also would the union's reimbursing presence behind the plaintiff have been taken into account had the defendant succeeded in the proceedings and then sought an order as to costs against Mr O'Malley. To so proceed is not, in my view, to accord the union party status but to simply recognise that it would reimburse its member (the plaintiff) in the proceedings for any orders made against him in favour of Vision Aluminium Ltd for costs and expenses. I firmly conclude this approach would be justified in the material circumstances in equity and good conscience.

[7] Mr Hall submits that *O'Malley* should be distinguished on the basis that he also is an employee of an organisation (the NZ School Trustees Association) and that, in a case where both parties are represented by salaried advocates, respectively employed by organisations that are, in part at least, in the business of representation,

² [1992] 2 ERNZ 1043

costs should lie where they fall as both advocates were just undergoing their “bread and butter work”. Their respective employers have the salary cost regardless, he says.

[8] Mr Hall also argues that the matter under investigation was novel, in that the provisions of clause 3.9, Appendix H and clause 4 of the Secondary Teachers’ Collective Agreement had not been litigated before.

[9] Mr Hall also argues that the respondent had some success in the case as the Authority agreed with its argument that no reorganisation of the college had occurred, contrary to the applicants’ submissions. He also points out that the Authority found that the respondent was not motivated by bad faith in wanting to restructure its allocation of available management units.

[10] Dealing with the distinguishing of *O’Malley* argument first, I do not accept that there is much logical force in Mr Hall’s argument. Just as *O’Malley* can be relied upon to argue that an employee party engaging in-house counsel who is employed by a union should have a proportion of the union’s costs reimbursed if successful, the same argument would apply, by logical extension, if an employer party engaging in-house counsel employed by an employer’s representative organisation was successful in proceedings. The mere fact that both counsel/advocates are employed in-house by the respective organisations in the present proceedings does not alter that principle.

[11] I therefore accept that, in principle, costs can be awarded to the applicants in this matter, even though Ms King is employed in-house by the NZPPTA.

[12] Turning to the *novelty* argument, whilst it may well be the case that the provisions of clause 3.9, Appendix H and clause 4 of the Secondary Teachers’ Collective Agreement had not been litigated before, the investigation was primarily about actions that had disadvantaged two teachers. The aspect of the investigation that was novel was not in the forefront of the investigation.

[13] I accept that the respondent was not wholly defeated in its arguments before the Authority. However, it was defeated in its key argument; namely that it was entitled to remove salary units from two teachers. If asked whether they feel they were successful, I am reasonably confident that the two applicants would answer that they were.

[14] Adopting the very well-known principles of *Da Cruz*, I am satisfied that costs should follow the event, and that this means that the applicants are entitled to be awarded costs, in principle.

[15] However, when I peruse Ms King's submissions, I note that she does not give any indication at all of what costs have been incurred in representing the two applicants. In *O'Malley*, counsel for the plaintiff had provided the Court with his hourly charge out rate and a breakdown of the time taken. No such information has been provided by Ms King.

[16] Ms King seeks costs of \$7,000 on the basis of the current Authority's daily tariff of \$3,500 a day. However, this daily tariff is not a right, and it must be referable to the actual costs incurred by the successful party. No successful party is entitled to an award of costs unless costs have actually been incurred by it, and a party cannot recover more by way of a costs contribution than the costs actually incurred by it. Otherwise, the paying party would be unfairly penalised, which goes against the *Da Cruz* principles that the discretion to award costs is to be exercised in accordance with principle and not arbitrarily, and that costs are not to be used as a punishment or as an expression of disapproval of the unsuccessful party's conduct.

[17] Even applying *O'Malley*, where it was recognised that the successful party himself did not incur any costs, it was recognised that *considerable expense was incurred through counsel's representation of the plaintiff*, and that expense was quantified. Whilst the duration of Ms King's actual attendance at the two investigation meetings falls within the knowledge of the Authority, it would be quite wrong of me to attempt to guess the expenses that have been incurred in this case, where no clue has been furnished of Ms King's hourly rate.

[18] Indeed, in a case where Ms King presumably does not regularly charge for her time like a private barrister does, say, and where any hourly rate is therefore nominal, it is even more important for it to be furnished to the Authority. Unfortunately, this has not been done, and I am not prepared to pluck it out of the air.

[19] Accordingly, I must decline to award any costs in favour of the applicants.

[20] Turning to the matter of the disbursements incurred, whilst no proof of them being incurred has been provided, I am prepared to take Ms King's assertions at face value. Certainly, they have not been questioned as not being genuine by Mr Hall.

[21] However, Mr Hall does argue that the disbursements in relation to the second day should not be allowed as the second day was not necessary. However, I do not agree with this. I found the second day of investigation indispensable in understanding the respective arguments of both parties.

[22] I therefore allow these disbursements. Mr Hall asks that, if the disbursements are allowed, then they should be stated as being GST inclusive. Ms King has not indicated whether they are or not, but I assume they are as the costs incurred (accommodation and flights) are GST rateable expenses. If they are not, Ms King must inform the Authority immediately.

[23] Ms King has not included in her disbursements the Authority's lodgement fee of \$71.56. That should also be reimbursed by the respondent. The Authority inadvertently did not charge the applicants for the second day of the investigation meeting.

Order

[24] I order the respondent to pay to each of the applicants the following GST inclusive sums, being disbursements incurred by the NZPPTA on their behalf:

- a. To Mr Thornley, the sum of \$578.78; and
- b. To Ms Brown, the sum of \$578.78.

David Appleton
Member of the Employment Relations Authority