

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**[2017] NZERA Auckland 116
5643402**

BETWEEN

ASSOCIATION OF
PROFESSIONALS AND
EXECUTIVE EMPLOYEES
INCORPORATED
Applicant

AND

WAIKATO DISTRICT HEALTH
BOARD
Respondent

Member of Authority: Eleanor Robinson

Submissions received: 11 April 2017 from Applicant
27 March 2017 from Respondent

Determination: 18 April 2017

COSTS DETERMINATION OF THE AUTHORITY

[1] By way of a joint memorandum dated 14 March 2017, the Applicant, Association of Professionals and Executive Employees (APEX), and the Respondent, Waikato District Health Board (Waikato DHB), advised that APEX had withdrawn proceedings in this matter.

[2] The memorandum advised that the parties had not been able to resolve the costs consequences of the withdrawal, and submissions on costs would fallow in due course.

[3] The Respondent has accordingly filed a submission on costs. Citing actual costs of \$6,000.00 plus GST, it is seeking a contribution to costs in the sum of \$3,500.00.

Submissions of the Respondent

[4] In support of this submission Mr Russell, on behalf of the Respondent, submits that the Respondent incurred costs in excess of \$8,800.00 plus GST in defending the matter when the application could never succeed.

[5] The Applicant was made aware of this in the statement of reply filed by the Respondent on 25 November 2016 in which the Respondent pointed out the statutory bar at s 56 of the Employment Relations Act 2000 to individual employment agreements overriding

the terms of a collective agreement, which it submits is essentially what the Applicant was seeking. . \$6,000.00 of these costs plus GST were incurred after the filing of the statement in reply.

[6] As a result, the Respondent had to consider documentary evidence, receive and consider the witness statement of the Applicant, and prepare and file its own evidence, as well as commencing preparation of its own evidence.

[7] It is submitted that the Applicant sought wide-ranging and significant remedies, including penalties to the maximum allowed under the law, for an alleged breach of a settlement agreement. In that respect the matter was not just a dispute seeking contractual interpretation, where costs traditionally lie where they fall.

[8] In addition, the Applicant refused to attend mediation when it was suggested by the Authority during a case management conference on 18 November 2016. Accordingly, it is submitted that the refusal to attend mediation is a relevant factor going to costs.

[9] Further, the Applicant did not withdraw the proceedings until 14 March 2017. Submissions were to be filed on 15 March, with the hearing to take place on 11 April 2017. All preparation for that hearing had been front-loaded by the Authority a month before the hearing to ensure all issues were canvassed well before the hearing.

Submissions of the Applicant

[10] Mr Manning, on behalf of the Applicant, submits that costs should lie where they fall.

[11] It is submitted that that an election to withdraw the proceeding more than a month prior to the scheduled investigation meeting, was an entirely responsible course of action.

[12] It is noted that since the filing of the statement in reply, each party had filed one 9 page brief of evidence. Written submissions were directed to to be filed by 15 March 2017, 4 weeks prior to the scheduled investigation meeting. It was on 10 March 2017 that the Applicant advised the Respondent that it would be withdrawing the matter.

[13] Mr Manning submits that the Applicant did not refuse to attend mediation, instead advising that in the circumstances it was not appropriate that the parties be directed to attend mediation a second time.

[14] It is submitted that the proceeding which concerned the enforceability of a term of a settlement agreement which the parties negotiated together, might have been avoided if the Respondent had honoured its duty of good faith by:

- i. engaging with the Applicant in a timely way about its retention of clause 3.4 (a);
- ii. responding openly and constructively with the Applicant when it first raised its concern that the retention of clause 3.4 (a) in the individual employment agreement appeared to conflict with clause 4 of the MOU.

Determination

Principles

[15] The power of the Authority to award costs arises from Section 15 of Schedule 2 of the Employment Relations Act 2000 (the Act) which states:

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.

[16] Costs are at the discretion of the Authority, as observed by Chief Judge Colgan in *NZ Automobile Association Inc v McKay*¹.

[17] The principles and the approach adopted by the Authority on which an award of costs is made are well settled and outlined in *PBO Limited (formerly Rush Security Ltd) v Da Cruz*² as confirmed in *Fagotti v Acme & Co Ltd*.³

[18] It is a principle set out in *PBO Limited (formerly Rush Security Ltd) v Da Cruz*⁴ that costs are modest. Costs are also reasonable as observed by the Court of Appeal in *Victoria University of Wellington v Alton-Lee*⁵ at para [48] “As to quantification, the principle is one of reasonable contribution to costs actually and reasonably incurred.”

[19] The Authority’s jurisdiction in respect of costs extends to a situation in which an Applicant elects to withdraw a proceeding at any stage prior to issue of determination. However, whilst I have discretion in considering whether or not a party’s costs were

¹ [1996] 2 ERNZ 622

² [2005] 1 ERNZ 808

³ [2015] NZEmpC 135 at [114]

⁴ [2005] 1 ERNZ 808

⁵ [2001] ERNZ 305

necessary or unreasonable, it is incumbent upon me that I approach the question of costs in a principled manner and not arbitrarily.

[20] Having fully considered this matter, I consider it appropriate to make that the Applicant make a contribution to the costs of the Respondent, albeit in the particular circumstances of this matter at a much reduced level than that the nominal daily tariff rate.

[21] Accordingly APEX is ordered to pay Waikato District Health Board the sum of \$500.00 towards its legal costs.

Eleanor Robinson
Member of the Employment Relations Authority