

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2018] NZERA Auckland 64  
5599036

BETWEEN KATENE PAENGA

Applicant

A N D

BOARD OF TRUSTEES, TE  
KURA KAUPAPA MAORI, O  
PUAU TE MOANANUI-A- KIWA

Respondent

Member of Authority: Nicola Craig

Representatives: Richard Harrison, Counsel for Applicant  
Nicholas Russell, Counsel for Respondent

Submissions received: 7 December 2017 for Applicant  
18 December 2017 for Respondent

Date of Determination: 26 February 2018

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**COSTS DETERMINATION OF  
THE EMPLOYMENT RELATIONS AUTHORITY**

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**A. The Board of Trustees of Te Kura Kaupapa Maori, o Puau Te Moananui-a-Kiwa is ordered to pay Katene Paenga the following sums within 14 days of the date of this determination:**

- (i) \$24,150.00 as a contribution towards his costs; and**
- (ii) \$838.20 being the filing fee and the hearing fee.**

## **Dismissal and remedies determinations**

[1] In an earlier determination the Authority found that Katene Paenga had been unjustifiably dismissed as Tumuaki/Principal by the Board of Trustees, Te Kura Kaupapa Maori, o Puau Te Moananui-a-Kiwa (the Kura Board).<sup>1</sup> After further submissions were received, a second determination was issued regarding remedies.<sup>2</sup> The Kura Board was ordered to pay Mr Paenga the following sums:

(a) \$47,563.86 gross as lost wages; and

(b) \$25,000 as compensation under s 123(1)(c)(i) of the Employment Relations Act 2000 (the Act).

[2] In the second determination the parties were invited to resolve the issue of costs between themselves. They have been unable to do so and submissions on costs were then received from both parties.

## **Costs application and submissions**

[3] Mr Paenga has applied for costs. He seeks an uplift on the notional daily tariff for the four days of the investigation meeting as well as reimbursement of the filing fee and hearing fee.

[4] Invoices to Mr Paenga for legal fees from his current and former representatives were filed. These totalled \$57,170.40, including GST. Mr Paenga was required to obtain a bank overdraft to pay these legal fees and there was a cost of borrowing.

[5] It is agreed that \$14,000 is the applicable total tariff, the applicable daily rate being \$3,500 when the claim was filed. Mr Paenga's uplift is sought primarily on the basis that the approach taken by the Kura Board up to Mr Paenga's dismissal and during the course of the investigation process caused him to incur significantly greater legal costs than would otherwise have been the case. Further, had any competency or performance issues been properly addressed in accordance with the procedures outlined in the employment agreement then Mr Paenga would not have

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<sup>1</sup> *Katene Paenga v Board of Trustees, Te Kura Kaupapa Maori, o Puau Te Moananui-a-Kiwa* [2017] NZERA Auckland 233

<sup>2</sup> *Katene Paenga v Board of Trustees, Te Kura Kaupapa Maori, o Puau Te Moananui-a-Kiwa* [2017] NZERA Auckland 347

been put to these legal costs. The Authority's finding was that issues raised by the Kura Board were largely competency or performance issues which should have been addressed in that manner.

[6] Submissions for Mr Paenga emphasised that he had to address multiple historical and ill-defined claims which were obviously not misconduct allegations. The Kura Board's approach was described as a shotgun approach which led to an onerous requirement to respond to extensive issues both during the Board's process and the Authority's investigation process.

[7] It is accepted for Mr Paenga that it is difficult to estimate the effect that these actions by the Kura Board had on increasing his legal costs. An uplift to an amount equivalent to 66%, or two thirds, of Mr Paenga's actual and reasonable costs is sought, equating to an award of \$37,732.45.

[8] For the Kura Board, it was submitted that that notional daily tariff should be applied, rather than any award based on a percentage of actual costs. Mr Paenga is said in effect to be relying on the Employment Court's former costs regime. Even the Court's current scale, similar to that used in the District and High Courts, is said not to have justified an award of the quantum sought by Mr Paenga. The amount sought for Mr Paenga was noted to be 250% of the tariff and was described as constituting a punishment disproportionate to the findings of the Authority at the substantive hearing.

[9] Further, Mr Paenga's unsuccessful application for reinstatement was relied on, described as ultimately failing due to his failure to take obvious steps within his control.

[10] The need for predictability of costs awards is stressed by the Kura Board and an uplift for conduct rejected. The conduct which may justify an uplift was said to be limited to conduct during the proceeding, rather than in the context of the events leading up to it (ie the employer's dismissal process). Also, particularly egregious conduct or bad faith would be required to justify such a large uplift as is sought, and no such behaviour has been identified here.

### **Determination on costs**

[11] The Authority's power to award costs comes from clause 15 of Schedule 2 of

the Act. This confers a wide discretion on the Authority to award costs on a principled basis.

[12] The principles guiding the Authority's approach to costs are set out by the Full Employment Court in *PBO Ltd (formerly Rush Security Ltd) v Da Cruz*<sup>3</sup>. These include:

- The discretion is to be exercised in accordance with principle and not arbitrarily.
- The statutory jurisdiction to award costs is consistent with the equity and good faith jurisdiction of the Authority.
- Equity and good conscience is to be considered on a case by case basis.
- Costs are not to be used as a punishment or as an expression of disapproval for an unsuccessful party's conduct, although conduct which increased costs unnecessarily can be taken into account in inflating or reducing an award.
- Costs generally follow the event.
- Awards will be modest.
- Frequently costs are judged against a notional daily tariff.

[13] The starting point for my consideration of costs must be the daily tariff which provides the figure of \$14,000.

[14] I am not satisfied that Mr Paenga's legal costs incurred prior to his termination of employment should be considered in relation to a costs award for this proceeding. Also some of the previous representative's costs seem likely to have been incurred in relation to mediation which are not usually awarded for.

[15] I accept that costs should not be used to punish the Kura Board. However, I consider that the Kura Board's conduct did unnecessarily increase costs. Some uplift should be given for the Kura Board's persistence, through the Authority's process, in pursuing multiple, historic and not always clearly identified complaints

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<sup>3</sup> *PBO Ltd (formerly Rush Security Ltd) v Da Cruz* [2005] 1 ERNZ 808

regarding Mr Paenga, which were pursued as allegations of serious misconduct when it should have been clear that many were at most competency or performance issues. As a moderating factor I have considered the effect which Mr Paenga's unsuccessful reinstatement claim had. The evidence which could be said to be solely related to the reinstatement issue was not considerable, although both counsel filed substantial submissions on reinstatement.

[16] Turning to the appropriate amount of an uplift, an increase by 250% is large although not unheard of. In *Performance Cleaners All Property Services Wellington Ltd v Chinan*<sup>4</sup> the Authority uplifted the \$3,500 then daily tariff to \$9,500 plus GST per day. I recognise that the actions by the unsuccessful party in that case, which caused additional and unnecessary costs, appear significantly greater than those in the present case.

[17] Having carefully considered all of the circumstances of the case, I regard an uplift of \$7,000 to \$21,000 in total is appropriate. I am also prepared to uplift on the basis of Mr Paenga not being GST registered and thus not being able to set off the GST he paid on his legal fees against any GST liability.<sup>5</sup> The total award of costs is therefore \$24,150.

[18] I order the Kura Board to pay to Mr Paenga the following sums within 14 days of the date of this determination:

- (a) \$24,150 as a contribution towards his costs; and
- (b) \$838.20 being the filing fee and hearing fee.

**Nicola Craig**  
**Member of the Employment Relations Authority**

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<sup>4</sup> *Performance Cleaners All Property Services Wellington Ltd v Chinan* [2017] NZERA Wellington 112

<sup>5</sup> *Judea Tavern Ltd v Jesson* [2017] NZEmpC 120; *Performance Cleaners All Property Services Wellington Ltd v Chinan* [2017] NZERA Wellington 112