

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2019] NZERA 114
3038971

BETWEEN ALLEN CLIVE PERROTT
Applicant

A N D ROTORUA BOYS' HIGH
SCHOOL BOARD OF
TRUSTEES
Respondent

Member of Authority: Anna Fitzgibbon

Representatives: Applicant in person
Gretchen Stone, counsel for Respondent

Submissions Received: 26 February 2019 from both the Applicant and the
Respondent

Date of Determination: 01 March 2019

**COSTS DETERMINATION OF THE EMPLOYMENT RELATIONS
AUTHORITY**

A. The Applicant is to pay a contribution towards the Respondent's costs in the sum of \$3,500 within fourteen days of the date of this determination.

The substantive determination

[1] By way of a determination dated 13 February 2019¹, the Authority found that the respondent, Rotorua Boys High School Board of Trustees (the Board) did not breach a confidential settlement agreement entered into with Mr Perrott under s149 of the Employment Relations Act 2000 (the Act). Further, the Authority found that the duty of confidentiality contained in the settlement agreement could not oust the Board's statutory

¹ [2019] NZERA 74.

duty to report to the Education Council in the circumstances. Accordingly, Mr Perrott did not have an employment relationship problem.

[2] Costs were reserved. The parties were invited to exchange memoranda as to costs.

Submissions as to costs

Mr Perrott

[3] A short memorandum as to costs was filed by Mr Perrott that he had been on a “huge learning curve”, it was never his intention to put financial pressure on Awhina School, he did his best as Director of Awhina School, is not a wealthy man and hopes the Board’s application for costs will be fair.

[4] Mr Perrott seems to accept his liability to pay some costs to the Board as a result of his failed claim against it but asks that note be taken by the Authority that he is not a wealthy man. Mr Perrott has not provided evidence concerning his financial status.

The Board

[5] Counsel for the Board filed an application seeking recovery of its legal costs from Mr Perrott on an indemnity basis. The submission is that the costs sought are reasonable and that Mr Perrott persisted with this case when “proper consideration would have shown it was a hopeless case.”² Counsel for the Board has provided the Authority with details of attendances and has attached relevant invoices. The Board seeks an order that Mr Perrott pay indemnity costs of \$4,611.65. Alternatively, if the Authority is not minded to order costs on an indemnity basis, the Board seeks costs of \$3,500.

Costs determination

[6] The Authority’s power to award costs against a party is set out in clause 15 of schedule 2 of the Employment Relations Act 2000 (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 a manner as it thinks reasonable.

² [1] Bradbury v Westpac Banking Corporation (2009) 3 NZLR 400 at para 24

[7] The Authority is bound by the principles set out in *PBO Ltd (formerly Rush Security Ltd) v. Da Cruz*³ when setting costs awards. These include:

- There is discretion as to whether cost would be awarded and in what amount;
- 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 conscience jurisdiction of the Authority;
- Equity and good conscience are to be considered on a case by case basis;
- 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;
- It is open to the Authority to consider whether all or any of the parties' costs were unnecessary or unreasonable;
- That costs generally follow the event;
- That without prejudice offers can be taken into account;
- That awards will be modest;
- That frequently costs are judged against a notional daily rate;
- 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.

[8] First, I accept that it is appropriate for Mr Perrott to make a contribution towards the Board's costs on the basis that costs follow the event. The Board successfully resisted Mr Perrott's claims.

Authority's daily tariff

[9] The starting point in awarding costs in the Authority where an investigation meeting has taken place is the daily tariff, which stands at \$4,500 for the first day and \$3,500 for each subsequent day. The daily tariff may be adjusted upwards or downwards by the Authority depending on the circumstances of the case. The investigation by the Authority was dealt with 'on the papers'. Affidavit evidence was filed in the Authority by both parties together with submissions.

[10] The Board utilised the legal services of Harrison Stone, solicitors. Legal costs for the drafting of documents, affidavit evidence, submissions and other attendances

³ [2005] 1 ERNZ 808.

amounted to \$4,611.65. The Board seeks full recovery of its legal costs from Mr Perrott. Counsel for the Board submits that the costs incurred were reasonable and that Mr Perrott's pursuit of a meritless claim was unreasonable in circumstances where he entered in to the settlement agreement at mediation with the advice of a legal advisor and the settlement agreement was signed by a mediator.

[11] Despite being referred to relevant case law at the Authority's telephone conference (which was not helpful to his case) Counsel for the Board contends Mr Perrott continued to pursue his claim. This caused unnecessary cost to the Board which is a state secondary school with very limited funding.

[12] I consider the amount being sought on behalf of the Board by way of indemnity costs to be too high. Costs should be reasonable and awards modest. Costs are not to be used as a punishment.

[13] Taking guidance from these principles and taking in to account the actual costs incurred by the Board, I consider a contribution by Mr Perrott to the Board of \$3,500 towards its costs, appropriate. This is less than the Authority's daily tariff of \$4,500 for the first day of an investigation meeting. However, costs incurred by the Board, in my view, were similar to those which would have been incurred if the parties had attended an investigation meeting. Documents and affidavit evidence was prepared. Research was undertaken and submissions filed.

[14] I order Mr Perrott to pay the Board the sum of \$3,500 towards the Board's costs. These costs are to be paid by Mr Perrott within fourteen(14) days of the date of this determination.

Anna Fitzgibbon
Member of the Employment Relations Authority