

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKĀURAU ROHE**

**[2022] NZERA 25
3096512**

BETWEEN SHANE WEST
Applicant

AND KOWHAI INTERMEDIATE
SCHOOL BOARD OF
TRUSTEES
Respondent

Member of Authority: Eleanor Robinson

Representatives: Kalev Crossland and Tony Sung, counsel for the Applicant
Simon Mitchell, counsel for the Respondent

Costs Submissions 23 December 2021 from the Applicant
25 January 2022 from the Respondent

Determination: 01 February 2022

COSTS DETERMINATION OF THE AUTHORITY

[1] In a determination dated 9 December 2021 ([2021] NZERA 549, I determined that the Applicant, Mr Shane West, had been unjustifiably dismissed and unjustifiably disadvantaged by the Respondent, the Kowhai Intermediate School Board of Trustees (the Board). I also determined that the Board had breached the duty of good faith it owed to Mr West.

[2] In that determination I encouraged the parties to resolve the issue of costs between themselves. Both parties have filed submissions in respect of costs.

[3] The matter involved four and a half days of an investigation meeting held on 26 – 29 October 2021.

[4] The Applicant, citing actual costs of \$130,938.09 (including GST), is seeking costs on an indemnity awards basis, or in the alternative, an increase on the Authority's notional tariff of \$4,500.00 for the first day of investigation, and \$3,500.00 for each succeeding day, to \$20,000.00 plus GST per day.

[5] On that basis the Applicant is seeking a costs award in the alternative of \$23,000.00 per day, a total sum of \$103,500.00 plus disbursements.

[6] The Respondent opposes the claim for costs significantly above the notional tariff rate on the basis that there is no principled basis for this claim, the Respondent called appropriate evidence and did not increase the costs of the hearing or act inappropriately.

The Applicant's submissions

[7] The Applicant submits that the costs are reasonable and includes only time charged to the Applicant. It also includes approximately \$8,165.00 plus GST which was incurred filing the Applicant's submission on legal professional privilege and preparing a response to the Employment Court.

[8] The Applicant submits that this is an appropriate case for awarding costs on an indemnity basis and submits in support of that view that:

- a) The Respondent's position was unmeritorious and motivated by improper considerations;
- b) The Respondent acted in wilful disregard of known facts or clearly established law; and
- c) The Respondent prolonging the Applicant's case by advancing groundless contentions.

[9] It is submitted that the Respondent only admitted liability on the final day of the investigation meeting which resulted in the Applicant incurring unnecessary legal fees.

[10] The Respondent further submits that the applicant's application to the Employment Court partway through the hearing which was subsequently discontinued, increased costs for the Applicant.

[11] In the alternative, the Applicant submits that there should be an uplift in the Authority's daily tariff to \$20,000.00 per hearing day plus GST. It is submitted that, having regard to the applicable principles pertaining to costs, the Authority should give particular regard to the principles that (i) equity and good conscience should be considered on a case by case basis; (ii) while costs should not be used as a punishment or as an expression of disapproval of a party's conduct, conduct which unnecessarily increased costs can be taken into account; and (iii) the nature of the case can also influence costs.

[12] It is submitted that there are two factors which justify an increase in costs. The first is the complexity of the case in which the Authority was required to consider evidence from 16 ordinary witnesses, evidence from four expert witnesses, the decision of the District Court in relation to the criminal charges laid against the Applicant, and the decision of the complaints Assessment Committee and New Zealand Teachers Disciplinary Tribunal.

[13] The second factor as submitted relates to procedural aspects of the investigation as follows:

- a) Considerable difficulties throughout the Authority's investigation with provision of information;
- b) The Applicant not complying with the Authority's direction to provide MYOB records and/or evidence of reimbursement of expenses;
- c) The Applicant seeking to produce further documentation including School policy part-way through the second day of the investigation;
- d) The Applicant seeking to produce further evidence not previously furnished on day three of the investigation;
- e) The Applicant failing to respond to the Authority within the time frame specified which caused additional costs;
- f) The Authority's investigation was scheduled for four days but required more than initially allocated for reasons which related to the Authority's decision on legal professional privilege; and
- g) Oral submissions were required from the Applicant's counsel in respect of legal professional privilege and for review of the Authority's determination on that issue.

[14] It is submitted in summary by the Applicant that there was a range of unusual factors that led to additional attendances by counsel. This resulted in additional work significantly beyond that required or expected in an Authority investigation, and on that basis there should be a significant uplift in the daily tariff.

[15] The Applicant submits that there is no evidence that the Respondent is unable to meet an award of costs.

[16] It is further submitted that disbursements should be awarded to include those of the expert witness called by the Applicant necessitated by the Respondent calling an expert witness, and of the expert witness regarding quantum.

Respondent's submissions

[17] The Respondent submits that costs included in the Applicant's invoices which relate to a separate proceeding in the Employment Court should not be taken into consideration.

[18] In respect of the claim for indemnity costs it is submitted that the case was not unusual.

[19] It is accepted that the Applicant was successful in his claim that he had been unjustifiably dismissed, although the costs award of the Authority has been challenged by the Applicant in the Court.

[20] It is submitted that there is nothing in the manner in which the case was conducted to suggest that costs were increased by the actions of the Respondent, or that the Respondent's actions increased the costs of the Applicant in establishing his claim.

[21] It is submitted that costs on a solicitor/client basis are not awarded in the Authority unless the circumstances are truly exceptional. While the Applicant may have incurred significant costs, that is not a relevant consideration for the Authority. The Respondent cites the comments made by Judge Ford in *Rodkiss v Carter Holt Harvey Limited*:

It may be timely to respectfully remind counsel practising in this jurisdiction of the following passage from the Judgment of the court of Appeal in **Alton-lee** delivered nearly one and a half decades ago.

The parties and those who practice in this field (where this case cannot be regarded as wholly exceptional) might well reflect on the consequences of conducting litigation without proper focus on the issues and without tight control of the escalation of costs.¹

[22] It is submitted by the Respondent that the matter was not unusually difficult or protracted, but was essentially a factual determination. The facts were straightforward and relatively uncontested. There were not major credibility findings required.

[23] While there were a large number of witnesses, 20 in total, many were quite short and it is submitted their evidence was not of great assistance.

¹ *Rodkiss v Carter Holt Harvey Limited* [2015] NZ EmpC 147 at [100]

[24] It is submitted that cases in relation to indemnity costs focus on punishment for actions where a party has acted entirely inappropriately in terms of the proceeding itself. In this case there were not any actions taken by the Respondent consistent with the type of scenario where indemnity costs have been ordered. It is submitted that the submissions of the Applicant do not identify any extra costs incurred by the Applicant as a result of any action taken by the Respondent.

[25] In reference to the issue regarding the privileged information issue, it is submitted that the Authority was informed that the information that the Respondent considered privileged, prior to its objection being raised. There is no basis for concluding that the actions of the Respondent increased the costs appropriate to award to the Applicant.

[26] It is submitted that in respect of the Applicant's submissions regarding the provision of documents by the Respondent, it is common for documents to arise during the course of discussions and to be provided during a hearing.

[27] In respect to the disbursements claimed, it is submitted that the evidence of the expert evidence on quantum did not assist the Authority on the basis that the quantification completed was straightforward, and it is inappropriate for any award to be made in respect of his services.

[28] Moreover it is submitted that the Applicant should bear the costs of the disbursement required by the psychologist expert called because the Authority was not assisted by this evidence.

Principles

[29] The power of the Authority to award costs arises from Section 15 of Schedule 2 of the Employment Relations Act 2000 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.

[30] Costs are at the discretion of the Authority².

² *NZ Automobile Association Inc v McKay* [1996] 2 ERNZ 622

[31] The principles and the approach adopted by the Authority on which an award of costs are made are well settled and outlined in *PBO Limited (formerly Rush Security Ltd) v Da Cruz (Da Cruz)*³.

[32] It is a principle set out in *Da Cruz* that costs are not to be used as a punishment. It is also a principle that costs are discretionary and awards made are consistent with the Authority's equity and good conscience jurisdiction.

Costs Award

[33] Costs in the Authority are made in accordance with a daily tariff amount which is currently set at \$4,500.00 for the first day of hearing. This amount can then be adjusted upwards or downwards by the Authority at its discretion having regard to the factors as set out in *Da Cruz*.

[34] In its submissions, counsel for the Respondent appears to criticise the Applicant for seeking an indemnity costs award based upon costs incurred by the Applicant in bringing the substantive case before the Authority, but refers in its own submission to the award made to the Applicant by the Authority as a reason to be taken into consideration by the Authority when determining costs.

[35] However the basis for increasing or decreasing an award of costs is in accordance with the factors set out in *Da Cruz* rather than having a nexus with the award for, or costs incurred in bringing, the grievance and that is the basis on which I exercise my discretion.

[36] I have considered the Applicant's submission regarding the indemnity claim, but do not consider that this was a case in which the circumstances were truly exceptional. Whilst a lengthy investigation that involved evidence from a large number of witnesses, it was not a complex case. In itself that is not a basis for increased costs or for awarding costs on an indemnity basis since the notional daily tariff addresses that situation.

[37] I find however that there were, as submitted by the Applicant, procedural aspects of the case which had an impact on the conduct of the case. Notably was the reliance on School policies referred to by a main witness for the Respondent in her oral evidence, and the notes made by the main Board Member.

[38] Whilst documents may be provided during an investigation meeting, in this case these were significant documents referred to by two of the main witnesses for the Applicant in their

³ *PBO Limited (formerly Rush Security Ltd) v Da Cruz* [2005] 1 ERNZ 808

oral evidence, and it is reasonable to expect that these should have been included in the Common Bundle of Documents prior to the investigation instead of needing to be requested by the Authority during the investigation but without a satisfactory outcome.

[39] There was time spent on the disputed legal privilege issue which was directed to the Employment Court, which took up hearing time, although I accept that costs for that lie with the Court.

[40] In respect of the disbursements claimed by the Applicant in respect of the expert witnesses called by it, contrary to the assertion by the Respondent, I did find the evidence of the expert witness on quantum helpful to the Authority, and observe that it did not occupy an unreasonable amount of hearing time.

[41] I accept that the Applicant was entitled to call an expert witness as regards psychology in light of the Respondent choosing to do it.

[42] Having considered these matters I consider that an uplift in the notional daily rate is merited, and will allow the disbursements claimed by the Applicant.

[43] I order the Board to pay Mr West a contribution to costs in the sum of \$27,000.00 plus disbursements in the sum of \$17,489.87 pursuant to clause 15 of Schedule 2 of the Employment Relations Act 2000.

Eleanor Robinson
Member of the Employment Relations Authority