

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

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

[2024] NZERA 275  
3170683

BETWEEN

YEVETTE  
WILLIAMS  
Applicant

AND

ST PETERS  
SCHOOL TRUST  
BOARD OF  
TRUSTEES  
Respondent

Member of Authority: Nicola Craig

Representatives: Erin Burke, counsel for the applicant  
Sam Hood, counsel for the respondent

Submissions Received: 15 April 2024 from the applicant  
12 and 29 April 2024 from the respondent

Date of Determination: 9 May 2024

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**COSTS DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] Yevette Williams argued that the St Peters School's Board of Trustees (the Board) had breached a mediated settlement agreement between them. The Authority agreed the Board had breached the agreement but declined to impose a penalty on the Board.<sup>1</sup>

[2] The Board argued that Ms Williams, by way of her representative disclosing information to the independent investigator Graeme Colgan, had also breached the

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<sup>1</sup> *Yevette Williams v St Peters School Board of Trustees* [2024] NZERA 155.

settlement agreement. This concerned passing on the purpose of a report summary, identified in the settlement agreement. The Authority concluded at most this was a technical breach with no penalty justified.

[3] The parties were encouraged to resolve any issue of costs between themselves but were unable to do so. Both applied for costs with Ms Williams' submissions also replying to the Board's submissions which came in first. The Board then responded to Ms Williams' submissions.

### **Submissions for Ms Williams**

[4] Ms Williams sees herself as the successful party on a number of fronts:

- The primary purpose of the proceedings was to compel the investigator to complete the investigation, which two previous threats to file proceedings did not achieve. Ms Williams had no other option. After almost a year's wait the draft report was produced some 12 days after the filing.
- The compliance and urgency applications were appropriately withdrawn after the final report and summary report were provided.
- The Board was found to have breached its obligations under the settlement agreement.
- The Board was unsuccessful in its arguments that the full and final settlement provision prevented the claim; Ms Williams' inaction and overprovision of information meant she waived her rights or was estopped; and the inapplicability of a supplementary terms of reference.
- Ms Williams was put to additional costs preparing witness statements that were objected to late in the day, with the proposed witnesses then withdrawing.

[5] Ms Williams seeks indemnity costs of \$38,344.06 or a tariff award with increased costs due to the Board's actions which are said to have increased both parties' costs dramatically. Submissions on Ms Williams' behalf are critical of the Board's failure to

lodge invoices in support of its position, suggesting (without identified evidence) ulterior motives.

### **Submissions for the Board**

[6] After the Authority's determination the Board pursued an agreement with Ms Williams that costs should lie where they fall as both parties were found to be in breach with no penalties awarded.

[7] Given that was not accepted, the Board seeks tariff costs as it was successful and Ms Williams' conduct unnecessarily increased costs. Submissions emphasise that Ms Williams was unsuccessful in her assertions of three contractual duties breached and failed in her argument that \$20,000 should be awarded for each breach, totalling \$60,000. Ms Williams is said to have raised arguments which either were or should have been known to be incorrect.

[8] The Board relies on a 3 June 2022 Calderbank offer it made that both parties withdraw their claims and costs lie where they fall. It points out a substantial majority of costs incurred by Ms Williams were incurred after Mr Colgan's final report was provided with her then being unsuccessful in seeking penalties.

### **Costs discussion**

[1] The Authority has the power to award costs.<sup>2</sup> This is a discretionary power, to be used in a principled manner. In *PBO Ltd (formerly Rush Security Ltd) v Da Cruz* the principles guiding the Authority's approach to costs are described as including:

- The statutory jurisdiction to award costs is consistent with the Authority's equity and good conscience jurisdiction
- 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

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<sup>2</sup> Employment Relations Act 2000 (the Act), Schedule 2, cl 15.

- Costs generally follow the event
- Awards will be modest
- Frequently costs are based on a notional daily tariff.<sup>3</sup>

### *Tariff*

[9] I begin by establishing the Authority's daily tariff rate for this matter.

[10] The first day of the investigation meeting lasted almost a full day. The meeting resumed for a further two full days. The first day's tariff is \$4,500 with \$3,500 for each of the following days. This gives a starting point of \$11,500.

### *Indemnity costs*

[2] Ms Williams seeks indemnity costs. The tests for such an award are high, requiring exceptional conduct.<sup>4</sup> They are not met in this case.

### *Success*

[11] There is some complexity to this costs assessment. I have considered the decision in *Coomer v J A McCallum and Son Limited*.<sup>5</sup>

[12] Ms Williams was successful in that the Authority found that the Board had breached the settlement agreement. The penalties she sought however were not granted.

[13] A complication is that Ms Williams' claim was based on an assertion that three different express terms were breached. Ms Williams was not successful on these arguments with the Authority instead finding a breach of an implied term in the settlement agreement that the Board take reasonable steps to ensure completion of the investigation and report. This is reflective of the Authority's focus on the substantive merits of matters and ability to describe the employment relationship problem in a different way to the parties.<sup>6</sup>

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<sup>3</sup> *PBO Ltd (formerly Rush Security Ltd) v Da Cruz* [2005] 1 ERNZ 808, confirmed in *Fagotti v Acme & Co Ltd* [2015] NZEmpC 135.

<sup>4</sup> *Bradbury v Westpac Banking Corp* [2009] NZCA 234 at [28].

<sup>5</sup> *Coomer v J A McCallum and Son Limited* [2017] NZEmpC 156.

<sup>6</sup> The Act, ss 157(1) and 160(3).

[14] In terms of submissions the Board focused in a detailed manner on each of the alleged breaches, setting out multiple difficulties with them. The evidence however largely went through the chronology of events, focusing on the actions or inactions of Mr Colgan, Ms Williams and the Board. This was as applicable to the implied term argument as the express terms argued on Ms Williams' behalf. In conclusion only a modest amount of additional time was required.

#### *Calderbank offer*

[15] The Calderbank offer the Board made would have saved Ms Williams a substantial amount of costs but would not have compensated her for the costs she had already spent to the point of a final report being obtained.

#### *Conduct*

[16] As indicated in the earlier determination, this matter has a lengthy history – a compliance order being sought until after the investigator's report was issued, followed by multiple memoranda from both parties.<sup>7</sup> Issues such as whether one or both counsel may need to appear as witnesses, whether broad non-publication orders should be made, whether there had been abuses of process and which witnesses could or should not give evidence were canvassed.

[17] Both parties acted in a number of ways during the proceeding which the other party identified as inappropriate. Large amounts of paperwork were generated by both. It is difficult to conclude that either party unnecessarily increased the parties' costs in a substantially more inappropriate way than the other.

#### **Outcome**

[18] In such a situation a nuanced assessment is needed.

[19] There was an element in this case of Ms Williams wanting vindication through finding out what had happened with the investigation and report. This came at a substantial legal cost to her. I must however be influenced by the requirement to keep costs awards modest.

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<sup>7</sup> Above, at n 1 at [17].

[20] Ms Williams should receive a contribution towards her costs as the overall more successful party. An uplift which might be justified on the basis of the Board's actions is balanced against the justification for a possible downgrade on basis of Ms Williams' actions.

[21] Ms Williams' request for an award of costs on the basis of the costs submissions required to be provided is rejected. The Authority does not usually allow costs on costs as the tariff is to encompass all elements of the proceeding.

[22] In conclusion, the Board is to pay Ms Williams the following amounts within 28 days of the date of this determination:

- \$11,500 as a contribution to Ms Williams' costs; and
- \$71.56 for the Authority's filing fee.

Nicola Craig  
Member of the Employment Relations Authority