IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE

[2024] NZERA 544
3266019

	BETWEEN	CHERYL MOANA MARIE WILSON Applicant
	AND	THE MANUREWA EAST SCHOOL BOARD Respondent

Member of Authority:	Peter Fuiava
Representatives:	Lui Alofa, advocate for the Applicant Paul Robertson, counsel for the Respondent
Submissions received:	No submissions from Applicant 21 August 2024 from Respondent
Determination:	9 September 2024

COSTS DETERMINATION OF THE AUTHORITY

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[1] By determination dated 25 July 2024, I dismissed Cheryl Moana Marie Wilson's application against the Board of Trustees of Manurewa East School (the school Board), finding that it had not breached a record of settlement (RoS) between them by making a mandatory report to the Teaching Council prior to the RoS being certified.[1]

How has the Authority proceeded?

[2] The question of costs was reserved and if the parties were not able to agree on costs, a timetable was set for the filing of memoranda. The school Board's cost submissions were lodged and served by email on 21 August 2024. On 28 August 2024, the Authority emailed the representatives that Ms Wilson's costs submissions in reply

[1] *Cheryl Moana Marie Wilson v The Manurewa East School Board* [2024] NZERA 447.

were due on 4 September 2024. As of drafting this costs determination, there has been no reply from her representative Mr Alofa.

[3] It may be noted that the email address used for Mr Alofa has been the same through the substantive investigation. In the interests of finality and bringing this employment problem to an end, I have determined the issue of costs having regard to all the information, evidence and submissions before the Authority as of the date of this determination.

What is the school Board's position regarding costs?

[4] Mr Robertson invites the Authority to award costs of $6,750 against Ms Wilson on the basis that:

(a) she advanced arguments that had no prospect of success;

(b) she was on notice that an adverse cost award was a real possibility but continued with her untenable claim undeterred; and

(c) her conduct unnecessarily increased the respondent's costs.

[5] It was submitted that although the school Board's actual costs in defending the application exceeded $10,000, costs of $6,750 are sought which comprises the notional daily tariff for the first day of an investigation meeting, plus an additional 50% uplift as a deterrence against the pursuit of entirely unmeritorious claims.

What is the Authority's approach to costs?

[6] The Authority has the power under sch 2 cl 15 of the Employment Relations Act 2000 to award costs. However, the discretion to order a party to pay costs to another party must be exercised in accordance with principle. Those principles are well settled and are outlined in its practice note which is publicly available.[2] Further information is also available in its Practice Direction.[3]

[2] www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1.
[3] www.era.govt.nz/assets/Uploads/practice-direction-of-the-employment-relations-authority.pdf.

[7] Informing the Authority's approach on costs is relevant caselaw such as *PBO v Da Cruz* in which the Employment Court observed that, since its inception, the Authority has held to some basic tenets concerning costs which relevantly include:[4]

- There is a discretion as to whether costs would be awarded, and 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.
- Costs are not to be used to punish or express disapproval of the unsuccessful party's conduct, although conduct which increased costs unnecessarily can be taken into account in inflating or reducing an award.
- That costs generally follow the event.
- That awards will be modest.

How much costs should be awarded against Ms Wilson?

[8] The starting point in the assessment of costs is determining the starting point which is a straight application of the daily notional tariff against the number of investigation meeting days, for example, $4,500 is the going rate for the first day of an investigation meeting. However, in this case there was no investigation meeting. To save costs for both parties, I determined Ms Wilson's employment problem on the papers. I adopt as my starting point one half of the daily tariff for the first day of an investigation meeting or $2,250.

[9] From this starting point (and not the $4,500 as contended), I must consider whether there are any circumstances or factors that require an upwards or downwards adjustment. I cannot in good conscience and equity apply a 50 percent uplift which is more of a punishment than a deterrence. The well-established principle in the Authority, being a first instance Tribunal, is that costs will be modest.

[10] While it was submitted that the school Board incurred in excess of $10,000 in defending itself against Ms Wilson's claim, some of those costs need not have been

[4] *PBO Ltd (formerly Rush Security Ltd) v Da Cruz* [2005] 1 ERNZ 808 at [44].

incurred in particular, as it had applied (unsuccessfully) to cut Ms Wilson's application off at the knees on the basis that it believed the claim to be frivolous and vexatious. That application was dismissed and arguably Ms Wilson could have sought costs for successfully resisting that application.

[11] In my view, the non-application for costs cancels out Mr Alofa's subsequent attempt to call the deputy school principal as a witness. She was never called because I was not persuaded she would be helpful to determining the issues in dispute. Ultimately the substantive was determined on the basis of legal written submissions and supporting documents from the representatives and a witness statement from Ms Wilson herself. Costs were minimised and this needs to be reflected in the final analysis.

[12] On balance, I see no reasonable basis for an uplift of costs against Ms Wilson which begins and ends at $2,250.

Outcome and order

[13] For the reasons given above, the Authority orders **Cheryl Moana Marie Wilson to pay the Manurewa East School Board $2,250 as a contribution towards its reasonable and actual legal costs no later than Monday 7 October 2024**.

Peter Fuiava
Member of the Employment Relations Authority