

Attention is drawn to the order prohibiting publication of certain information

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2018] NZERA Christchurch 69
3015315

BETWEEN A TEACHER
 Applicant

A N D A SCHOOL BOARD OF
 TRUSTEES
 Respondent

Member of Authority: David Appleton

Representatives: Mr X, Counsel for Applicant
 Richard Harrison, Counsel for Respondent

Investigation Meeting: Determined on the papers

Submissions Received: 1 May 2018 from Respondent
 15 May 2018 from Applicant

Date of Determination: 17 May 2018

**COSTS DETERMINATION OF THE
EMPLOYMENT RELATIONS AUTHORITY**

[1] By way of a determination dated 17 April 2018¹, the Authority found that it did not have the jurisdiction to investigate the applicant's claim that he had been unjustifiably dismissed. Costs were reserved, and the parties directed to seek to agree how they were to be dealt with. They have been unable to agree, and so this determination addresses the matter of costs.

¹ [2018] NZERA Christchurch 47

[2] The prohibition from publication order referred to in the substantive determination continues in the same terms.

[3] Mr Harrison seeks on behalf of the respondent a contribution towards its costs in a sum equivalent to the Authority's daily tariff of \$4,500. Mr X, on behalf of the applicant, says that the applicant is impecunious and submits that costs should lie where they fall.

Discussion

[4] The Authority's power to award costs is set out in clause 15 of Schedule 2 of 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 manner as it thinks reasonable.

[5] The Authority is bound by the principles set out in *PBO Ltd v. Da Cruz*² when setting costs awards. These include:

- a. There is discretion as to whether costs would be awarded and in what amount.
- b. The discretion is to be exercised in accordance with principle and not arbitrarily.
- c. The statutory jurisdiction to award costs is consistent with the equity and good conscience jurisdiction of the Authority.
- d. Equity and good conscience are to be considered on a case by case basis.
- e. 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.

² [2005] 1 ERNZ 808

- f. It is open to the Authority to consider whether all or any of the parties' costs were unnecessary or unreasonable.
- g. That costs generally follow the event.
- h. That without prejudice offers can be taken into account.
- i. That awards will be modest.
- j. That frequently costs are judged against a notional daily rate.
- k. 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.

[6] Counsel for the applicant refers me to the Employment Court case of *Gates v Air New Zealand*³ in which His Honour Judge Couch⁴ stated the following:

A factor which must be considered in the overall exercise of my discretion to award costs is the ability of the plaintiff to pay. The established principle is that a party ought not to be ordered to pay costs to the extent that doing so would cause undue hardship. What this principle allows for is that payment of any substantial sum will cause a measure of hardship to some litigants, particularly individuals. That is to be expected and is considered to be an acceptable consequence of unsuccessfully engaging in litigation. It also recognises that the primary focus of an award of costs should be on compensation of the successful party. It is only when payment of an award which achieves the purpose of justly compensating the successful party would cause a degree of hardship which is excessive or disproportionate that the interests of the unsuccessful party must be recognised by reducing the award which would otherwise be appropriate.

[7] It must be said that the applicant did not have a strong case from the start, and he was seeking to pursue two strands of an argument which were always going to face difficulties. Having said that, his claims were not entirely without merit, and the very unfortunate position he has found himself in fairly early in his teaching career does explain his desire to attempt to rectify the situation.

[8] However, I believe that the respondent is entitled to receive some compensation (to use the words of the Court in *Gates*) for the costs it incurred in defending the applicant's claim. The question is, in what sum?

³ [2010] NZEmpC 26

⁴ At [21]

[9] No affidavit was lodged on behalf of the applicant, although his counsel did lodge a copy of his bank statement for April/May 2018. Counsel says that the applicant is working as a kitchen hand at a local care home earning minimum wage. He says that the applicant does not own a home or other assets and has no car, and no savings.

[10] A review of the bank statement shows the applicant received \$883.76 in wages on 2 May and paid \$630 in rent on 3 May. The statement does not indicate whether the pay is fortnightly and the rent monthly, but the small window shown by the statement indicates that the applicant has very little money spare to live on.

[11] I am prepared to accept at face value the details outlined in Mr X's submissions as to the financial situation of the applicant. Having done so, it is clear to me that he would not be able to pay an award of \$4,500. That is to say, that sum would cause him undue hardship that would be excessive and disproportionate.

[12] Any award that the applicant is ordered to pay is likely to cause hardship but the point at which the hardship goes beyond an acceptable level is hard to gauge without more information. On the information that has been provided, I believe that an award in excess of \$500 would cause the applicant undue hardship.

[13] I accept that such an award would be little more than a token contribution towards the respondent's actual costs. However, the hardship caused to the respondent by such an award is significantly outweighed by the hardship the applicant would suffer if he were ordered to pay more.

[14] I order the applicant to make a contribution towards the respondent's costs in the sum of \$500, to be paid in such instalments as he can reasonably manage, provided that the entire sum is paid to the respondent by no later than 31 October 2018.

David Appleton
Member of the Employment Relations Authority