

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

AA 52A/09  
5136613

BETWEEN                      TIMOTHY JENKINSON  
   Applicant  
  
AND                              BOARD OF TRUSTEES of  
   BAYVIEW                      PRIMARY  
   SCHOOL  
   Respondent

Member of Authority:        James Wilson  
  
Representatives:              Andrew Hooker for the applicant  
   Richard Harrison for the respondent  
  
Submissions received:        13 March 2009 from the respondent  
   16 March 2009 from the applicant  
  
Determination:                15 June 2009

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**COSTS DETERMINATION OF THE AUTHORITY**

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[1]     In a determination dated 17 February 2009 (AA 52/09) I found that:  
*Although .....the delay in Mr Jenkinson rising his personal grievance with his employer was occasioned by exceptional circumstances, it would not be just to grant Mr Jenkinson leave to raise his personal grievance out of time. Leave is therefore declined.*

In that determination I reserve the question of cost and requested that the parties attempt to settle the matter between themselves in the first instance. Unfortunately they have been not been able to do so. Mr Harrison has filed a submission requesting a \$1000.00 contribution towards his clients costs.

[2]     In a brief submission in response Mr Hooker has argued that no award of costs should be made.

### **The respective submissions**

[3] Mr Harrison's submissions are succinct. He says (and has produced supporting invoices) that he is clients costs in this matter totalled \$3392.25, including GST. He argues that this fee is not unreasonable given the time required for compiling affidavit evidence as well as submissions and seeks a contribution of \$1000.

[4] Mr Hooker's submissions are equally succinct. He says that Mr Jenkinson has no job and no income (except a benefit) has lost his house and is unable, because of the circumstances of his dismissal and despite being totally innocent of the matter's that led to the termination of his employment, to find another job.

### **Legal considerations in respect of costs**

[5] In *PBO Ltd v. Da Cruz* (AC2A/05, 9 December 2005) a full bench of the Employment Court said:

*[44]. The costs principles which the Authority now applies are not necessarily as comprehensive or as prescriptive as those set out in Okeby and similar earlier judgments. The Authority is able to set its own procedure and has, since its inception, held to some basic tenets when considering costs. These include:*

*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.*

*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 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 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.*

## **Discussion**

[6] The original determination on this matter was whether or not Mr Jenkinson had raised his grievance with his employer within the statutory 90 day timeframe, and if he had not whether or not it was appropriate to grant leave for him to pursue his grievance out of time. By agreement with the parties I determined the matter on the papers.

[7] Mr Jenkinson's principal argument was that he had instructed his then representative to advise his employer of his grievance. I determined that she had not done so and that this failure to act on her behalf amounted to *exceptional circumstances* is proscribed in section 115 of the Employment Relations Act (the Act). However relying on the Supreme Court decision in *Creedy v Commissioner of Police* (SC 57/2007 [2008] NZ SC31, 23 April 2008) I found that it would not be just, in all the circumstances to grant leave to Mr Jenkinson to pursue his grievance.

[8] The Board of Trustees have been required to expend in excess of \$3000 to defend Mr Jenkinson's application and under usual circumstances would be entitled to receive some contribution towards those costs. However I accept Mr Hookers submission that Mr Jenkinson, as a result of his dismissal, is in difficult financial circumstances and would find any order of costs almost impossible to meet. Although it would not be appropriate for me to comment on the likely success or otherwise of Mr Jenkinson's claim (that he was unjustifiably constructively dismissed) had he been able to pursue it, he has been denied that opportunity by the failings of his employment advocate. It would be unfair to penalise him further.

**Determination**

[9] For the reasons set out above I decline to award costs in this matter. **Costs will lie where they fall**

James Wilson

Member of the Employment Relations Authority