

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 228A/08
5113403

BETWEEN DIANA POHATU
 Applicant

AND KAITI SCHOOL BOARD OF
 TRUSTEES
 Respondent

Member of Authority: Alastair Dumbleton

Submissions Received 26 August and 15 September 2008

Determination: 28 November 2008

COSTS DETERMINATION OF THE AUTHORITY

[1] In its determination dated 3 July 2008 issued under AA 228/08, the Authority found that Mrs Diana Pohatu did not have a sustainable personal grievance arising out of her dismissal by the Kaiti School Board of Trustees. The Board's action was determined to be justified under s 103A of the Employment relations Act 2000.

[2] As the parties were not able to settle it themselves, the question of costs is now also to be determined by the Authority. Full submissions from counsel Mr Robertson for the Board and Ms Tarsau for Mrs Pohatu, have addressed the question.

[3] In principle the Board is entitled to an award of costs to contribute to the actual legal costs and disbursements reasonably incurred by it through its preparation for and participation in the investigation that was commenced by Mrs Pohatu.

[4] Actual costs incurred by the Board were approximately \$30,000. That includes disbursements of \$2,293.50 incurred for Mr Robertson's travel to Gisborne

and his accommodation there. The reasonableness of the total cannot be assessed, as legal costs have not been broken down or itemised and counsel's hourly rate has not been given.

[5] An award of \$20,000 is sought by the Board as a contribution to actual costs, and \$1,431 for disbursements.

[6] In submissions Mr Robertson has referred to *PBO Limited v. Da Cruz* [2005] 1 ERNZ 808, which is the leading decision of the Employment Court on costs in the Authority. Several of the key principles set out in that decision have been addressed by Mr Robertson.

[7] This was a tragic case. For Mrs Pohatu a long and successful teaching career was brought abruptly to an end in a way she unfortunately did not think about before continuing to actively oppose the lawful decision of her employer. Even by the time of the investigation meeting it was clear that Mrs Pohatu had gained little insight into the nature and seriousness of her actions as an employee of the Board. Those actions continue to have repercussions for the Board, the Principal, teachers employed by the Board, and no doubt the community the school serves including pupils and their families. The closely related grievance of another Kaiti teacher has yet to be resolved.

[8] Some of the legal argument advanced on behalf of Mrs Pohatu was unusual and interesting, but not strong on merit. There was greater complexity in the facts of the case, as reflected by the 2 ½ days of investigation meeting.

[9] It is relevant in cases such as this to consider, as a matter of equity and good conscience, any attempts made by the parties to settle a grievance before an investigation by the Authority is required with the attendant expense of that.

[10] In his submissions Mr Robertson provided details of several offers and counters-offers in this regard. Ms Tarsau acting for Mrs Pohatu has objected to the particular information provided to the Authority, as she claims it breaches confidentiality and also the without prejudice nature of the pre-investigation communications between the parties in which those offers were exchanged.

[11] I uphold that objection and have set aside the information in considering the issue of costs. On the face of the Annexure 1 memorandum of an offer made by the Board to Mrs Pohatu, this was a document made or created for the purposes of

mediation and was therefore required by s 146(1) of the Employment Relations Act to be kept confidential by both parties. The offer is acknowledged by Mr Robertson as having been made at mediation and there is no claim that it was repeated as an open offer outside and independently of mediation, as it could have been. Under s 146(3) the memorandum and its contents are expressly inadmissible as evidence.

[12] The counter-offer relayed by senior counsel Mr Crotty to Mr Robertson was implicitly made during without prejudice communications that took place while the parties were trying to settle the personal grievance. The public policy reasons for not allowing that sort of communication to later be aired before a court or tribunal when costs are being fixed, should be well known.

[13] In seeking an award of \$20,000, Mr Robertson has drawn attention to the Court's reference in *Da Cruz* to a notional daily rate, which at a level of \$2,500 he submits would support a contribution to costs of at least \$7,500 in this case, which required two full days of investigation meeting and a further half day for legal submissions. Mr Robertson concluded his submissions with reference to the passage in *Da Cruz*, at paragraph [61], that each case is to be treated on its own facts by the Authority in the exercise of the discretion it has to award costs.

[14] Ms Tarsau for Mrs Pohatu in her submissions has referred to legal authority directing that in appropriate cases, when considering the amount of any award of costs, regard is to be had to a party's ability to pay. That submission made in this case is not supported by any evidence, and while inferences might reasonably be made about the disparity of financial resources as between an insurance company (providing cover to the Board) and a career primary school teacher, ultimately the Authority is asked to speculate about those matters, which it is not prepared to do.

[15] Mrs Pohatu cannot expect to take any advantage from the fact that Kaiti, as many School Boards have done, prudently insured itself against the risk of having to participate in personal grievance claims, so as to preserve school funds for use on education rather than litigation.

[16] As to whether Ms Pohatu is impecunious, as previously stated the Authority is left to guess about that. If it was open to the Authority to speculate as to her financial circumstances, the Authority could equally speculate that before she decided to proceed with an investigation Mrs Pohatu would have been advised by her senior

counsel of the significant risks involved in pursuing her case, and also the costs to her of her own legal representation as well as the Board's costs she would have pay some of if she was unsuccessful.

[17] The Authority could also guess that the mediator who assisted the parties gave, as many do, a clear analysis of the risks involved to Mrs Pohatu in proceeding with an investigation, including the risk of incurring substantial cost which she might not be able to afford.

[18] Clearly the Act, at clause 15 of Schedule 2, by providing for awards of costs contemplates that although a party has the right to have a personal grievance investigated by the Authority, the exercise of that right provides no forgiveness from liability for costs in the event of the party's claim being unsuccessful.

[19] One of the principles in *Da Cruz* is that costs awards are to be at a relatively modest level, to reflect the role of the Authority and its investigative procedure.

[20] From a starting point of \$7,500 as "reasonable costs," Ms Tarsau submits that a reasonable level of contribution for the 2½ day investigation meeting is half of that amount, or \$3,750. I consider that is too low.

[21] I agree with Ms Tarsau's submission that it is contrary to principle to 'punish' a party through an award of costs, the purpose of which is to 'compensate' the successful party for costs reasonably incurred.

[22] I consider that applying a tariff in this case would not do justice to this costs application. In my view \$9,000 will be a reasonable contribution to actual costs incurred. That award will include the disbursements also incurred by the Board.

[23] Pursuant to clause 15 of Schedule 2 of the Employment Relations Act 2000, Mrs Diana Pohatu is therefore ordered to pay \$9,000 as costs to the Kaiti School Board of Trustees.

A Dumbleton
Member of the Employment Relations Authority