

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2013] NZERA Auckland 444  
5383491

BETWEEN                      TE APITI TRUST  
   Applicant  
  
A N D                              GRANT McLEOD  
   Respondent

Member of Authority:      James Crichton  
  
Representatives:              Kathy Gibbs, for Applicant  
   Respondent in person  
  
Submissions Received:      23 August 2013 from Applicant  
   15 and 23 August 2013 from Respondent  
  
Date of Determination:      27 September 2013

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**COSTS DETERMINATION OF THE AUTHORITY**

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**Introduction**

[1]      By determination issued as [2013] NZERA Auckland 228, the Authority dealt with the original claim brought by the present respondent against the present applicant and made findings in favour of the present respondent concerning some of his claims against Te Apiti Trust.

[2]      However, that investigation of the Authority proceeded without the active participation of Te Apiti Trust which, despite the usual notification of the Authority's investigation meeting, did not attend. The Authority considered at the time that the failure to attend was deliberate rather than inadvertent and proceeded to make its determination notwithstanding the absence of Te Apiti Trust.

[3] When that decision issued, Te Apiti Trust protested, indicating that for whatever reason it had not received notification of the investigation meeting, and made an application to reopen the Authority's investigation.

[4] That application to reopen was granted notwithstanding the objection of Mr McLeod, the respondent in the application to reopen, because the Authority satisfied itself that there was reasonable doubt about whether in fact Te Apiti Trust had received notification of the Authority's original investigation meeting details.

[5] Because of the request by Te Apiti Trust for the Authority to reopen its investigation, the Authority decided that the most practical way of proceeding was by requesting both parties to attend on the Authority again so that both parties could give the Authority their views about the proposed reopening, and in addition, in case the Authority decided to allow the reopening, so that the Authority could hear Te Apiti Trust's evidence on the substantive matter.

[6] That second investigation meeting proceeded on 1 August 2013. Both parties attended on this occasion. Both parties were given an opportunity to address the Authority on the proposal to reopen and both parties were given an opportunity to comment on the evidence which, but for the absence of Te Apiti Trust at the original investigation meeting, would have been before the Authority at first instance.

[7] The results of that second investigation meeting were summarised in the Authority's second determination issued as [2013] NZERA Auckland 364 (the second determination).

[8] In respect of costs, in the original determination, costs were reserved. In the second determination, costs were reserved as well. The Authority sought to have submissions from Te Apiti Trust and directed that the Support Officer should remind Te Apiti Trust of the Authority's wish to have submissions from it in respect of costs. Those submissions have now come to hand.

### **The claim for costs**

[9] Mr McLeod seeks costs first in respect of legal services provided by an advocate in the sum of \$1,046.50, secondly in respect of the significant work performed by Mrs McLeod in preparing Mr McLeod's original claim against Te Apiti

Trust in the sum of \$1,000 and thirdly travel costs of \$1,016.40 for Mr McLeod to attend the various Authority and mediation hearings in respect of the matter.

[10] Dealing more extensively with that third head of claim, the calculation is based on three return trips from Mr McLeod's home in the Bay of Plenty to Auckland, one for a mediation hearing and two for each of the Authority's investigation meetings. The claim is computed at 77c per kilometre which the Authority is advised is now the standard rate used by the Inland Revenue Department.

### **The response**

[11] The Trust's submissions propose that costs should lie where they fall. Moreover, it is contended that the Trust has already contributed to the costs of Mr McLeod's advocate and the Trust denies that Mr McLeod has made "numerous" attempts to settle the matter prior to it coming before the Authority.

### **Discussion**

[12] The law relating to the fixing of costs in the Authority is well settled and need not be recited again here. An excellent summary of the principles of costs fixing in the Authority is contained in the leading case of *PBO Ltd v. Da Cruz* [2005] 1 ERNZ at 808.

[13] Amongst those principles, is the precept that costs usually follow the event. In the original determination, the Authority found that Mr McLeod ought to succeed against Te Apiti Trust in respect of one of his claims but not in respect of the other.

[14] On usual principles then, in respect of the original determination where honours were effectively even with each party winning a portion of the argument, the law and practice of cost fixing would suggest that this might be an appropriate case for costs to lie where they fall, that is for each party to meet their own costs as each party was arguably as successful as the other.

[15] But that conclusion overlooks Mr McLeod's claim that he made "numerous" attempts to deal with the matter informally with Te Apiti Trust but entirely without success and that it was only because of Te Apiti Trust's unwillingness to engage with him that he was forced to file his claim in the Authority and then follow the matter through the Authority's process. He says that had Te Apiti Trust been more inclined

to engage with him, the matter could have been settled more quickly and with significantly less cost to both parties.

[16] Te Apiti Trust deny that there were numerous attempts to resolve the matter by Mr McLeod, and as well the Authority fancies that Te Apiti Trust might see this matter as one of principle and not something therefore that it could feel able to compromise over and so it may be unrealistic to expect Te Apiti Trust to have engaged informally with Mr McLeod.

[17] Of course, Mr McLeod also maintains that while he dutifully attended both Authority hearings as requested, Te Apiti Trust did not attend the original investigation and so, notwithstanding the fact that the Authority was disposed to reopen the matter because of its conclusion that there may have been a breakdown in communication which meant that Te Apiti Trust did not attend the original investigation meeting, the facts remain that Mr McLeod had to attend both, effectively doubling his costs.

[18] However, the Authority has not usually awarded costs to assist a party to travel to an investigation meeting. If parties are involved in litigation, the expectation is that they will meet the costs of attending at the forum in question. This was a case where the employment in dispute was in the Auckland region and the Authority's investigation was accordingly conducted from its Auckland office. The fact that Mr McLeod had, since the employment, moved to the Bay of Plenty may not justify an award of costs for the travel involved.

[19] Furthermore, Mr McLeod is claiming for the costs of attending mediation. The Authority has traditionally not allowed costs for mediation in any circumstances.

[20] Finally, the Authority notes that one of the items claimed by Mr McLeod is for the costs of having his wife prepare his claim for the Authority. There is no doubt that Mrs McLeod performed a valuable service to Mr McLeod in the preparation of the material that was the basis of his financial claim and it is also the case that Mr McLeod's case was materially assisted by that information. It would be remiss of the Authority not to observe that Mrs McLeod's work not only assisted her husband in the prosecution of his case but also assisted the Authority in the determination of it.

## **Determination**

[21] The Authority's considered view is that, taking all of the factors into account, Te Apiti Trust ought to make a modest contribution to the costs incurred by Mr McLeod in bringing his claim to the Authority and being at least partially successful in that regard. Further, the Authority's considered view is that, whatever the explanation for Te Apiti Trust not attending the first investigation meeting, it is the fact that Mr McLeod dutifully attended both and was put to the need to do that because Te Apiti Trust, for whatever reason, did not attend the first investigation meeting.

[22] However, the fundamental position is that Mr McLeod was only partially successful and therefore cannot recover all of his costs. Nor can he recover for the cost of mediation because that is traditionally not recoverable in a costs fixing environment in the Authority.

[23] The Authority thinks, looking at the matter in the round, Te Apiti Trust should pay to Mr McLeod the sum of \$1,500, that sum representing 50% of the costs incurred by Mr McLeod (and reflecting the fact that Mr McLeod was approximately 50% successful), but also allowing a complete deduction for the costs of attending mediation and some uplift beyond the 50% for the work performed by Mrs McLeod in preparing Mr McLeod's successful claim in the Authority which materially assisted the Authority in determining the matter.

[24] The Authority has not been persuaded that Te Apiti Trust has already contributed to the costs incurred by the advocate engaged by Mr McLeod. Preferring the evidence of Mr McLeod that the contribution now sought is for different work than that originally contributed to by the Trust.

[25] Accordingly, Te Apiti Trust is directed to pay to Mr McLeod the sum of \$1,500 as a contribution to Mr McLeod's costs.

James Crichton  
Member of the Employment Relations Authority