



# New Zealand Employment Relations Authority Decisions

You are here: [NZLII](#) >> [Databases](#) >> [New Zealand Employment Relations Authority Decisions](#) >> [2017](#) >> [2017] NZERA 168

[Database Search](#) | [Name Search](#) | [Recent Decisions](#) | [Noteup](#) | [LawCite](#) | [Download](#) | [Help](#)

---

## T v K (Auckland) [2017] NZERA 168; [2017] NZERA Auckland 168 (14 June 2017)

Last Updated: 5 July 2017

### IN THE EMPLOYMENT RELATIONS AUTHORITY AUCKLAND

[\[2017\] NZERA Auckland168](#)

5639198

BETWEEN T Applicant

A N D K Respondent

Member of Authority: Rachel Larmer

Representatives: Allan Halse, Advocate for Applicant Shima Grice, Counsel for Respondent Andrea Twaddle, Counsel for Ms X

Date of Investigation

Meeting:

On the papers

Submissions: 25 May 2017 from Ms X

29 May 2017 from K

29 May 2017 from T

30 May 2017 from Ms X

02 June 2017 from T Date of Determination: 14 June 2017

### COSTS DETERMINATION OF THE EMPLOYMENT RELATIONS AUTHORITY

#### Employment relationship problem

[1] *Material background* – This costs determination relates to the Authority’s non-publication determination dated 18 May 2017.<sup>1</sup> The parties were encouraged to resolve costs by agreement but that has not occurred.

[2] *Costs application* – Ms X seeks an order that Mrs T and K contribute towards

her (Ms X’s) actual legal costs. K says that the general principle that costs follow the

<sup>1</sup> [2017] NZERA Auckland 148.

event means no costs should be awarded against it because it was the successful party in respect of the non-publication application - because final non-publication orders were issued.

[3] *K’s position* – K submits that it and Ms X were put to additional unnecessary expense because Mrs T’s advocate raised irrelevant matters and filed additional irrelevant evidence notwithstanding the Authorities directions about what evidence was relevant. K says that it does not seek costs “so that [Ms X] receives the full benefit of any costs awarded.”

[4] *Mrs T’s position* – Mrs T opposes Ms X’s costs application. Mrs T says that Ms X should bear the costs of the non-publication application or alternatively if costs are to be awarded then any such award should be made against K.

[5] *Costs jurisdiction* – The Authority’s costs jurisdiction arises from Schedule 2, clause 15 of the [Employment Relations Act 2000](#) (the Act). Costs are discretionary. Under clause 15(1) the Authority may make an order that “any party” pay “any other party” reasonable costs and expenses.

[6] *Interpretation of “any party”* – I find that the reference to “any party” and “any other party” in clause 15(1) of the Second Schedule of the Act refers to a party to the proceedings. I find that the parties to the proceedings are those recorded on the pleadings, meaning the Statement of Problem and Statement in Reply.

[7] *Ms X not a party* - Ms X was not a party to the non-publication proceedings so I find that there is no jurisdiction to award her costs. Accordingly Ms X’s costs application fails for want of jurisdiction.

[8] *Ms X’s recovery of costs* - If Ms X wishes to recover her legal costs from K then I consider that appears to involve an entirely separate employment relationship problem which is not currently before the Authority.

[9] *Successful party* - I agree that K is the successful party in respect of the non- publication application because, notwithstanding Mrs T’s opposition, final non- publication orders were issued. Although a successful party is usually entitled to an award of costs in its favour I consider it appropriate to depart from that norm in the circumstances of this particular case.

[10] *Exercise of discretion* – I consider that the situation requiring the non- publication application arose from the manner in which K elected to run its case before the Authority. K could have challenged the (subsequently) disputed material during the substantive investigation but did not. Having regard to the Authority’s equity and good conscience jurisdiction I decline to exercise the Authority’s discretion to award costs in K’s favour.

[11] *Costs to lie where they fall* – I consider that it is in the overall interest of justice for costs associated with the non- publication application to lie where they fall.

[12] *Alleged breach of non-publication order* – Ms X suggested to the Authority that Mr Halse was in breach of the final non- publication order. A breach of a non- publication order is a serious matter which is why the Authority specifically noted in the final non-publication determination the need to ensure social media posting and/or

media communications do not breach the final non-publication order.<sup>2</sup>

[13] *Police involvement* - I consider that alleged breaches of a non-publication order should be raised directly with the Police who are responsible for deciding whether or not criminal charges are warranted.

[14] *Failing to abide by Authority directions* – Mr Halse alleges that K failed to abide by Authority instructions. I do not accept that. I find that Mr Halse’s interpretation of the Authority’s communications and about what was discussed during the telephone conference is incorrect. I consider that Ms Grice has accurately recorded the directions given regarding the briefing of witnesses.

[15] *No instruction* - I did not issue the “instruction” Mr Halse alleges was issued. I also specifically reject Mr Halse’s allegation that K’s actions regarding Ms Y were inappropriate or untoward. I consider that their actions align with the Authority’s directions and with what was discussed during the lengthy telephone conference.

[16] *Mrs T’s costs* – In what Mr Halse described as a “victim impact statement” Mrs T says she should be awarded “all of her costs”. Assuming that is a valid costs application, I nevertheless do not consider awarding costs in favour of Mrs T would be an appropriate exercise of the Authority’s discretion. Mrs T elected to incur costs

by choosing to oppose the final non-publication application. The position Mrs T

<sup>2</sup> [2017] NZERA Auckland 148 at paragraph [45].

adopted was unsuccessful. An unsuccessful party is not usually entitled to an award of costs in their favour.

[17] *Mr Halse’s allegations unfounded* – Mr Halse has made a number of adverse comments about Ms X’s and K’s application for a final non-publication order. These allegations are strongly refuted by Ms X and K who submit they are unfounded. I have considered Mr Halse’s concerns but find no evidential or factual basis for them.

**Rachel Larmer**

**Member Employment Relations Authority**