

[4] The EPMU's submission is that the attempt to join the union is wholly misconceived. Its submission is that the EPMU is not a party to the personal grievance and cannot be liable for costs. It accepts that a legal representative may be joined as a party to an application for costs in certain exceptional circumstances. However, there is no evidence that the representative's conduct was responsible for the incursion of any costs by the respondent. It further says that Mr Weko was exercising his right to seek legal representation under s.236 of the Act and that the EPMU was entitled to provide that legal representation under s.18 of the Act. In all other respects, the EPMU says the respondent has failed to place before the Authority a single piece of admissible evidence to support a finding that the EPMU was responsible in whole or in part for the respondent's costs. The EPMU further says that all reasonable steps were taken to ensure that Mr Weko was properly represented in his claim.

[5] The EPMU took steps to cover Mr Weko's absence, it put the seriousness of the matter to Mr Weko, and put him on notice that the union would withdraw its representation if he continued to be unavailable. The union formally withdrew as Mr Weko's representative and advised the respondent and Authority accordingly. That was its right since it was standing behind him and incurring costs.

[6] It is my decision not to join the union for the following reasons. The EPMU is not a party to the personal grievance proceedings. It was acting as a representative in accordance with s18 and s236 of the Employment Relations Act. The framework of the Act relates to the parties associated with a personal grievance and not the parties' representatives. There was nothing to suggest that the union was not acting genuinely and properly. One of the cases cited by the respondent¹, to support its case to join the union, and to have costs made against it, can be distinguished as it involves costs being paid to a union and not against a union. The other cases involve personal interests and different circumstances, although it is accepted that an application to join a person/organisation would be required². Since the union is not a party and was representing Mr Weko at the time, I am not prepared to award costs in its favour for the cost of the submission opposing the application to join the EPMU. Also, I do not agree that the application is misconceived because the union acknowledged there

¹ *O'Malley v Vision Aluminium Ltd No 3* [1992] 2 ERNZ 108.

² *O'Conner v AMTEC Engineering Group Limited* (unreported) WA 104A/04; *NZ Medical Laboratory Workers Union Inc v Capital Coast Health Limited* [1998] 2 ERNZ 107; and *Unkovich v Air New Zealand Limited* [1995] 1ERNZ 336.

could be exceptional circumstances in which a party could be joined. The respondent was entitled to test the grounds put forward given that the union was standing behind Mr Weko if he was successful.

[7] Other reasons to decline the application to join the EPMU include that the union did take all reasonable steps to put Mr Weko on notice of his responsibilities and the risk that costs could be awarded against him personally. I hold that the union was genuinely caught out by Mr Weko's unexplained absence and difficulties contacting him. Furthermore there is no evidence that the union was acting independently of Mr Weko's instructions when the union's representative was very concerned about getting instructions from him to proceed.

[8] Finally I refer to matters that the respondent has relied upon to join the union. These are that the EPMU provided an undertaking as to damages at an interim hearing; that the EPMU verbally indicated during the course of the interim hearing that it was standing behind the applicant in respect to his claim on the matter. First, the undertaking for damages, which the union signed off, related to any interim reinstatement of Mr Weko and any damages arising thereof. That did not happen and is therefore not relevant. The undertaking did not relate to the legal costs, which are an entirely separate matter. Second, the union standing behind the applicant would have related to its costs in the matter and that it would be entitled to claim the payment of costs if Mr Weko had been successful, but as it happened Mr Weko was not successful. Therefore nothing will arise from that. Finally, I would have expected that if there was any problem over the payment of costs then the union would fairly have expected to have been put on notice at a much earlier time. That did not happen.

The case for costs against Mr Weko personally

10 July 2009 Interim investigation meeting

[9] Mr Weko was unsuccessful in his application for interim reinstatement. Witnesses were not required to attend the interim investigation meeting that was held in Wellington with both parties' representatives. The interim investigation meeting held on 10 July 2009 lasted 1.45 hours for submissions and discussions on affidavit evidence. This meeting also involved putting in place arrangements for the substantive investigation meeting.

Scheduled investigation meetings: 6 and 7 August 2009 and 16 December 2009

[10] Without good cause Mr Weko did not turn up to the Authority's substantive investigation meeting held in New Plymouth on 6 August 2009 (also scheduled for 7 August), and the meeting was abandoned. Without good cause, Mr Weko failed to appear and be represented at the rearranged investigation meeting held in New Plymouth on 16 December 2009. He did not make any contact with the Authority, despite his union and the Authority trying to contact him. There was no acceptable explanation provided by Mr Weko for this failure to attend the Authority's investigation meeting scheduled on 6 and 7 August and 16 December 2009.

Tegel's costs

[11] Tegel's breakdown of costs includes:

(a) The interim hearing:

• Preparation for hearing	\$ 4,838.76
• Hearing	612.50
• Travel time and costs	612.50
• Costs	585.86
• Total	\$ 6,649.61

(b) Substantive hearing:

• Preparation for hearing	\$ 4,817.50
• Attendance at Authority's hearing	250.00
• Costs subsequent to 6 August 2009	312.50
• Total	\$ 5,380.00

[12] Tegel's total costs for the investigation meetings are \$12,029.61. The total costs relate to the Authority's investigation process and meetings and there is nothing in the detail that needs to be discounted, except that there would have been some overlap in preparation and that there were different issues involved on the interim matter and the substantive matter.

[13] Tegel is seeking a significant, if not full, award of costs instead of the general practice of awarding costs on the basis of a notional daily rate/tariff. Tegel has

submitted that its costs were largely incurred without any advance notice of the applicant's intention not to pursue the matter

[14] The Authority has been requested by Tegel to take into account that it took all reasonable steps to avoid incurring costs associated with this matter and on 21 July 2009 made a *Calderbank* offer to the applicant via his representative. That *Calderbank* offer was an offer to settle with a payment of \$3,500 on a without prejudice and denial of liability basis. It was premised on the basis that Mr Weko would not be charged any legal costs associated with this matter and that the terms of any settlement would be full and final. The offer was made on 21 July 2009 and was put on the table until 24 July 2009. This was after the legal costs had been incurred by both parties on their statement of problem and statement in reply with affidavits and documents and the interim investigation meeting.

[15] The invoices for the costs incurred by Tegel have also been provided that refer to the Authority's investigation meetings, preparation and attendances. I am satisfied that Tegel has incurred these costs.

Mr Weko

[16] Mr Weko was given an opportunity and time to respond to the above claims. He has decided for whatever reason not to do so. He has had enough time.

[17] Mr Weko appears to be the author of his own misfortune in this affair. His union representatives rightly did everything possible to point out and to endeavour to arrange for his attendance at the Authority's investigation. Mr Weko's failure to attend and to be involved in his personal grievance investigation meeting has meant that the employer has been put to unnecessary costs in this matter. Indeed, even if Mr Weko had withdrawn at such a late stage, and after the offer to settle had been made, there still would have been an issue of costs for which he was liable.

[18] In this situation, Mr Weko stands liable for a contribution for Tegel's costs at the higher end of the daily tariff because he failed without good cause to attend scheduled investigation meetings on 6 August and 16 December 2009. Tegel was required to prepare in the eventuality that Mr Weko might have turned up on 16 December.

Determination on costs

[19] The *Calderbank* offer is not directly applicable, but the fact that it was made is a matter to take into account because the respondent was successful and costs follow the event.

[20] The offer was made after some costs had already been incurred and preparation started at least on the interim application. There would have been overlapping preparation between the interim and the substantive hearings and additional work in organising witnesses, some additional written statements and attendance planned at least for 6 August. However, the issues were different in the interim and the planning for the substantive investigation meetings. On this basis I am prepared to increase the tariff arrangements that apply.

[21] I am satisfied that Tegel took all reasonable steps to try and avoid costs, including giving Mr Weko an opportunity to settle and attended the interim investigation held in Wellington instead of New Plymouth. Tegel agreed to vacate the investigation meeting on 6 August to give Mr Weko more time to attend an investigation meeting. However, Tegel has incurred the costs related to the meeting time on 6 August; including additional preparation of witness statements and the organisation of witnesses and attendance of its representative where Tegel reasonably expected Mr Weko to turn up. Tegel took steps to avoid further costs on 16 December, when it became likely Mr Weko would not turn up and the EMPU had withdrawn. Tegel's lawyer participated by telephone, and Alf Robson, a witness for Tegel, attended.

[22] It is my decision that Mr Weko is to pay \$4,000 as a contribution to Tegel's costs for the investigation meeting held on the interim application given the time involved, preparation required and the attendance of a representative for Tegel. In regard to the other scheduled days, when Mr Weko did not turn up for the substantive investigation meeting the assessment of costs for 6 August is based on \$3,000 contribution to reasonable costs because of the additional preparation and attendance required; and \$1,000 for 16 December 2009 for the cost of Tegel's arrangements for attendances.

Order on costs for Mr Weko to pay

[23] Mr Weko is to pay Tegel New Zealand Limited \$8,000 contribution towards its reasonable costs.

P R Stapp
Member of the Employment Relations Authority