

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

Determination Number: WA 119A/07
File Number: 5051897

BETWEEN DENIS CADMAN
(Applicant)

AND NAPIER GIRLS HIGH SCHOOL
BOARD OF TRUSTEES
(Respondent)

Member of Authority: P R Stapp
Submissions received: 10, 13 & 18 October 2007
Determination: 30 October 2007

COSTS DETERMINATION OF THE AUTHORITY

Costs

[1] There are outstanding issues on costs that the parties have not been able to settle since the Authority released a determination (dated 27 August 2007) in respect of an application of an employment relationship problem from Mr Cadman. He was unsuccessful in getting a determination that he was an employee. I found he was a contractor.

[2] The Respondent has applied for costs. The applicant has asked for costs to lie where they fall.

Application for costs

[3] The matter had been to mediation provided by the Department of Labour before an application was filed in the Authority (SOP 15 January 2007 and SIR 31 January 2007). The Authority's investigation meeting was scheduled for two days: 8 May 2007

and 18 July 2007. There were two conference calls: 16 February 2007 and 2 May 2007.

[4] There were further attempts made by the parties to settle after the mediation services were provided by the department and have been disclosed to me for the issue of costs. The parties seemed to miss the mark on obtaining a compromise to resolve the matter, for whatever reason. The pity is that further third party involvement outside the Authority seemed to be absent, and could have had an impact on the matter, particularly following mediation assistance provided by the department. The parties committed to an investigation and the costs involved with that. The correspondence disclosed that these attempts to settle between the parties' counsel occurred on 9 and 10 May 2007. Costs had already been incurred for the investigation meeting by that time.

[5] There should have been nothing unusual about the investigation on the issue that had to be determined. However the Authority's investigation meeting took longer than it needed to because there was a failure to provide the replies in writing that had been agreed would be provided in advance of the investigation meeting and evidence was not completed because of new allegations made by the applicant.

[6] Therefore it was not until Mr Cadman gave his evidence during the investigation meeting on the first day that it became necessary to hear other witnesses again on another day to determine the factual issues.

[7] The respondent's actual costs I am told were \$36,949. It has claimed a reasonable contribution and put the total figure of \$9,300 on the basis of legal fees being \$8,100 and disbursements of \$1,200. There was no list provided of the disbursements.

[8] The sum of \$8,100 is entirely reasonable to make an assessment for a contribution considering the length of the investigation meeting (1.5 days), the number of witnesses required, written statements and affidavits produced and the documents relied upon.

[9] Because the disbursements were not itemised I have decided to reserve the parties' rights in respect of this for more detail and disclosure on exactly what the items include.

[10] Costs follow the event. The respondent successfully saw off the employment relationship problem in regard to the preliminary matter. The respondent was insured and the insurer engaged counsel to represent the Board. The Board under the law is not precluded from claiming costs when it is insured. The Board I was told during the investigation meeting had paid "two and a half thousand" dollars excess on costs. Costs are treated in the same manner as if the Respondent was not insured and determined on well known principles without punishing the unsuccessful party.

[11] Although I have viewed the settlement correspondence I have not given it any weight because it happened after the costs had been committed by the parties. I noted that the parties' positions had been well formed with the filing of the SOP and the SIR for them to be on notice of any costs implications following a determination from the Authority.

[12] However, I do accept that there was an important issue of principle involved for the applicant that he wanted tested. He has to accept that in not being successful that desire for a principle comes with a cost when there was a preliminary matter that impacted on his primary concern about how his relationship with the Board ended and that the Respondent successfully defended the preliminary matter.

[13] It is my conclusion that an appropriate assessment of a contribution should be based on 60% of the sum of reasonable costs claimed for attendances, preparation and 1.5 days investigation meeting. The total is within the usual range of Authority awards for the time involved in an investigation. It is my decision that Mr Cadman is to pay to the Board of Trustees of Napier Girls High School the sum of \$4,860 for legal costs. Disbursements are reserved.

P R Stapp

Member of the Employment Relations Authority