

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKĀURAU ROHE**

[2020] NZERA 260
3091535

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|---------|----------------------------------------------|
| BETWEEN | PAULA CARSTENSEN Applicant |
| AND | LAKES DISTRICT HEALTH BOARD Respondent |

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|----------------------|-----------------------------------------------------------------------------------------------------------------------------|
| Member of Authority: | Robin Arthur |
| Representatives: | Allan Halse, advocate for the Applicant Mark Beech, counsel for the Respondent |
| Submissions: | 26 March 2020 from the Respondent and 22 April 2020 from the Applicant and 22 April 2020 in reply from the Respondent |
| Determination: | 29 June 2020 |

COSTS DETERMINATION OF THE AUTHORITY

- A. Within 28 days of the date of this determination Paula Carstensen must pay Lakes District Health Board the sum of \$1,125 as a contribution to its costs in successfully seeking a determination that she was out of time to commence an action in the Authority in relation to a personal grievance.**

[1] An Authority determination issued on 5 March 2020 found Paula Carstensen was barred by provisions of the Employment Relations Act 2000 (the Act) from pursuing a personal grievance she had raised on 1 December 2016 against her former employer Lakes District Health Board (LDHB).¹ LDHB succeeded in its objection that an application lodged in the Authority for Ms Carstensen by her advocate Allan Halse

¹ *Carstensen v Lakes District Health Board* [2020] NZERA 109.

on 12 February 2020 was outside the three year statutory period permitted for an employee to start proceedings after a grievance is raised.

[2] Ms Carstensen’s advocate said Ms Carstensen was told in August 2019 that her statement of problem has been prepared for lodging in the Authority. If done then, the application would have been lodged within the permitted three year period. However her advocate said he made “an administrative error” by not lodging it until February 2020 and said Ms Carstensen should not be penalised for that error. The determination found the Authority was strictly bound by Parliament’s words in the relevant sections of the Act, as explained in an Employment Court ruling directly on the same issue.² In *Blue Water Hotel Limited v VBS* the Court said the Authority could not “on any ground” allow such an extension of time to pursue a personal grievance outside the three year period.³

[3] LDHB sought an order for its costs it said it was forced to incur in seeking that determination from the Authority. A timetable was set for memoranda about costs to be lodged on behalf of LDHB and Ms Carstensen. Those submissions have been considered along with the well-established principles regarding costs in the Authority and the particular circumstances of the case.⁴

[4] The memorandum lodged by Ms Carstensen’s advocate put one succinct argument. He proposed each party bear its own costs as it was “[his] fault for missing the original deadline and incurring costs for an application for leave”.

[5] This was not a case where the parties could reasonably be left to bear their own costs. As soon as it was notified of Ms Carstensen’s application to pursue her 2016 grievance LDHB had, through counsel, promptly objected that she was prevented from commencing those proceedings by what it called the “prescribed and mandatory time bar”. It pointed to the Court’s ruling in the *Blue Water* case that had explained why the time limit could not be extended.

[6] Despite those plainly insurmountable barriers, Ms Carstensen’s advocate insisted that it was “inconceivable” that she could not continue with her claim. He filed

² Employment Relations Act 2000 s 14(6), s 219 and s 221.

³ [2018] NZEmpC 128 at [55] and [56].

⁴ *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808, 819-820 and *Fagotti v Acme & Co Limited* [2015] NZEmpC 135 at [106]-[108].

an application for an extension of time. However the subsection of the Act he relied on in making that application only allows extensions of time where a personal grievance has *not* been raised earlier. This clearly did not apply to Ms Carstensen's circumstances. As expressly noted in the statement of problem her advocate had belatedly lodged, she had in fact raised a grievance in December 2016.

[7] As LDHB submitted, it was entitled to an award of costs because it put Ms Carstensen's advocate on notice from the outset that both the proceedings and the application for leave for an extension were misguided and, on any proper assessment, could not have succeeded. LDHB said it had to seek some appropriate recovery of its costs due its responsibilities as a body funded from the public purse. LDHB suggested it was entitled, on an indemnity basis, to its full costs of \$2,587. However, responding to a reference by the Authority to recent judicial comment on not overlooking the principle that costs in this investigative body will be "modest", LDHB instead sought an order for costs of \$1,125.⁵

[8] Applying the relevant principles LDHB could appropriately be awarded costs of that amount. It was put to an unnecessary expense of having to take steps to stop proceedings that, from the outset, clearly had no legal basis to go ahead. There was no information showing Ms Carstensen lacked the financial capacity to pay costs at that level. In the circumstances, it was a relatively modest amount.

[9] Ms Carstensen's liability for the amount is not displaced by her advocate's suggestion that he, and not she, was really responsible for LDHB having incurred those costs. The obligation to pay those costs sits with Ms Carstensen as she is fixed with responsibility for the actions of her appointed representative. Ms Carstensen and her advocate will have to resolve between themselves how that amount is paid.

[10] Accordingly, Ms Carstensen must pay LDHB the sum of \$1,125 within 28 days of the date of this determination as a contribution to its legal costs in this matter.

Robin Arthur
Member of the Employment Relations Authority

⁵ *Elisara v Allianz New Zealand Limited* [2020] NZEmpC 13 at [29]-[32].