

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

CA 17A/10
5278135

BETWEEN PENNY McARTHUR
 Applicant

AND LOGAN PARK HIGH
 SCHOOL BOARD OF
 TRUSTEES
 Respondent

Member of Authority: Philip Cheyne

Representatives: Quentin Stratford, Counsel for the Applicant
 Barry Dorking & Fiona McMillan, Counsel for
 Respondent

Submissions Received: 26 February 2010 from the respondent
 Nothing received from the applicant

Determination: 23 March 2010

DETERMINATION OF THE AUTHORITY ON COSTS

[1] In a determination dated 29 January 2010 I dismissed Mrs McArthur's challenge to the validity of a full and final settlement entered into by her and her former employer. At the same I did not accept the validity of the former employer's counter-claim for damages based on the allegation of a breach of a term of that settlement being Mrs McArthur's application to the Authority. Costs were reserved for the parties each to lodge and serve a memorandum in accordance with a timetable. I have the memorandum from the respondent but nothing from the applicant, despite several reminders and an offer from the Authority (enlarging time) to accept any submissions if lodged and served by 4pm Friday last week. The original and the enlarged deadline having elapsed, this determination resolves the issue of costs.

[2] I agree with the respondent's submission that in any meaningful sense Mrs McArthur was wholly unsuccessful. The statutory bar to an attempt to challenge a settlement did not arise because there was not compliance with s.149(2) of the Employment Relations Act 2000. However, the settlement remained enforceable as a

contract on ordinary principles. Mrs McArthur had fully and finally ended all disputes arising from her employment.

[3] The proper approach is to assess costs in accordance with *PBO Ltd (formerly Rush Security Ltd) v Da Cruz* [2005] ERNZ 808. There is no reason to depart from the ordinary principle that costs should follow the event.

[4] I agree that Mrs McArthur's only prospect of success lay in the allegation of misrepresentation or fraud by the respondent. However, even the applicant's evidence did not seriously put this in issue. In light of that, the claim was unlikely to succeed and that should have been apparent from the outset. I do accept that the respondent still had to take the proceedings seriously.

[5] I accept counsel's submissions that the respondent's costs were increased because of delay on the part of the applicant in providing statements of evidence. I am less convinced that the applicant's failure to engage over what might be wanted by her if she had succeeded added to the respondent's costs. Nor do I accept that I should attribute any blame to the applicant for the inability of the parties to agree on costs. The additional costs incurred by reason of this application for costs fall to be assessed in the ordinary way.

[6] Counsel submits that an appropriate contribution would be \$3,000.00 - \$3,500.00. That would apply a tariff based figure for a one day matter when the investigation meeting took less than a half day.

[7] The most significant feature in considering costs is the negligible prospects for success from the outset. An important reason for parties entering into these settlements is to avoid litigation risks and costs. Those who try to undo such settlements on flimsy grounds should expect to bear a higher proportion of the successful party's costs than ordinarily.

[8] Mrs McArthur is to pay \$3,500.00 to the respondent by way of costs.

Philip Cheyne
Member of the Employment Relations Authority