

*Under the Employment Relations Act 2000*

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND OFFICE**

**BETWEEN** Ross McKean (Applicant)  
**AND** Wakaaranga School (Respondent)  
**REPRESENTATIVES** Paul Pa'u, Counsel for Applicant  
Christine Chilwell, Counsel for Respondent  
**MEMBER OF AUTHORITY** Y S Oldfield  
**SUBMISSIONS** 20 August 2004  
**DATE OF DETERMINATION** 11 March 2005

**DETERMINATION OF THE AUTHORITY AS TO COSTS**

**Investigation Process**

The original employment relationship problem with which this application for costs is associated has had a protracted history.

The investigation spanned many months. There were altogether five adjournments. One, which occurred prior to the applicant's employment being terminated, was in order that the parties might further explore an agreed solution to their differences, and was at my suggestion. One arose as a result of a bereavement of Counsel for the respondent and the remaining three were at the request of the applicant. In addition, the Authority held dates for the resumption of the matter on a number of occasions only to find that those dates did not suit all concerned.

There were also five telephone conferences. These were in part taken up with case management matters. In addition the conferences were also a means by which Counsel was consulted about input to be obtained from the Ministry of Education and NZEI about the application of the Collective Employment Agreement.

Investigation meetings totalled three full days in all, and extensive written submissions were provided to the Authority at the conclusion of its investigation.

In a determination dated 3 August 2004 I concluded that the applicant had not established a personal grievance in relation to any of his claims, two of which were of unjustified disadvantage and one of unjustified dismissal. On 20 August I received a submission from the respondent in which it sought a contribution to its costs.

No reply submissions were received from the applicant and on 17 December an Authority support officer advised the applicant's representative, Mr Pa'u, that if the applicant were intending to file costs submissions, they should be filed and served by Friday 14 January 2005. No submissions have

been received and I now proceed to determine the issue on the basis of the respondent's submissions and after consideration of the history of the proceedings.

### **Respondent's submissions**

Counsel for the respondent made the following points in submissions.

1. Her charge-out rate is \$275.00 per hour. The respondent has incurred actual legal fees of \$61,616 plus GST (a total of \$69,318.02) and disbursements of \$2,595.59. (Invoices were provided to verify these amounts.) Counsel for the respondent argued that these costs were reasonably incurred given the nature of the case, which involved multiple causes of action, a detailed fact situation and the application of the competency provisions of a collective agreement that covers thousands of teachers. In such circumstances she submitted that it was appropriate for the respondent to engage Counsel at a reasonably senior and experienced level.
2. The respondent made two Calderbank offers to the respondent, in November 2002 and March 2003, of \$10,000.00 and \$20,000.00 respectively. These were not accepted and as a result the respondent was put to avoidable cost, inconvenience and stress.
3. It was acknowledged that the applicant was legally aided. However it was noted that s.40(3) of the Legal Services Act provides that any order for costs made against the aided person may specify the amount that the person would have been ordered to pay if this section had not affected that person's liability. Counsel also notes that where an order is made under s.40 (3) or s.40 (4) the other party may apply to the Legal Services Agency for some or all of the difference in the award of costs (s.41). The respondent therefore seeks an order specifying the amount that Mr McKean would have been ordered to pay if s.40 had not affected his liability, either pursuant to s.40(3) or (4).
4. The respondent says that a reasonable contribution to its costs would be 50%, or \$34,659.01 (including GST) plus disbursements.
5. Alternatively, and adopting the approach of the Authority in *Graham v Airways Corporation of New Zealand Ltd Employment Relations Authority Auckland AA 39/04; AEA 223/03 28 January 2004*, the respondent submits that a reasonable contribution to the respondent's costs would be \$13,200.00 plus disbursements.
6. Ms Chilwell explained that she arrived at this figure as follows:

*“(1) The investigation meeting lasted three days. At 8 hours per day, this amounts to 24 hours;*

*(2) It is appropriate to use a multiplier of two for preparation time to recognise the complexity and importance of the issues and the number of adjournments involved (both formal and informal), necessitating an unusual amount of liaison between counsel and the Authority;*

*(3) Again, given the complexity and importance of the issues, the hourly rate of \$275.00 was reasonable;*

*(4) This gives a starting point of 48 hours x \$275.00 (\$13,200.00) plus disbursements of \$2,595.59.*

*(5) On the approach in Graham the applicant's contribution would be 75% of these costs or \$9,900.00 plus disbursements;*

*(6) To this should be added a significant weighting for the Calderbank letters. Given that the respondent made these offers from the very beginning, the applicant's contribution should be*

*100%, which in any event would represent only a nominal contribution to the respondent's actual costs. This would give \$13,200 plus disbursements."*

### **Determination**

7. I do not accept Ms Chilwell's submission that a reasonable contribution to costs in this case would be 50% of the respondent's actual costs. A contribution at that level would not be consistent with the general approach of the Authority to costs.
8. I do however consider the approach adopted by the Authority in the *Graham* case to be a very sound one, for all the reasons set out there. I also accept that the method by which Ms Chilwell has applied that approach to this case is entirely reasonable. All of her submissions are supported by the circumstances of this matter. I adopt her argument (as set out above in paragraph [6] subparagraph (6)) in its entirety.
9. I am therefore satisfied that a reasonable contribution to the respondent's costs would be \$13,200 plus disbursements.
- 10. Had s.40 of the Legal Services Act 2000 not affected his ability to pay, Mr McKean would therefore have been ordered to pay to the respondent the sum of \$13,200.00 as a contribution to its costs.**
- 11. Further to that, Mr McKean is ordered to pay to the respondent, as a contribution to its costs, a sum equal to the contribution he was required to make pursuant to s.15 (1) of the Legal Services Act 2000.**

Y S Oldfield  
Member of Employment Relations Authority