

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 294A/07
5091921

BETWEEN STEPHEN MICHAEL SHONE
Applicant

AND GISBORNE INTERMEDIATE
SCHOOL BOARD OF
TRUSTEES
Respondent

Member of Authority: Robin Arthur

Representatives: Adam Simperingham for Applicant
Daniel Erickson for Respondent

Submissions received: 6 November 2007 from Applicant
20 November 2007 from Respondent

Determination: 20 November 2007

COSTS DETERMINATION OF THE AUTHORITY

[1] The Applicant seeks costs in relation to an Authority investigation initiated by his request for an injunction to prevent the Respondent board stopping his pay while he awaits trial on criminal charges. The Respondent itself sought declarations that it was contractually entitled to change the basis of the Applicant's suspension from being on full pay to being without pay.

[2] By determination AA 294/07 (24 September 2007) the Authority declined to make the declarations sought by the Respondent but considered there was no need to enjoin the Respondent on the basis sought by the Applicant. The Respondent had not made any formal decision on its proposal to change the basis of the suspension and the terms of ongoing replacement funding provided by the Ministry of Education were such that it appeared there would be no need to make any such decision. Leave was reserved for the Applicant to apply for orders should that position change.

[3] The parties were encouraged to resolve any question of costs between themselves but have not. The Applicant seeks costs of \$2000 and expenses comprising \$521 in airfares for counsel's return trip from Gisborne to Auckland and \$246.80 for accommodation, transfers and lunch.

[4] The Respondent replies that costs should lie where they fall on several grounds. Firstly, it says the Applicant did not succeed in gaining the injunction sought. Secondly, it says the matter was something of a test case on how a clause on suspension in the primary teachers collective employment agreement is to be applied when criminal proceedings are pending, and in such cases costs generally lie where they fall. Thirdly, it says the Respondent acted in good faith in proposing to change the basis of the Applicant's suspension. However if the Authority considered costs should be awarded to the Applicant, the Respondent submits this should be for a half day only, at less than the "upper level" of the Authority's usual tariffs, and not include Applicant counsel's fare from Gisborne.

[5] Applying the non-exclusive range of principles for exercise of the Authority's discretion on costs, summarised in *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808, I consider the Applicant should have an award of costs in this matter. That award is not for a full day as the investigation meeting traversed necessary questions and the concise, helpful submissions of counsel in less time. Having regard for the usual range of the so-called daily tariff, and the generally modest nature of costs awards, an award of \$1200 is appropriate given the nature of the case and the degree of preparation required.

[6] I do not consider that costs should lie where they fall on a 'test case' basis. I did call for and receive helpful evidence from the Ministry and the teachers' union as the principal parties to the relevant collective employment agreement. However they were not – as far as I know – promoting or directly involved in the case of these particular parties in order to have the issue resolved for its 'test case' value. The particular parties had no interest in whether it was a test case or not. Rather they were concerned solely as to how it applied to their particular circumstances and I deal with costs between them on that basis alone.

[7] Although the costs of out-of-town counsel are not generally allowed, this was an unusual case. The cause of action arose in Gisborne and the investigation meeting would normally have been held there but the Applicant's terms of bail required him to stay out of Gisborne and to live in Napier. By agreement, the investigation meeting was held in Auckland. That was incidentally more convenient for the Authority member and Respondent counsel. The Respondent was spared what would otherwise have been the travel costs of its counsel going to Gisborne. The Respondent's principal did incur travel costs to Auckland but that was his choice as I had indicated that I was prepared to take evidence from both him (in Gisborne) and the Applicant (in Napier) by way of affidavit, with any necessary questions by telephone conference. I note that the Applicant too chose to attend the investigation meeting, having made special arrangements to vary his terms of bail for the purpose.

[8] In these relatively unusual circumstances as to venue, I consider that it is appropriate for Applicant counsel's \$571 return airfare, \$35 taxi fare and \$150 overnight hotel accommodation to be awarded as a reasonable expense.

[9] Accordingly, under clause 15 of Schedule 2 of the Employment Relations Act 2000, the Respondent is ordered to pay to the Applicant the sum of \$1956 as a reasonable contribution to his costs and expenses.

Robin Arthur
Member of the Employment Relations Authority