

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2017] NZERA Auckland168  
5639198

BETWEEN      T  
                    Applicant  
  
A N D            K  
                    Respondent

Member of Authority:      Rachel Larmer

Representatives:            Allan Halse, Advocate for Applicant  
                                        Shima Grice, Counsel for Respondent  
                                        Andrea Twaddle, Counsel for Ms X

Date of Investigation Meeting:      On the papers

Submissions:                25 May 2017 from Ms X  
                                        29 May 2017 from K  
                                        29 May 2017 from T  
                                        30 May 2017 from Ms X  
                                        02 June 2017 from T

Date of Determination:      14 June 2017

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**COSTS DETERMINATION OF THE  
EMPLOYMENT RELATIONS AUTHORITY**

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**Employment relationship problem**

[1]      *Material background* – This costs determination relates to the Authority’s non-publication determination dated 18 May 2017.<sup>1</sup> The parties were encouraged to resolve costs by agreement but that has not occurred.

[2]      *Costs application* – Ms X seeks an order that Mrs T and K contribute towards her (Ms X’s) actual legal costs. K says that the general principle that costs follow the

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<sup>1</sup> [2017] NZERA Auckland 148.

event means no costs should be awarded against it because it was the successful party in respect of the non-publication application - because final non-publication orders were issued.

[3] *K's position* – K submits that it and Ms X were put to additional unnecessary expense because Mrs T's advocate raised irrelevant matters and filed additional irrelevant evidence notwithstanding the Authorities directions about what evidence was relevant. K says that it does not seek costs “so that [Ms X] receives the full benefit of any costs awarded.”

[4] *Mrs T's position* – Mrs T opposes Ms X's costs application. Mrs T says that Ms X should bear the costs of the non-publication application or alternatively if costs are to be awarded then any such award should be made against K.

[5] *Costs jurisdiction* – The Authority's costs jurisdiction arises from Schedule 2, clause 15 of the Employment Relations Act 2000 (the Act). Costs are discretionary. Under clause 15(1) the Authority may make an order that “any party” pay “any other party” reasonable costs and expenses.

[6] *Interpretation of “any party”* – I find that the reference to “any party” and “any other party” in clause 15(1) of the Second Schedule of the Act refers to a party to the proceedings. I find that the parties to the proceedings are those recorded on the pleadings, meaning the Statement of Problem and Statement in Reply.

[7] *Ms X not a party* - Ms X was not a party to the non-publication proceedings so I find that there is no jurisdiction to award her costs. Accordingly Ms X's costs application fails for want of jurisdiction.

[8] *Ms X's recovery of costs* - If Ms X wishes to recover her legal costs from K then I consider that appears to involve an entirely separate employment relationship problem which is not currently before the Authority.

[9] *Successful party* - I agree that K is the successful party in respect of the non-publication application because, notwithstanding Mrs T's opposition, final non-publication orders were issued. Although a successful party is usually entitled to an award of costs in its favour I consider it appropriate to depart from that norm in the circumstances of this particular case.

[10] *Exercise of discretion* – I consider that the situation requiring the non-publication application arose from the manner in which K elected to run its case before the Authority. K could have challenged the (subsequently) disputed material during the substantive investigation but did not. Having regard to the Authority’s equity and good conscience jurisdiction I decline to exercise the Authority’s discretion to award costs in K’s favour.

[11] *Costs to lie where they fall* – I consider that it is in the overall interest of justice for costs associated with the non-publication application to lie where they fall.

[12] *Alleged breach of non-publication order* – Ms X suggested to the Authority that Mr Halse was in breach of the final non-publication order. A breach of a non-publication order is a serious matter which is why the Authority specifically noted in the final non-publication determination the need to ensure social media posting and/or media communications do not breach the final non-publication order.<sup>2</sup>

[13] *Police involvement* - I consider that alleged breaches of a non-publication order should be raised directly with the Police who are responsible for deciding whether or not criminal charges are warranted.

[14] *Failing to abide by Authority directions* – Mr Halse alleges that K failed to abide by Authority instructions. I do not accept that. I find that Mr Halse’s interpretation of the Authority’s communications and about what was discussed during the telephone conference is incorrect. I consider that Ms Grice has accurately recorded the directions given regarding the briefing of witnesses.

[15] *No instruction* - I did not issue the “*instruction*” Mr Halse alleges was issued. I also specifically reject Mr Halse’s allegation that K’s actions regarding Ms Y were inappropriate or untoward. I consider that their actions align with the Authority’s directions and with what was discussed during the lengthy telephone conference.

[16] *Mrs T’s costs* – In what Mr Halse described as a “*victim impact statement*” Mrs T says she should be awarded “*all of her costs*”. Assuming that is a valid costs application, I nevertheless do not consider awarding costs in favour of Mrs T would be an appropriate exercise of the Authority’s discretion. Mrs T elected to incur costs by choosing to oppose the final non-publication application. The position Mrs T

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<sup>2</sup> [2017] NZERA Auckland 148 at paragraph [45].

adopted was unsuccessful. An unsuccessful party is not usually entitled to an award of costs in their favour.

[17] *Mr Halse's allegations unfounded* – Mr Halse has made a number of adverse comments about Ms X's and K's application for a final non-publication order. These allegations are strongly refuted by Ms X and K who submit they are unfounded. I have considered Mr Halse's concerns but find no evidential or factual basis for them.

**Rachel Larmer**  
**Member Employment Relations Authority**