

**IN THE EMPLOYMENT COURT
AUCKLAND**

**[2011] NZEmpC19
ARC 56/09**

IN THE MATTER OF a challenge to a determination of the
Employment Relations Authority
AND IN THE MATTER OF costs

BETWEEN TASITUMUA GEORGE MASINA
Plaintiff

AND THE COMMISSIONER, TE KURA
KAUPAPA MAORI O PIRIPONO TE
KURA WHAKAHOU O OTARA
Defendant

Hearing: By memoranda filed by defendant counsel on 10 November and
plaintiff counsel on 2 December 2010

Judgment: 2 March 2011

COSTS JUDGMENT OF JUDGE M E PERKINS

[1] On 27 October 2010 I issued my substantive judgment in respect of this matter. The issue of costs was reserved pending receipt of written submissions from counsel, which are now filed. These were filed some time ago and unfortunately overlooked by me.

[2] The defendant successfully challenged the determination of the Employment Relations Authority that costs in respect of the investigation should be left where they fell. I awarded costs to the defendant in respect of the investigation of \$3,000.

[3] In her memorandum as to costs in these proceedings Ms Robins, counsel for the defendant, seeks the sum of \$30,000 in costs. This she states is just less than two-thirds of the actual costs incurred. Those actual costs amount to \$50,246.27

including disbursements. The actual costs incurred are substantiated by invoices attached to the memorandum. I consider them fair and reasonable.

[4] Ms Watson, counsel for the plaintiff, in her submissions in answer, points to the financial position of the plaintiff presently existing. She submits that he has an inability to pay even the costs awarded by the Court in respect of the investigation.

[5] While I accept that Mr Masina may not presently be in a position to pay the costs in a lump sum, he chose to embark upon a challenge to the reasoned determination of the Authority in circumstances where success was remote. A clear decision of the Authority had been against him and his challenge to the Court represented an unrealistic expectation as to his prospects in having that set aside.

[6] The principles upon which costs awards are considered in this Court are now well established.¹

[7] In assessing any award of costs I have regard not only to the position of Mr Masina but also the position of the Kura, which the Commissioner oversees, as a small struggling school community. The problems which faced that school, and which continue are well set out in the following submissions of Ms Robins:

13. The case was of significant importance to the Kura. From the time the Commissioner was appointed in February 2008, a substantial amount of his time and energy was devoted to managing, first, the Plaintiff's reinstatement, then the Plaintiff's dismissal and, finally the protracted interim and substantive legal proceedings in the Authority and in the Court. The Commissioner gave evidence that the strain of these legal proceedings contributed to his ill health. He and Mr Woodman deposed that the Kura was unable to appoint a new Principal until the proceedings were concluded and that, in the face of the ongoing disruption, the Ministry of Education had had to appoint a new Commissioner as an interim measure.
14. The consequences of the Court's judgment are immense. They will affect the entire school community, including students, parents, and whanau. Subject to any appeal lodged by the plaintiff, the Kura is now able to look forward to a future of growth and development, after three years of uncertainty.

¹ *Victoria University of Wellington v Alton-Lee* [2001] ERNZ 305; *Binnie v Pacific Health Ltd* [2002] 1 ERNZ 438; *Health Waikato Ltd v Elmsly* [2004] 1 ERNZ 172.

[8] Ms Watson for Mr Masina has confirmed that he does not intend to appeal against my decision. In the circumstances, however, it is appropriate that Mr Masina make a reasonable contribution towards the costs incurred by the defendant which he necessarily undertook to protect the interests of the Kura.

[9] I see no reason why, applying the usual principles to which I have referred, that the contribution of Mr Masina should be anything other than the usual contribution awarded. Accordingly, Mr Masina is ordered to pay to the defendant costs in the sum of \$30,000 plus disbursements of \$150.

M E Perkins
Judge

Judgment signed at 2.00pm on 2 March 2011