

**IN THE EMPLOYMENT COURT
AUCKLAND**

**AC 3B/09
ARC 21/08**

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

AND IN THE MATTER OF an application for costs

BETWEEN PATRICK JOHN CLARK
Plaintiff

AND THE BOARD OF TRUSTEES OF
DARGAVILLE HIGH SCHOOL
Defendant

Hearing: By memoranda of submissions filed on 24 June and 26 July 2009

Judgment: 9 December 2009

SUPPLEMENTARY COSTS JUDGMENT OF CHIEF JUDGE GL COLGAN

[1] The plaintiff having discontinued his proceedings in this specialist jurisdiction in favour of defamation claims in the District Court, the Board of Trustees now seeks costs of \$13,088.80, being 66 percent of its actual legal costs and disbursements of \$399.62.

[2] I accept the Board's submission that it has acted reasonably in the proceeding including by not opposing a challenge by hearing de novo despite the contents of the good faith report of the Employment Relations Authority and also by raising properly and expeditiously jurisdictional problems with the statement of claim and attempting to resolve these so that Mr Clark's claim could be determined on its merits in this Court.

[3] The Board has, since July 2008, incurred legal fees (including GST) of almost \$20,000. These and supporting narrative have been supplied to the Court as appropriate and I accept that they are fees and disbursements reasonably incurred in all the circumstances.

[4] Mr Clark has filed detailed submissions opposing the defendant's application for costs. Although I have read these closely and repeatedly, some are irrelevant to the matter now to be determined and others are difficult to understand. However, it appears that Mr Clark's position is that the parties should each meet their own costs and that, for reasons connected with the conduct of the litigation by the Board in this Court and in the Authority, it should not be entitled to an award of costs against him.

[5] Mr Clark also challenges the reasonableness of the costs claimed by the Board by reference to the relatively short time spent in the hearing in this Court.

[6] Mr Clark advances his opposition to an order for costs on five main premises.

[7] First, he says that it was the Board that brought the matter before the Employment Court so that it should be responsible for costs because it was unsuccessful in its pleadings. I do not accept this submission. Mr Clark's proceedings sought to challenge his treatment by his employer and were not instituted by the Board. It is true that it has advanced the position that those challenges should more properly be heard in the specialist employment jurisdiction rather than in defamation proceedings in the District Court but that is not the same thing as instituting and prosecuting the proceedings in this jurisdiction which Mr Clark has done.

[8] Next, the plaintiff has submitted that the Board's legal arguments were "*novel*". I reject this submission. The defendant's position has been consistent, readily explicable and entirely conventional, and no new propositions of law have been established in the proceedings.

[9] Third, Mr Clark claims that the Board did not act reasonably as it has asserted. In my assessment, the Board has acted very reasonably, more so than it

might have been expected to, whether by reference to obligations of good faith to a former employee or otherwise. The Board and its solicitors have impressed me by their scrupulous fairness to Mr Clark in allowing him opportunities to have the merits of his dissatisfactions aired in an appropriate forum in circumstances where he was at risk of having those entitlements severely constrained or negated.

[10] Penultimately, Mr Clark says that the Board has benefited from an award of costs in the District Court because of inconsistent determinations by the Employment Relations Authority in October 2007 and March 2008. I do not accept this submission. Any award of costs made by the District Court related to proceedings in that forum and will not affect the Board's claim in this. In any event, I do not accept that the Authority's determinations have been inconsistent and have resulted in Mr Clark incurring costs in the District Court.

[11] Finally, Mr Clark submits that the defendant's claimed costs are "*excessive for a short hearing*". Although the single hearing in this Court was relatively short, to isolate costs to time spent in the courtroom would ignore artificially the very significant time that I accept has been put into pleadings, written submissions, and other out-of-court attendances reasonably and properly incurred by the defendant.

[12] Mr Clark submits that he should be given credit for conducting himself responsibly in the litigation. He offered to the defendant, by letter dated 30 April 2009, to withdraw his claims before the District Court and to bring his complaints before the Employment Court as employment problems. That was on condition that the Board agreed immediately to retract a report sent to the New Zealand Teachers Council in March 2006, together with attached documents, and to ask the Teachers Council to remove conditions of censure imposed by its Complaints Assessment Committee. As further conditions, Mr Clark proposed that the Board should offer him an unreserved apology for sending its report to the Teachers Council; that the Board's Brian Burnett retract and apologise for documents that he had signed and sent to the Teachers' Council; that the Board was to "*Have the New Zealand [School] Trustees Association apologise for their part in advising the Defendants (sic) during the process*"; that a range of documents listed was to be removed from his file at Dargaville High School; that the Board was to prepare a mutually agreed

job reference including some specified items; and the Board would withdraw claims of costs in the District and Employment Courts.

[13] I do not accept that this was, in all the circumstances, a reasonable offer, the absence of acceptance by the Board of which ought to count against its claim in costs. Although the evidence has not been heard by this Court, in reliance on the findings of the Authority and on the pleadings on the challenge, I would conclude that the Board could not have fulfilled at least some of the terms of the offer. These include, in particular, seeking to retract a report that it was obliged by statute to make to the Teachers Registration Board. Other conditions of the settlement offer appear to be of at least dubious reasonableness in all the circumstances.

[14] Next, Mr Clark submits that the defendant should be disqualified from having costs because, through counsel, it misled the Employment Relations Authority about the availability of significant witnesses to attend an Authority investigation.

[15] I have assessed such evidence as has been provided in support of, and in opposition to, this submission. I am unable to find, to an appropriately stringent standard commensurate with such a serious obligation, that the Board, through counsel, deliberately misled the Authority and thereby disadvantaged Mr Clark. Indeed it is more probable in my conclusion that the Board, through counsel, conveyed accurately to the Authority the state of availability or potential availability of the witness at the time this was discussed. It was not to mislead the Authority deliberately that arrangements for the witnesses' availability, that turned on a school programme, changed but by which time it was too late to bring on the Authority's investigation meeting to suit Mr Clark.

[16] The plaintiff appears to take the view that the defendant and/or the Court and/or the Employment Relations Authority were responsible for the presence of his proceedings in these specialist institutions. That is not so. The forum of a proceeding is at the election of the party that commences it, subject to laws that govern these things. Those rules must be enforced by the courts and may be on application of others affected by the proceedings. This Court's last judgment has set out the juridical basis for Mr Clark's dispute with the Board being in the specialist

employment forums and I will not repeat what is in the judgment in that regard. The abandonment of his proceeding here and election to sue in the District Court is Mr Clark's decision.

[17] The defendant is entitled to a reasonable contribution to its legal costs incurred reasonably in this litigation. The usual starting point for assessing these is at the figure of two thirds of actual costs reasonably incurred: see *Binnie v Pacific Health Ltd*¹. There is no ground to either increase or decrease that assessment point and I therefore award the defendant costs of \$13,088.80 and disbursements of \$399.62.

GL Colgan
Chief Judge

Judgment signed at 11 am on Wednesday 9 December 2009

¹ [2002] 1 ERNZ 438 (CA)