

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

CA 185A/10  
5070822

BETWEEN

MARY O'NEILL  
Applicant

A N D

THE VICE CHANCELLOR  
UNIVERSITY OF OTAGO  
Respondent

Member of Authority: James Crichton

Representatives: Anna Irving, Counsel for Applicant  
Barry Dorking, Counsel for Respondent

Submissions Received: 18 October 2010 from Applicant  
4 November 2010 from Respondent

Determination: 30 November 2010

---

**COSTS DETERMINATION OF THE AUTHORITY**

---

**The application for costs**

[1] By determination dated 12 May 2010, the Authority dealt with the employment relationship problem between these parties and while rejecting the majority of Ms O'Neill's claims did conclude that she had been disadvantaged unjustifiably in her employment. Costs in the substantive matter were reserved.

[2] The parties sought to resolve costs between them but that resolution process was overtaken by the respondent University's decision to apply to the Authority to reopen its investigation. The second determination of the Authority is dated 17 September 2010 and it declines the University's application to have the matter reopened. Costs were again reserved by the Authority.

[3] The short point is that costs have yet to be determined in relation to either of the Authority's fixtures and in the absence of agreement from the parties, this determination deals with that issue.

### **The claim for costs**

[4] Ms O'Neill seeks a total of \$11,596.70 from the University as a contribution to her costs. This is broken down as follows:

- (a) \$7,500 legal fees for the substantive hearing;
- (b) \$70 filing fee;
- (c) \$3,375 legal fees for defending the application to reopen;
- (d) \$651.70 legal fees in respect of the costs application itself.

[5] Conversely, the University proposes a contribution to Ms O'Neill's costs in the range between \$1,820 and \$2,570 being a contribution of \$1,000 to the application to reopen and the balance (inclusive of the Authority's filing fee) is a contribution to the substantive application.

[6] It follows that the real area of difference between the parties is the extent to which Ms O'Neill is entitled to a costs award in respect to the substantive matter. While Ms O'Neill's submissions proceeding on the footing that she was found to have suffered a personal grievance by reason of unjustified actions of the University causing her disadvantage, the University's submissions point out that Ms O'Neill's extensive claims against the University were comprehensively rejected by the Authority and the successful personal grievance was found to have been made out as a consequence of a claim Ms O'Neill did not even make. Indeed, the University goes so far as to state *it is stretching the meaning of the word to consider she (Ms O'Neill) had succeeded in her claim in any meaningful way; it was the respondent (the University) which succeeded in defending itself against claims which were serious but which were not reasonably arguable.*

[7] In the reopening application, the University argued unsuccessfully that the Authority had determined to allow a different sort of personal grievance from the one pleaded but that in doing that it had exceeded its powers. That submission was not accepted by the Authority in the reopening application, the Authority reasoning being

that what had happened in the substantive decision was that the member hearing the original application had determined that on the facts before him, the University had not fulfilled its obligations to Ms O'Neill as a fair and reasonable employer ought.

[8] That said, it is nonetheless a reasonable observation that the claim that Ms O'Neill was "successful" in her substantive application, rather over eggs the pudding. It would I consider be more accurate to say that Ms O'Neill was substantially unsuccessful but that she had a modicum of success in respect to a very small aspect of the University's management of her employment relationship problem.

[9] It follows that I am not persuaded that it is correct for Ms O'Neill to claim, as she does, that she was successful in both of her proceedings in the Authority. There is no doubt that she was completely successful in her resistance of the application to reopen and she is entitled to costs being fixed in her favour on usual principles for that fixture. I hold that the position is otherwise in respect to the substantive application where a proper analysis of the outcome is that Ms O'Neill was substantially unsuccessful.

[10] Two final matters needs to be dealt with from the submissions of counsel for Ms O'Neill. The point is made that, unless Ms O'Neill receives a substantial costs award, the effect of her *successes* will be rendered nugatory. The first point to observe here is that, for reasons I have just made clear, I do not accept that Ms O'Neill was substantially successful in the principal fixture before the Authority and it follows that in respect of that fixture, she must take the usual litigation risk that applies to all parties who make use of the State's resolution system.

[11] It is not a function of a costs award to rebalance a perceived unfairness in the outcome of substantive proceedings; nor is it the function of a costs award to penalise or punish the other party. Ms O'Neill must accept the reality that her principal application to the Authority was fundamentally unsuccessful and she cannot now look to the University who were basically successful in resisting the application, to make good her losses by now contributing significantly to her costs.

[12] Finally, I note one unusual aspect of this case. There was, I am satisfied, an unreasonable delay in concluding the Authority's original investigation and issuing the substantive determination. That delay, I am sorry to record, rests entirely with the

Authority. It would be completely inappropriate for Ms O'Neill to be allowed to rely on that delay to enhance the contribution to costs made by the University. As the delay was the fault of neither party, it ought not to sound in costs.

### **Determination**

[13] The legal principles in respect to costs fixing in the Authority are well settled and do not need to be recited again here. Both submissions refer to those principles appropriately.

[14] Costs in respect to the application to reopen are uncontroversial. Ms O'Neill was completely successful. Costs should follow the event. She is entitled to an award of costs fixed on the Authority's usual principles. There is no reason in the present case to depart from the notional daily tariff approach frequently used by the Authority and approved by the Employment Court. If the matter had proceeded to an actual hearing, rather than having been dealt with on the papers, it would have been dealt with in half a day. The notional daily tariff continues to move with inflation and the cost of legal services as with other costs. The notional daily tariff is, I consider, around \$3,000. It follows that an appropriate award for Ms O'Neill for the successful defence of the application to reopen is \$1,500.

[15] As to the substantive application, for reasons I have already identified, Ms O'Neill can only expect a token contribution. I think the proper course is to award her a token sum of \$1,000 as a contribution to her modest success in the substantive matter. It offends logic and common sense that Ms O'Neill should receive the same level of costs as she might have done if she had been wholly successful: *Blue Star Print Group (NZ) Ltd v. Mitchell* [2010] NZCA 385 considered.

[16] In summary then the University of Otago is to pay to Ms O'Neill the sum of \$2,500 as a contribution to her legal costs.

James Crichton  
Member of the Employment Relations Authority