

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

AA 243A/10  
5112663

BETWEEN                      RAYMOND KEVIN  
   RICHARDS  
   Applicant

AND                              THE VICE CHANCELLOR OF  
   THE UNIVERSITY OF  
   WAIKATO  
   Respondent

Member of Authority:        James Wilson

Representatives:            Joanne Watson for the applicant  
   David France and Catherine Stewart for the respondent

Costs submissions  
received:                      2 June 2010 from the applicant  
   21 June 2010 from the respondent

Determination:              29 July 2010

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**COSTS DETERMINATION OF THE AUTHORITY**

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**The substantive determination**

[1]     In a determination dated 24 May 2010 (AA 243/10) Authority member Leon Robinson found that:

*[62] ... the University breached the study leave policy in relation to Dr Richards by failing to assess his study leave report in accordance with clause 29 of the study leave policy.*

*[63] I decline to make findings that the university breached its obligations to act in good faith through the chairperson's conduct. I decline to make any order in this respect*

[64] *I find that ... Dr Richards has a personal grievance for unjustified disadvantage.*

[65] *I am not prepared to make an order that the University reinstate Dr Richards' ability to accrue study leave from the date it determined he was unable to accrue study leave.....*

Mr Robinson went on to order the University to pay Dr. Richards \$2000 in compensation as a result of his personal grievance.

[2] In that determination Mr Robinson reserved the question of costs and invited the parties to resolve the matter between them. Unfortunately they have been unable to do so and Ms Watson, on behalf of Dr Richards, has now filed a memorandum seeking costs of \$12,000. Mr France, on behalf of the University has filed submissions in reply proposing an award of costs of between \$3000 and \$4000.

[3] Mr Robinson is no longer a member of the Authority and the parties submissions have been referred to me for determination

### **The submissions**

[4] Ms Watson says that Dr. Richards indicated legal costs of \$15,940 and a \$70 filing fee, and is seeking "full recovery" of those costs which, she says are reasonable given the amount of evidence, the three days of investigation meeting, the post meeting requirement to provide additional affidavit evidence and correspondence and legal submissions. Ms Watson sites the employment Court decision in *PBO Ltd (formally Rush Security Ltd) v Da Cruz* [2005] ERNZ 808 as setting out the principles to be applied by the Authority when making an award of costs. She says that the notional daily rate often applied in the Authority may not be sufficient in this instance. She points to what she refers to as additional post investigation work arising from the respondents accusations made during the investigation meeting. She says that this conduct of the respondent unnecessarily added to Dr Richards costs.

[5] Ms Watson says that Dr Richard should be awarded at least \$9000 for the three days of investigation meeting plus an additional \$1868 for the additional week in preparing affidavit evidence required post the investigation meeting. She also says that Dr Richards incurred another \$1200 for the preparation and filing of legal submissions which were necessarily considerably longer than those usually given and were required 12 months after the Authority had received additional information from both parties and more than 18 months after the Authority's initial investigation meetings. In total Ms Watson says that Dr Richard should receive costs in the order of \$12,000.

[6] For the University Mr France also cites *Da Cruz* as setting out the appropriate principles to be applied. However Mr France argues that Dr Richards was successful in only two of the seven claims he made against the University - he was unsuccessful in claiming two separate breaches of good faith, a breach of the University's protected disclosures policy, a breach of the Protected Disclosures Act and a claim under the Human Rights Act that he had been victimized because he had made a protected disclosures claim. He argues that at least one of the three investigation days was taken up with evidence and questioning regarding these unsuccessful claims. He also says that the University was put to unnecessary expense in having to apply to the Authority to have the University Chancellor removed as a respondent.

[7] Mr France says that rather than the University it was the applicant who sought to raise additional issues following the investigation meeting and that this request resulted in additional expenditure for the University. He also says that Authority's request for further submissions 18 months after the investigation is not a factor that can be attributed to the University.

[8] Mr France also argues that had Dr Richards claim focused on the key issue (whether the University correctly applied its study leave policy) the investigation would have taken one day. He says that while Dr Richards was entitled to pursue numerous allegations as he chose the costs award should recognize that the majority of Dr Richards claims were not determined in his favour and that cost should be significantly less than an award based on the usual daily tariff for a three-day investigation meeting.

## Discussion and determination

[9] I am not convinced that this is a case in which the Authority should diverge from its usual practice in the award of costs. As Mr France has quite rightly commented Dr. Richards was entitled to pursue a range of claims against the University. On the other hand in pursuing the multiplicity of claims he accepted the risk that, should you not be successful he may be required to meet at least some of costs incurred by the University. As the Court said in *Da Cruz*

*We hold that these principles are appropriate to the Authority and consistent with its functions and powers. They do not limit its discretion and proper application of them should ensure that each case is considered in the light of its own circumstances. While these general principles are applicable also to the Court, the Authority is not bound by the Binnie principles which extend the range of costs which the Court may award beyond what could reasonably be labelled “modest.” (My emphasis)*

[10] This is a case where it is appropriate to use my discretion to balance the arguments of the parties and reach a conclusion which is fair in all the circumstances. Having considered the principles set out in *Da Cruz*, the Authority’s usual daily tariff, the degree of “success” of the respective parties, the time taken by the Authority in its investigation and the conduct of the parties during that investigation, I have reached the conclusion that a fair award of costs in this case is \$7500.

**[11] The University of Waikato is ordered to pay Dr Richards the sum of \$7500 (this sum includes reimbursement of the \$70 filing fee) as a contribution towards his costs.**

James Wilson

Member of the Employment Relations Authority