IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

[2014] NZERA Christchurch 16
5416219

	BETWEEN	KERRY KIRKLAND Applicant
	A N D	THE VICE-CHANCELLOR OF THE UNIVERSITY OF OTAGO Respondent

Member of Authority:	David Appleton
Representatives:	Len Andersen, Counsel for Applicant Barry Dorking, Counsel for Respondent
Submissions Received:	6 and 16 January 2014 from Applicant 15 January 2014 from Respondent
Date of Determination:	5 February 2014

COSTS DETERMINATION OF THE AUTHORITY

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[1] By way of a determination dated 3 December 2013, the Authority determined that Dr Kirkland had been unjustifiably dismissed and had suffered an unjustified disadvantage in her employment, for which she was awarded remedies which were reduced by 25% for her contribution to the situation giving rise to the personal grievances. Costs were reserved, and the parties have since been unable to agree how they should be dealt with between them.

[2] Dr Kirkland, through her counsel, seeks an order that the respondent pays her legal costs of $26,099.23 (including GST and disbursements) on an indemnity basis. Her justification is as follows:

a. The university did not make available to Dr Kirkland a copy of the Sim Report until after the Authority had directed it to do so;

b. An issue arose as to whether Mr Seales (the respondent's HR Director) had asked staff whether they were to give evidence;

c. It was a daunting task to fight an organisation such as the University;

d. The Sim report identified an unsatisfactory working environment at the university and it would send a wrong message to a powerful employer if it could spend a considerable sum fighting one personal grievance case;

e. The university did not follow procedures set out in Dr Kirkland's employment contract regarding the assessment of her medical capacity to work;

f. The university's refusal to discuss the issue of costs;

g. The complexity of the matter; and

h. Dr Kirkland's legal costs exceed the remedies awarded to her.

[3] The respondent rejects these assertions and submits that:

a. Dr Kirkland had considered challenging the Authority's determination, and so was not *the successful party*;

b. There was nothing unusual about the case to justify departing from the usual daily tariff system;

c. The bulk of the time spent in the investigation meeting involved investigating allegations in respect of which Dr Kirkland was unsuccessful;

d. The 25% contribution finding should be reflected in any award of costs; and

e. The respondent did not fail to discuss the issue of costs.

[4] In accordance with these submissions, the respondent argues that costs should lie where they fall or, that the daily tariff should be applied as a starting point, with a significant reduction.

[5] The principles to be applied by the Authority in fixing an award of costs are well known, but bear repeating here. They derive, of course, from the Employment Court case of *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808.

a. There is a discretion as to whether costs would be awarded and what amount.

b. The discretion is to be exercised in accordance with principle and not arbitrarily.

c. The statutory jurisdiction to award costs is consistent with the equity and good conscience jurisdiction of the Authority.

d. Equity and good conscience is to be considered on a case by case basis.

e. Costs are not to be used as a punishment or as an expression of disapproval of the unsuccessful party's conduct although conduct which increased costs unnecessarily can be taken into account in inflating or reducing an award.

f. It is open to the Authority to consider whether all or any of the parties' costs were unnecessary or unreasonable.

g. That costs generally follow the event.

h. That without prejudice offers can be taken into account.

i. That awards will be modest.

j. That frequently costs are judged against a notional daily rate.

k. The nature of the case can also influence costs and this has resulted in the Authority ordering that costs lie where they fall in certain circumstances.

[6] The starting point is that costs normally follow the event. Whilst the respondent argues that, by debating whether to challenge the determination, Dr Kirkland cannot be characterised as the successful party, I cannot accept this argument. Dr Kirkland can, at most, be characterised as not having been wholly successful, in that not all of her allegations succeeded. She did, however, succeed in a

significant part of her application, her unjustified dismissal grievance. In addition, a successful party can, of course, challenge a determination if they are dissatisfied with findings of fact, or the level of remedy awarded, or for other reasons.

[7] Accordingly, I am satisfied that Dr Kirkland was the successful party and so the principle that costs follow the event should apply in this case.

[8] Turning to Dr Kirkland's arguments as to why an indemnity approach should be adopted in fixing the amount of costs to be awarded, I reject them for the following reasons.

The respondent's initial refusal to produce the Sim report

[9] Even though the Authority had to direct production of this report, the respondent's reluctance to produce it voluntarily was not arbitrary, capricious or unreasonable. On balance I considered that it could be relevant, but required some careful analysis of the document in reaching that conclusion. I therefore do not accept that the respondent acted unreasonably in this regard.

[10] Furthermore, if the report had been produced voluntarily, Dr Kirkland's counsel would still have had to read and consider it.

Mr Seales allegedly asking staff whether they were to give evidence

[11] This matter took up a small amount of time in the investigation meeting, and the Authority did not find it necessary to make a formal finding on the matter. I am not satisfied that this issue warrants the imposition upon the respondent of a greater contribution to costs than would otherwise be the case.

It was a daunting task to fight an organisation such as the University

[12] Whilst this may well be the case, it is the same for most individuals bringing a claim against their former employer. However, I do not find that the respondent acted unreasonably in its defence of the allegations or the conduct of the proceedings in the Authority.

[13] Whilst I do have sympathy for Dr Kirkland, she is an educated and intelligent person with experience of the business world, and who is likely to have been less

daunted than many individuals who pit themselves against large former employers before the Authority.

[14] I do not believe that this argument warrants the imposition upon the respondent of a greater contribution to costs than would otherwise be the case.

Sending a wrong message

[15] Again, it is often the case that resource-rich employers defend proceedings against them with vigour, engaging senior counsel to assist them. This is their right, just as Dr Kirkland had the right to utilise the services of senior counsel. It would offend against the principle of even handedness for the Authority to award increased costs against a respondent simply because it had greater resources at its disposal, or because it reasonably chose to defend arguable claims against it.

[16] I do not believe that this argument warrants the imposition upon the respondent of a greater contribution to costs than would otherwise be the case.

The university did not follow procedures set out in Dr Kirkland's employment contract

[17] This is simply not a matter that should be reflected in costs.

The university's refusal to discuss the issue of costs

[18] It appears that this assertion stems from a technical failure of electronic communication between the parties' representatives. I am satisfied that the respondent did attempt to engage in email discussions with Mr Andersen on the question of costs, having seen a comprehensive email from Mr Dorking to Mr Andersen dated 13 December 2013.

The complexity of the matter

[19] I do not consider that this matter was more complex than many unjustified dismissal and unjustified disadvantage/alleged bullying matters normally before the Authority. I do not believe, therefore, that the matter justified greater preparation than is normal for a two day matter and so do not agree that a greater contribution to Dr Kirkland's costs are warranted in respect of this submission.

Dr Kirkland's costs exceed the remedies awarded to her

[20] This raises two issues; the amount of the remedies awarded and the costs Dr Kirkland has incurred. In respect of the remedies awarded, Dr Kirkland had the right to challenge the award in the Employment Court. It is unfortunate that her costs exceed the remedies awarded, but that alone cannot justify imposing greater costs on the respondent than would usually be the case.

[21] As for the amount of the costs she faces, unfortunately, Mr Andersen provides no breakdown of these costs whatsoever, save to say that his rate is $350 an hour and that of his graduate assistant, $100 an hour. In the absence of any further detail, I am simply unable to assess whether these costs incurred are reasonable or not, which the Authority has the right to do pursuant to the *Da Cruz* principles. In the absence of such information, I cannot justify imposing on the respondent a greater contribution than would otherwise be the case.

[22] Turning to the respondent's arguments, not already addressed above, I find as follows:

The bulk of the time spent in the investigation meeting

[23] Whilst I agree that the bulk of the time spent in the investigation meeting involved investigating allegations in which Dr Kirkland was unsuccessful, Dr Kirkland did not act unreasonably in bringing these allegations before the Authority, I believe. They warranted investigation, and I do not agree that the contribution to her costs should be reduced in light of this argument.

The 25% contribution finding should be reflected in any award of costs

[24] Dr Kirkland's contribution has already been reflected in the reduction in her remedies, and it is not appropriate to further penalise her by reducing her costs in respect of contribution.

Summary

[25] All in all, I do not find that there is any cogent reason to either award greater costs than would be available under the normal daily tariff approach, or to reduce the costs awarded under that approach. As the investigation meeting lasted the best part

of two complete days, and the normal tariff is $3,500 a day, I award Dr Kirkland the sum of $7,000 as a contribution towards her legal costs.

Order

[26] I order the respondent to pay to Dr Kirkland the sum of $7,000 as a contribution towards her legal costs.

David Appleton
Member of the Employment Relations Authority