

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2015] NZERA Christchurch 139
5423706

BETWEEN

LISA TURNER
Applicant

AND

VICE-CHANCELLOR OF THE
UNIVERSITY OF OTAGO
Respondent

Member of Authority: Christine Hickey

Representatives: Warren Forster, Counsel for the Applicant
Barry Dorking, Counsel for the Respondent

Costs submissions received: From the applicant on 16 and 17 July 2015
From the respondent on 8 July 2015

Determination: 16 September 2015

COSTS DETERMINATION OF THE AUTHORITY

A. The Vice-Chancellor of the University of Otago must pay Lisa Turner \$10,000 towards her legal costs and reimburse her the \$71.56 filing fee.

[1] On 10 June 2015 I issued a determination that Dr Turner was unjustifiably dismissed and that the Vice-Chancellor of the University of Otago (the University) must pay her \$3,717.00 gross in lost wages and \$5,000 in compensation once Dr Turner's 50% contribution was factored in. I reserved my decision on legal costs.

[2] Generally, costs follow the event and on the face of it Dr Turner being the successful party could be expected to recover a reasonable contribution towards her costs from the University. However, both parties have applied for costs. The University claims \$30,000 which it says is only a fraction of its legal costs. Dr Turner claims either \$12,250 or \$18,375 if I accept her submissions that a 50% increase in the daily tariff is justified.

The University's position

[3] The University's application was received first. It argues that although I found that Dr Turner had been unjustifiably dismissed and awarded her a total of \$8,717 Dr Turner did not actually succeed in her claims. The University came to that view for the following reasons:

- One of the two reasons for the finding of unjustified dismissal was not argued by Dr Turner.
- Dr Turner's claims about information were not upheld.
- The claims of unjustified disadvantage were dismissed.
- The claim that the University could not proceed with disciplinary action because of a dispute about the meaning of the contract was dismissed.
- The claim that Dr Turner was discriminated against because of her involvement in union activities (her earlier raising of an unjustified disadvantage grievance) was dismissed.
- The claim that disciplinary action against Dr Turner had been triggered by her grievance of unjustified disadvantage was dismissed.
- A declaration that the video-based teaching was not one of Dr Turner's contractual requirements was refused.
- A decision that Dr Turner was guilty of serious misconduct was a view the University was entitled to reach.
- Certain criticisms were made of Dr Turner's conduct of her disagreements with the University while she remained employed.
- Dr Turner's claim for reinstatement was only withdrawn at the investigation meeting when the Authority pointed out that she was already in full-time employment.
- Two other claims were not within the Authority's jurisdiction.

[4] The University submits that effectively it had more success than Dr Turner in that it had greater success in defending Dr Turner's claims than she did in succeeding in one finding of unjustified dismissal. Therefore, it argues that the presumption on costs should be reversed in its favour although it concedes that some recognition

should be given for Dr Turner's success and proposes that a \$3,500 credit from the notional daily tariff of \$12,250 be made in her favour.

[5] However, the University then submits that a higher than usual daily tariff should be awarded to it because of criticisms it makes of Dr Turner's conduct of the case both before and at the investigation meeting. It argues that Mr Forster's actions unnecessarily increased its own costs and claims full costs should be paid for what it says were fees chargeable for unnecessary work before the investigation meeting.

[6] In addition the University submits that it made a reasonable Calderbank offer to settle for \$6,000¹ in November 2014 and again at the beginning of the first day of the investigation meeting. It says that despite the fact that it was for less than Dr Turner achieved, if she had accepted that offer in November 2014 both parties would have been better off in that significant costs would have been saved.

Dr Turner's views

[7] Mr Forster's submissions suggest a simple application of the daily tariff approach leading to costs payable by the University to Dr Turner of \$12,250. Alternatively, he invites me to consider an uplift in the tariff approach of 50%, in Dr Turner's favour, because of the University's dismissive approach to the applicant's attempts to meet and the University's aggressive approach.

[8] Dr Turner submits that the letter the University refers to as a Calderbank offer was not specific enough to amount to a Calderbank letter. In particular, the offer was for:

... the amount of six thousand dollars in settlement of Dr Turner's claims including the claim of compensation, lost wages, and contribution to legal costs.

[9] The costs portion of the \$6,000 was not separately specified. In addition, the offer was made three weeks after the matter was originally set down for hearing² and according to Mr Forster did not reflect the pre-meeting costs already incurred.

¹ Offered as a combined amount of compensation, lost wage and costs.

² The first meeting dates were vacated because of the filing of new evidence from six witnesses by Mr Forster close to the date of the meeting's commencement.

[10] Mr Forster says that the offer also included the settlement of other possible litigation before the Human Rights Review Tribunal that was already in train by way of a complaint to the Privacy Commissioner about how Dr Turner's private information prior to dismissal was handled by the University. Therefore, he says it was not reasonable to expect Dr Turner to accept the offer in full and final settlement of all matters that arose out of her employment with the University.

[11] Mr Forster also submits that Dr Turner achieved a greater dollar amount than was offered in the alleged Calderbank letter meaning it cannot be relied on to reverse the usual presumption of costs.

[12] Mr Forster then goes on to criticise the University's conduct of the proceedings both before and at the investigation meeting.

Determination

[13] I do not agree that the offer to settle made by the University means that the presumption that Dr Turner should be able to recover a reasonable contribution to her costs should be reversed. That is for the principal reason that the amount offered was less than what Dr Turner was awarded, particularly taking into account that the settlement offer apparently included an amount for costs. I do take into account that an offer to settle was made by the University, and another was made at the beginning of the investigation meeting. However, they are merely one consideration I take into account in exercising my discretion.

[14] Nor do I agree that the University was more successful than Dr Turner in terms of the claims. Dr Turner's principal claim was that of unjustified dismissal and it was important to her not only to receive a finding in her favour but also to be able to put her case to the Authority and have the University answer her claims. Although the University may consider that the substantive determination did not deliver Dr Turner any vindication it is clear that is not her view.

[15] It is not relevant that the grounds on which I found the dismissal to be unjustified were not specifically argued by Dr Turner. That can be the case in the Authority as I apply statutory tests and undertake an investigative process that does not limit me to matters argued by the parties. Mr Seales' evidence about how he

made the decision to dismiss and his interaction with the Vice-Chancellor about that decision was only given under questioning in the investigation meeting as his witness statement did not include that detail. In the circumstances no criticism can be made of Dr Turner for not raising that as a concern when there was no evidence in relation to it prior to the investigation meeting.

[16] I do not accept that the conduct of Dr Turner's case overall was so significantly outside normally accepted practice to reverse the usual direction of the flow of costs.

[17] However, there is an aspect of how Dr Turner's case was approached that I agree has unnecessarily increased costs for the University beyond what might be expected in a relatively routine case such as this one. The original dates for the investigation meeting were 20 and 21 October 2014. A timetable was set by the Authority for the provision and exchange of witness statements. The first date set for the applicant's statements was 20 August and for the respondent's statements was 8 September 2014. The applicant's three witness statements were not provided until 25 August 2014. With them was a memorandum stating further evidence would be provided *from the Applicant's peers regarding the impact upon the Applicant of the Respondent's decision*. Mr Forster also stated that there were still problems with the provision of information by the respondents. Mr Forster indicated that he would not be back at work until 1 October 2014.

[18] Upon receiving a memorandum from Mr Dorking in response to Mr Forster's memorandum I issued a direction that the respondent had an extension of time to file its briefs in response to those provided late by Mr Forster. I also directed any further witness statements were to be filed by 10 October and that Mr Forster needed to supply a specific and clear list of what other documents the applicant says exist and how they were relevant to the proceedings, also by 10 October.

[19] The respondent's briefs of evidence were supplied on time in line with the extension granted.

[20] Another teleconference was arranged for 9 October and just prior to that Mr Forster provided a memorandum indicating that he was filing briefs of evidence for six more witnesses, which were attached, and included a 20 page brief from

Lianne Smith, a former HR employee of the respondent. Ms Smith's evidence had not been signalled earlier. It made a number of allegations about record-keeping by the University. Mr Forster also made various objections to the content of the respondent's witness briefs and some documents included in the bundle provided by the respondent.

[21] Mr Forster also made allegations that there had been spoliation of evidence by the University, an extremely serious allegation.

[22] On 15 October the respondent's counsel applied for an adjournment of the matter on the basis that the University needed an opportunity to properly consider the new evidence and to prepare evidence in response as necessary, particularly to Ms Smith's statement. In addition, counsel raised the very sensible point that with 13 witnesses two days was unlikely to be long enough to complete the meeting.

[23] Mr Forster responded in writing arguing against an adjournment. There was a written response to that from Mr Dorking and another in response from Mr Forster.

[24] On 16 October I issued a minute vacating the meeting dates largely because of the late provision of witness evidence and also because of the fact that two days would no longer be enough time. In addition, I considered that the University should be afforded time to respond to the allegation of spoliation.

[25] The matter proceeded on 16 February 2015 and took until the early afternoon of 19 February to hear with written submissions filed later. As it happened by then Ms Smith was unwell and did not appear to give evidence. I decided to exclude her evidence.

[26] On the first day of the investigation meeting the claim for reinstatement was withdrawn.

[27] Mr Dorking submits that preparation for response to Ms Smith's brief caused fees of at least \$7,378 to be amassed. In addition, the respondent had prepared its final submissions before receiving Ms Smith's brief and had to amend those as well as prepare cross examination of Ms Smith. Mr Dorking submits that amassed a further \$2,220 in fees.

[28] The respondent submits that the withdrawal of the reinstatement claim not only rendered a portion of Professor Glue's and Dr Adams' evidence unnecessary it meant that submissions already prepared on the issue of reinstatement were unnecessary. Mr Dorking submits that caused a further \$1,480 in wasted costs. The respondent suggests that a total of \$13,000 in costs should be reimbursed in full

[29] I do not accept Mr Dorking's submission that other behaviour in the way Mr Forster conducted Dr Turner's case at the investigation meeting added unnecessary costs for the respondent.

[30] Mr Forster's submissions arguing for an uplift in the daily tariff in Dr Turner's favour are that the University was unnecessarily aggressive in its dealing with Dr Turner while she was still employed and leading up to the investigation meeting. I do not accept that the University's approach should lead to any increase in the daily tariff payable to Dr Turner.

Conclusion

[31] The starting point for the amount of costs to be paid to Dr Turner is \$12,250. I accept that the late provision of evidence leading to the vacation of the original dates did add unnecessary costs for the respondent. However, I do not consider that the amount of \$13,000 should be paid to the respondent. I do not consider that the daily tariff should be increased in Dr Turner's favour either. Overall, I consider a decrease in the costs payable to Dr Turner of \$2,250 adequately recognises that. Therefore, I consider that the University must pay a contribution of \$10,000 to Dr Turner's legal costs, as well as reimbursing her \$71.56 for the filing fee.

Christine Hickey
Member of the Employment Relations Authority