

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2017] NZERA Wellington125  
3003932

BETWEEN THE VICE-CHANCELLOR OF  
VICTORIA UNIVERSITY OF  
WELLINGTON  
Applicant

A N D CAROLINE SAWYER  
Respondent

Member of Authority: Anna Fitzgibbon

Representatives: Mary Scholtens QC, and  
Geoff Davenport, Counsel for the Applicant

Kevin Smith, Counsel for the Respondent and Caroline  
Sawyer

Investigation Meeting: On the papers

Submissions Received: 10 November 2017 from Applicant  
29 November 2017 from Respondent

Date of Determination: 7 December 2017

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**COSTS DETERMINATION OF THE  
EMPLOYMENT RELATIONS AUTHORITY**

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**A The respondent is to pay a contribution towards the applicant's costs in the sum of \$ 4,500 together with the filing fee of \$71.56 within fourteen days of the date of this determination.**

**The substantive determination**

[1] By way of a determination dated 1 November 2017<sup>1</sup>, the Authority found that the respondent Ms Caroline Sawyer was to pay a penalty to the applicant in the sum of \$8,500

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<sup>1</sup> [2017] NZERA Wellington 106

within twenty eight days, in accordance with the orders set out in paragraph [65] of that determination.

[2] Costs were reserved and the parties were invited to exchange memoranda as to costs.

### **Submissions as to costs on behalf of the applicant**

[3] Counsel for the Vice-Chancellor of Victoria University of Wellington (“the University”) submits that the University’s total costs in pursuing its application for a compliance order and penalties against Ms Sawyer exceed \$10,000 plus GST. Copies of invoices are attached to the memorandum as to costs filed on behalf of the University.

[4] The University seeks the applicable daily tariff in the Authority of \$4,500 plus the filing fee. Counsel for the University accepts that the compliance order was granted by the Authority on the papers, and following the consent of Ms Sawyer. However, it submits that the penalties aspect of the claim which was not dealt with by the Authority in its consent determination was complex primarily because of the approach taken by Ms Sawyer.

[5] The University was required to file affidavits from three of its staff in order to bring evidence of breaches by Ms Sawyer of the compliance order. Ms Sawyer filed lengthy affirmations in the Authority which were confusing and, as observed in the Authority’s substantive determination<sup>2</sup>, were largely a submission in support of her view that the Record of Settlement (ROS) entered into between Ms Sawyer and the University on 24 July 2014 is not enforceable. The enforceability of the ROS was a matter which had been already determined by the Authority<sup>3</sup> and was subsequently the subject of a consent determination<sup>4</sup>.

### **Submissions as to costs by the respondent**

[6] The memorandum as to costs filed by Ms Sawyer is in reality, another submission by her that the ROS was not enforceable and the reasons for her view. Ms Sawyer also refers in detail to the affidavits filed on behalf of the University in support of its application for penalties and argues, among other things, that the affidavits contain

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<sup>2</sup> Ibid footnote 1at [34].

<sup>3</sup> [2016] NZERA Wellington 158.

<sup>4</sup> [2017] NZERA Wellington 14

spurious allegations. The Authority has investigated whether penalties were to be paid by Ms Sawyer and found they were<sup>5</sup>.

[7] Ms Sawyer was asked to make submissions as to the costs being sought by the University. The only submission relevant to this issue appears to be in the final sentence of her memorandum when she requests that the Authority not “reward” the Applicant costs. There is no reference to any of the principles to be applied by the Authority when considering whether costs should be awarded and the quantum of any such award.

### **Costs determination**

[8] The Authority’s power to award costs against a party is set out in clause 15 of schedule 2 of the Act which provides as follows:

15. **Power to Award Costs**

- (1) The Authority may order any party to a matter to pay to any other party such costs and expenses (including expenses of witnesses) as the Authority thinks reasonable.
- (2) The Authority may apportion any such costs and expenses between the parties or any of them as it thinks fit, and may at any time vary or alter any such order in such manner as it thinks reasonable.

[9] The Authority is bound by the principles set out in *PBO Ltd (formerly Rush Security Ltd) v. Da Cruz*<sup>6</sup> when setting costs awards. These include:

- There is discretion as to whether costs would be awarded and in what amount;
- The discretion is to be exercised in accordance with principle and not arbitrarily;
- The statutory jurisdiction to award costs is consistent with the equity and good conscience jurisdiction of the Authority;
- Equity and good conscience are to be considered on a case-by-case basis;
- 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;

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<sup>5</sup> Ibid footnote<sup>1</sup>

<sup>6</sup> [2005] 1 ERNZ 808.

- It is open to the Authority to consider whether all or any of the parties' costs were unnecessary or unreasonable;
- That costs generally follow the events;
- That without prejudice offers can be taken into account;
- That awards will be monitored;
- That frequently costs are judged against a notional daily rate;
- 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.

[10] First, I accept that it is appropriate for Ms Sawyer to make a contribution towards the University's costs on the basis that costs follow the event. The University was successful in its claim for penalties against Ms Sawyer.

[11] The starting point in awarding costs in the Authority where an investigation meeting has taken place is the daily tariff, which stands at \$4,500 for the first day and \$3,500 for each subsequent day for matters lodged after 1 August 2016 (which the University's statement of problem was).

[12] This matter was dealt with on the papers. However, the preparation for the matter in my view was the equivalent to the preparation required for a one-day investigation meeting. The Authority convened a telephone conference on 2 June 2017 at which the University was directed to adduce evidence in relation to the alleged breaches by Ms Sawyer of the compliance order. Ms Sawyer was directed to file any evidence in reply.

[13] The University filed affidavits from 3 staff members and Ms Sawyer filed two lengthy affirmations.

[14] I have reviewed the invoices filed on behalf of the University and am satisfied that it has incurred costs in excess of \$10,000 in pursuing its compliance order and penalties against Ms Sawyer.

[15] I consider that the sum of \$4,500 in costs sought by the University against Ms Sawyer to be appropriate in the circumstances. The University also seeks reimbursement

of the Authority's filing fee of \$71.56. These costs in my view are reasonable and modest in view of the time consuming matter.

**Order**

[16] I order Ms Sawyer to make a contribution towards the University's costs in the sum of \$4,500 together with the \$71.56 filing fee. These costs are to be paid to the University no later than 14 days from the date of this determination.

**Anna Fitzgibbon**  
**Member of the Employment Relations Authority**