

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

**[2017] NZERA Wellington 5
5637953**

BETWEEN

CAROLINE SAWYER
Applicant

AND

THE VICE-CHANCELLOR OF
VICTORIA UNIVERSITY OF
WELLINGTON
Respondent

Member of Authority: Eleanor Robinson

Submissions received: 30 January 2017 from Applicant
17 January 2017 from Respondent

Determination: 1 February 2017

COSTS DETERMINATION OF THE AUTHORITY

[1] By determination [2017] NZERA Wellington 158 it was determined that the Record of Settlement (ROS) entered into by the Applicant, Dr Caroline Sawyer, and the Respondent, the Vice-Chancellor of Victoria University of Wellington (VUW), was final and binding on the parties.

[2] Costs were reserved in that determination and VUW now seeks costs in that matter.

[3] The matter was determined 'on the papers'.

[4] Both parties have filed submissions on costs. Ms Mary Scholtens QC, on behalf of VUW, is seeking a contributory award of \$5,000.00 towards the actual costs which exceeded \$30,000.00. In addition, Ms Scholtens seeks an additional sum of \$800.00 in respect of preparation of the costs memorandum.

[5] On the basis that the Authority decides to adopt a lower starting point than the usual daily tariff rate in the Authority of \$4,500.00 in view of the matter was decided on the papers, Ms Scholtens submits that the following matters should be taken into consideration as

meriting an uplift from that starting point, making reference to the unusual amount of preparation which included:

- Consideration of the Applicant's statement of problem and supporting documents which ran to approximately 406 pages, despite having previously agreed the ROS with the Applicant, which was found by the Authority to be fully binding on the parties; and
- The need for Counsel to read and advise upon the Applicant's submissions of some 19 close-typed pages and a Chronology running to over 30 pages, both of which contained a significant number of assertions, views and opinions which were not relevant to the issues for determination by the Authority.

[6] Dr Sawyer submits that there should not be an award of costs where there has been no investigation, citing in support the determination *Ward v Mark Stevenson* [2016] NZERA Christchurch 62.

Principles

[7] The power of the Authority to award costs arises from Section 15 of Schedule 2 of the Employment Relations Act 2000 (the Act) which states:

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.

[8] Costs are at the discretion of the Authority, as observed by Chief Judge Colgan in *NZ Automobile Association Inc v McKay*¹.

[9] The principles and the approach adopted by the Authority on which an award of costs is made are well settled and outlined in *PBO Limited (formerly Rush Security Ltd) v Da Cruz*² as confirmed in *Fagotti v Acme & Co Ltd*.³

¹ [1996] 2 ERNZ 622

² [2005] 1 ERNZ 808

³ [2015] NZEmpC 135 at [114]

[10] It is a principle set out in *PBO Limited (formerly Rush Security Ltd) v Da Cruz*⁴ that costs are modest. Costs are also reasonable as observed by the Court of Appeal in *Victoria University of Wellington v Alton-Lee*⁵ at para [48] “As to quantification, the principle is one of reasonable contribution to costs actually and reasonably incurred.”

Determination

[11] Dr Sawyer has submitted that no costs should be awarded in this matter since there was no investigation. I note that:

- (i) the case Dr Sawyer has cited in support of this submission may be distinguished from this case because in that case there was no investigation due to the matter being withdrawn at the initial case management conference prior to the Authority taking any steps to investigate the claims made by the applicant, and
- (ii) a matter being determined ‘on the papers’ involves an investigation albeit based upon the statement of problem, the statement in reply, documents and submissions from the parties rather than in a face-to-face meeting.

[12] As observed, a tariff based approach is that usually adopted by the Authority, which has the discretion to raise or lower the tariff, depending upon the circumstances. Although this matter was decided ‘on the papers’ I consider in all the circumstances that the starting point for costs should be the notional daily tariff rate in the Authority. From that point I take into consideration the following observation by the Employment Court:⁶

.... The danger that tariffs may be unduly rigid can be avoided by adjustments either up or down in a principled way without compromising the Authority’s modest approach to costs.

[13] Costs normally follow the event and VUW is entitled to a contribution towards its costs. Although this matter was decided ‘on the papers’, it involved a level of complexity and consideration of the lengthy submissions and documents filed, in particular by the Applicant, which was above that usually encountered in a matter of this nature, and which I accept as having had an impact on costs.

⁴ [2005] 1 ERNZ 808

⁵ [2001] ERNZ 305

⁶ *PBO v Da Cruz* [2005] 1 ERNZ 808 at [46]

[14] Accordingly Dr Sawyer is ordered to pay VUW the sum of \$5,000.00 towards its legal costs.

[15] There is no additional costs award in respect of the costs submissions as the daily tariff rate has been set to encompass all aspects of the investigation process.

Eleanor Robinson
Member of the Employment Relations Authority