

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2018] NZERA Auckland 63
5638147

BETWEEN ERIC MESSICK
 Applicant

A N D THE VICE CHANCELLOR OF
 THE UNIVERSITY OF
 WAIKATO
 Respondent

Member of Authority: T G Tetitaha

Representatives: Applicant in person
 D France, Counsel for Respondent

Investigation Meeting: On the papers

Submissions Received: 14 December 2017 from Applicant
 8 January 2018 from Respondent

Date of Determination: 26 February 2018

**COSTS DETERMINATION OF THE
EMPLOYMENT RELATIONS AUTHORITY**

A. I order the Vice Chancellor of the University of Waikato to pay Eric Messick the sum of \$7,986.67 as a contribution towards his legal costs.

Employment relationship problem

[1] In a substantive determination dated 30 November 2017¹ Dr Eric Messick was found to be unjustifiably dismissed. The Vice Chancellor of the University of Waikato was ordered to pay three months' salary and \$20,000 compensation.

[2] Dr Messick seeks to recover his entire legal fees of \$13,406 GST inclusive and his filing fee of \$71.56. He also seeks interest upon the costs and his remedies ordered previously. The University denies this case warrants payment of Dr

¹ *Eric Messick v The Vice Chancellor of the University of Waikato* [2017] NZERA Auckland 370

Messick's full costs and interest upon costs and remedies already determined. It submits a cost award of \$4,000 only is appropriate.

Interest

[3] The power to award interest is discretionary.² Generally there is a requirement for a claim of interest to be set out in the Statement of Problem. That did not occur here. As a result, any claim for interest upon the remedies granted was not investigated.

[4] Even if it had been sought, I would not have granted interest on the remedies or costs here. This is because the delays in bringing the matter on for hearing that were not occasioned by actions of the University. I am not satisfied there is any evidential basis to justify a claim for interest even at this late stage.

Special damages

[5] Dr Messick's legal fees include \$1,426 for preparation and representation at mediation. Dr Messick now seeks to recover those fees as special damages.

[6] The fact of success does not of itself require an award of special damages for mediation costs. The remedy of special damages was also not sought in the statement of problem. As a consequence this matter was never investigated.

[7] Generally costs in mediation are not recoverable unless the mediation was directed by the Authority or Court and the unsuccessful party refuses to attend.³ From the file the parties attended mediation voluntarily in 2013 and again in 2016. I decline to award special damages of \$1,426 for mediation costs in the circumstances.

Indemnity costs?

[8] A successful party before the Authority should not expect payment of all of its legal costs. The Authority may award all of a party's costs or indemnity costs only in appropriate cases. The sort of circumstances in which such costs may be considered include particular misconduct that causes loss of time to the Court and to other parties; commencing or continuing proceedings for some ulterior motive; doing so in wilful disregard of known facts or clearly established law; and/or prolonging a case by

² Clause 11 Schedule 2 Employment Relations Act 2000.

³ *PRI Flight Catering Limited v Debasish Saha* [2015] NZEmpC 25 at [30] to [32].

advancing groundless contentions.⁴ Indemnity costs generally require exceptionally bad behaviour.⁵

[9] This matter does not meet the very high threshold required before indemnity costs may be imposed.

What is the starting point for assessing costs?

[10] Awards of costs in the Authority are based around a daily notional tariff for each hearing day. A daily notional tariff of \$3,500 applies to matters filed prior to 1 August 2017. This matter occupied four hearing days. Accordingly, the starting point for assessing costs shall be \$14,000. However, the applicant has only incurred costs of \$13,406 GST inclusive. Therefore the starting point shall be lower because costs awards cannot exceed the total amounts actually incurred.

[11] Costs awards are usually a contribution towards a party's reasonable legal fees. A 66 per cent contribution to the reasonable costs is normally regarded as fair and reasonable, but that percentage contribution may be adjusted upwards or downwards, depending on particular circumstances.⁶ Therefore the starting point for costs award in this case shall be two-thirds of the reasonable costs incurred.

[12] I do not accept that Dr Messick's costs incurred in instructing his first lawyer are unrecoverable in total. His first lawyer provided advice in preparation for his filing of the statement of problem. That advice would normally be recoverable as costs of proceeding excluding mediation. Deducting the costs for mediation, Dr Messick's reasonable costs are \$11,980. Therefore the starting point for costs shall be two thirds or \$7,986.67.

Are there any reasons to increase or reduce costs?

[13] There are no factors warranting an increase in costs. The University seeks a reduction in costs awarded to \$4,000 to reflect its success in striking out several personal grievances.⁷

⁴ The leading case on an indemnity costs is the Court of Appeal decision in *Bradbury & Ors v. Westpac Banking Corporation* [2009] NZCA 234 at [29].

⁵ See above at [29] and *Catherine Stormont v Peddle Thorp Aitken Limited* [2017] NZEmpC 159 at [8].

⁶ *Shabeena Shareen Nisha (Nisha Alim) v Lsg Sky Chefs New Zealand Limited* [2017] NZEmpC 8 at [17].

⁷ *Eric Messick v The Vice Chancellor of the University of Waikato* [2017] NZERA Auckland 6.

[14] It was clear during the hearing of the substantive matter that several of the personal grievances struck out remained relevant contextually to the unjustified dismissal. This included the disadvantages relating to high workloads; student numbers in PSYC587 Practicum; (mis)handling of his work struggles via the EAP process; and the 1 May 2013 warning. Specific evidence about each of these matters formed part of the factual matrix referred to within the final determination. It was evident at least one matter struck out (the 1 May warning) had merit.

[15] Although costs follow the event, they are discretionary. On balance I have determined to decline to further reduce Dr Messick's costs in these circumstances.

[16] In the circumstances I order the Vice Chancellor of the University of Waikato to pay Eric Messick the sum of \$7,986.67 as a contribution towards his legal costs.

T G Tetitaha
Member of the Employment Relations Authority