

**IN THE EMPLOYMENT COURT OF NEW ZEALAND
WELLINGTON**

**I TE KŌTI TAKE MAHI O AOTEAROA
TE WHANGANUI-A-TARA**

**[2020] NZEmpC 47
EMPC 7/2017**

IN THE MATTER OF a challenge to determination of the
Employment Relations Authority

AND IN THE MATTER of an application for costs

BETWEEN CAROLINE SAWYER
Plaintiff

AND THE VICE-CHANCELLOR OF VICTORIA
UNIVERSITY OF WELLINGTON
Defendant

Hearing: On the papers

Appearances: C Sawyer, plaintiff in person
G Davenport, counsel for defendant

Judgment: 21 April 2020

COSTS JUDGMENT OF JUDGE K G SMITH

[1] Caroline Sawyer issued proceedings in the Employment Relations Authority seeking to establish that a record of settlement she signed with her former employer, the Vice-Chancellor of the Victoria University of Wellington, was invalid and that she had been constructively dismissed.¹ She was unsuccessful.

¹ *Sawyer v The Vice-Chancellor of Victoria University of Wellington* [2016] NZERA Wellington 158 (Member Robinson).

[2] Dr Sawyer challenged the Authority's determination and the Court considered the lawfulness of the settlement agreement as a preliminary issue. The settlement agreement was held to be lawful and binding.² That judgment did not resolve all issues between Dr Sawyer and the Vice-Chancellor, because there was a further claim of constructive dismissal alleged to have arisen between the date the settlement agreement was signed and when her employment would otherwise end pursuant to that settlement.

[3] On 13 September 2019 Dr Sawyer discontinued this proceeding. She did so without reaching agreement with the Vice-Chancellor over the costs he had incurred. On 27 November 2019 Mr Davenport, counsel for the Vice-Chancellor, applied for costs. On the same day directions were issued providing Dr Sawyer with an opportunity to respond no later than 10 January 2020. She did not make submissions by that date and has not done subsequently.

[4] I am satisfied that it is appropriate for costs to be decided. This application was concerned only with the Vice-Chancellor's costs incurred by him after the Court's judgment on the preliminary issue was released. Costs up to that stage have been dealt with.³

[5] The Court has a discretion in relation to costs.⁴ That discretion must be exercised in the interests of justice and in accordance with established principles. Since January 2016 the discretion has been assisted by a Guideline Scale.⁵ It is intended to support, as far as possible, the policy objective that fixing costs should be predictable, expeditious and consistent.⁶ The Court is also empowered by reg 68 of the Employment Court Regulations 2000 to take into account conduct which has increased or contained costs.

² *Sawyer v The Vice-Chancellor of Victoria University of Wellington* [2018] NZEmpC 71, (2018) 16 NZELR 76.

³ *Sawyer v The Vice-Chancellor of Victoria University of Wellington* [2019] NZEmpC 84.

⁴ Employment Relations Act 2000, sch 3 cl 19.

⁵ Employment Court Practice Directions, No 16 (<www.employmentcourt.govt.nz/legislation-and-rules>).

⁶ *Xtreme Dining Ltd (T/A Think Steel) v Dewar* [2017] NZEmpC 10, [2017] ERNZ 26 at [25].

[6] Mr Davenport's submissions sought costs in accordance with the Court's Guideline Scale by applying Category 2, Band B. That was the classification previously allocated to this proceeding and it remains appropriate.

[7] The claim was based on allowing for one counsel and on the Vice-Chancellor being required to take each of the steps in the attached appendix, reproduced from Mr Davenport's submissions. The costs calculated on this basis amount to \$15,291.22.

[8] This proceeding was one of three between Dr Sawyer and the Vice-Chancellor. For practical reasons case management of them was combined. Mr Davenport apportioned some of the steps in his calculation between this proceeding and those other proceedings. He made a similar apportionment for those steps associated with the Vice-Chancellor's application for security for costs. I am satisfied that this methodology is appropriate.

[9] There is, however, a further adjustment that needs to be made. The Court's guideline applies sch 2 from the High Court Rules 2016. The amount claimed for all the steps taken by the Vice-Chancellor applied the current daily rate of \$2,390, but that only applied from 1 August 2019. The previous daily rate was \$2,230.

[10] Most of the steps taken by the Vice-Chancellor occurred before 1 August 2019. Only three of them were taken afterwards; an application for security for costs, supporting affidavit, and filing related submissions. Those steps amount to 1.8 days. At the post-1 August rate the total for them amounts to \$4,302. The balance of the calculation is for those steps taken before 1 August, which come to 4.598 days and amounts to \$10,253.54. The combined total is therefore \$14,555.54, which I would round to \$14,500. The next issue is whether that sum is appropriate to award the Vice-Chancellor.

[11] A plaintiff discontinuing a claim is liable for the costs of the litigation unless an agreement has been made with the defendant or the Court orders otherwise. There has been no agreement and I am not aware of any reason to deprive the Vice-Chancellor of costs. I am satisfied that each of the steps claimed on the Vice-Chancellor's behalf was necessary to enable him to respond to Dr Sawyer's claim.

For completeness, Mr Davenport has confirmed that the amount claimed is less than the Vice-Chancellor's actual costs.

Outcome

[12] Dr Sawyer is ordered to pay costs to the Vice-Chancellor of Victoria University of Wellington of \$14,500.

[13] There was no application for costs associated with preparing the costs submissions and no order is made in relation to that task.

K G Smith
Judge

Judgment signed at 4.30 pm on 21 April 2020

Appendix 1

| Attendance | Cost category | Total time Allocation as per Category 2B | Daily Rate | Total |
|--|---------------|--|------------|--------------------|
| 9/8/18 - Notice of Opposition to application for stay | 29 | 0.6 | \$2,390 | \$1,434 |
| 28/8/18 - Telephone directions conference | 13 | 0.2 | \$2,390 | \$478 |
| 24/10/18 - Submissions regarding application for stay | 30 | 1 | \$2,390 | \$2,390 |
| 3/12/18 - Notice of Opposition to application (0.2) | 29 | 0.2 | \$2,390 | \$478 |
| 17/12/18 - Telephone directions conference (0.066) | 13 | 0.066 | \$2,390 | \$158 |
| 21/12/18 - Notice objecting to disclosure | 24 | 0.2 | \$2,390 | \$478 |
| 4/2/19 - Memo and Notice of Opposition to the amended application | 29 | 0.6 | \$2,390 | \$1,434 |
| 14/2/19 - Notice of Opposition to the application regarding release of audio tapes | 29 | 0.6 | \$2,390 | \$1,434 |
| 1/3/19 - Submissions re the application for a stay | 30 | 1 | \$2,390 | \$2,390 |
| 5/7/19 - Telephone directions conference, which CS fails to attend (0.066) | 13 | 0.066 | \$2,390 | \$158 |
| 15/7/19 - Rescheduled telephone directions conference (0.066) | 13 | 0.066 | \$2,390 | \$158 |
| 15/8/19 - Application for security for costs (0.3) - including one substantive affidavit (1.0) | 28 and 36 | 1.3 | \$2,390 | \$3,107 |
| 5/9/19 - Submissions in support of application for security for costs (0.5) | 30 | 0.5 | \$2,390 | \$1,195 |
| Total | | 6.398 days | | \$15,291.22 |