

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

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

**[2020] NZEmpC 48  
EMPC 317/2017**

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

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**COSTS JUDGMENT OF JUDGE K G SMITH**

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[1]     In this proceeding Caroline Sawyer challenged an Employment Relations Authority determination requiring her to pay a penalty for breaching the record of settlement she signed with her employer, the Vice-Chancellor of Victoria University of Wellington.<sup>1</sup>

[2]     The breach was making certain disparaging comments that the agreement specifically prohibited. The penalty imposed was \$8,500. Of that amount, \$3,750 was

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<sup>1</sup>     *The Vice-Chancellor of Victoria University of Wellington v Sawyer* [2017] NZERA Wellington 106 (Member Fitzgibbon); Employment Relations Act 2000, s 149(4).

paid to two of the Vice-Chancellor's employees who were adversely affected by the breach. The balance was payable to the Crown.

[3] Dr Sawyer challenged that determination. In September 2019, she filed a notice of discontinuance bringing the proceeding to an end.

[4] On 27 November 2019 the Vice-Chancellor applied for costs. Directions were made for Dr Sawyer to respond. A generous allowance of time was provided to her with submissions to be filed no later than 10 January 2020. She did not file submissions by that date and has not attempted to do so subsequently. I am satisfied she has had ample time to respond and that it is appropriate for this costs application to be determined.

[5] The Court has a discretion in relation to costs conferred by sch 3 reg 19 of the Employment Court Regulations 2000. That discretion must be exercised in the interests of justice and on a principled basis. Since 1 January 2016 the Court has used a Guideline Scale, adopting the approach in the High Court Rules 2016, to aid in exercising that discretion.<sup>2</sup> The guideline is intended to support, as far as possible, the policy objective of ensuring that fixing costs should be predictable, expeditious and consistent.<sup>3</sup> In addition, reg 68 of the Employment Court Regulations empowers the Court to consider conduct which contains or increases costs.

[6] Mr Davenport, counsel for the Vice-Chancellor, submitted that the appropriate costs category for this proceeding was Category 2, Band B. That is the same classification that has applied to all other proceedings between Dr Sawyer and the Vice-Chancellor relating to, or arising from, the settlement agreement. That categorisation is appropriate.

[7] The costs claim was calculated using the Court's Guideline Scale. The table in Appendix 1 reproduces the relevant parts of the Vice-Chancellor's claim.

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<sup>2</sup> Employment Court Practice Directions, No 16 (<[www.employmentcourt.govt.nz/legislation-and-rules](http://www.employmentcourt.govt.nz/legislation-and-rules)>).

<sup>3</sup> *Xtreme Dining Ltd (T/A Think Steel) v Dewar* [2017] NZEmpC 10, [2017] ERNZ 26 at [25].

[8] In Mr Davenport's calculations the completion of steps in the proceeding comes to 7.898 days and, by applying the daily rate of \$2,390, the potential costs claim is \$18,876.22.

[9] A brief explanation is required about the steps in the table where an apportionment has been made. This proceeding was one of three between Dr Sawyer and the Vice-Chancellor but they were managed together for convenience. Mr Davenport's apportionment makes an effective allowance for those attendances relevant to the proceedings. He made a similar apportionment for those steps associated with the Vice-Chancellor's application for security for costs. I am satisfied that it was appropriate to apportion those attendances and that the methodology in the table is reasonable.

[10] However, a further adjustment is necessary, to deal with a change made to the daily rate last year. The Guideline Scale applies sch 2 from the High Court Rules 2016. Until 1 August 2019 the daily rate for Category 2 proceedings in that schedule was \$2,230. From that date it increased to \$2,390.

[11] Most of the steps in this proceeding took place before 1 August 2019. Only three steps were taken after August 2019; the preparation of an application for security for costs, including an affidavit, and associated submissions. The steps post-dating 1 August 2019 come to 1.8 days, at \$2,390 for a total of \$4,302. The remaining steps amount to 6.098 days which, at the daily rate of \$2,230, results in \$13,598.54. The combined total is \$17,900.54, but that amount should be rounded to \$17,900.

[12] There are no circumstances to depart from the principle that costs follow the event. The Vice-Chancellor is entitled to an award of costs. Each step claimed on his behalf was necessary to enable him to participate in this proceeding.

[13] The application sought costs according to the Guideline Scale and I consider that to be appropriate.

## **Outcome**

[14] Dr Sawyer is ordered to pay the Vice-Chancellor costs of \$17,900.

[15] There was no application for costs for preparing the costs memorandum and no further order is made in relation to it.

K G Smith  
Judge

Judgment signed at 4.35 pm on 21 April 2020

## Appendix 1

<b>Attendance</b>	<b>Cost category</b>	<b>Total time Allocation as per Category 2B</b>	<b>Daily Rate</b>	<b>Total</b>
2/11/17 - Notice of Opposition to applications filed	29	0.6	\$2,390	\$1,434
7/11/17 - Telephone directions conference	13	0.2	\$2,390	\$478
22/11/17 - Telephone directions conference regarding stay application	13	0.2	\$2,390	\$478
28/11/17 - Statement of Defence to challenge to ERA penalties determination	2	1.5	\$2,390	\$3,585
6/12/17 - Submissions in opposition of application for stay	30	1	\$2,390	\$2,390
24/10/18 - Notice of Opposition to the application for stay	29	0.6	\$2,390	\$1,434
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
4/2/19 - Notice of Opposition to the amended application	29	0.6	\$2,390	\$1,434
1/3/19 - Submissions in relation to 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
<b>Total</b>		<b>7.898 days</b>		<b>\$18,876.22</b>