

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

**I TE KŌTI TAKE MAHI O AOTEAROA
TĀMAKI MAKĀURAU**

**[2025] NZEmpC 109
EMPC 477/2021**

IN THE MATTER OF proceedings removed from the
Employment Relations Authority

AND IN THE MATTER OF an application for costs

BETWEEN SIOUXSIE WILES
Plaintiff

AND THE VICE-CHANCELLOR OF THE
UNIVERSITY OF AUCKLAND
Defendant

Hearing: On the papers

Appearances: C W Stewart and D Church, counsel for plaintiff
R Judge and G Buckleton, counsel for defendant

Judgment: 29 May 2025

COSTS JUDGMENT OF JUDGE J C HOLDEN

[1] In the Court’s substantive judgment in respect of this matter, the issue of costs was reserved, and the parties were encouraged to reach agreement.¹ Agreement was not reached, and Siouxsie Wiles filed a memorandum applying for costs. The Vice-Chancellor of the University of Auckland filed a memorandum in opposition, submitting that costs should lie where they fall.

[2] At about the same time as she applied for costs in the Employment Court, Associate Professor Wiles lodged an application for leave to appeal the Court’s

¹ *Wiles v The Vice-Chancellor of the University of Auckland* [2024] NZEmpC 123 at [190].

judgment in respect of a number of issues on which she was unsuccessful. In the circumstances, the Court stayed the application for costs and indicated that the parties would be able to make further brief submissions on costs once the Court of Appeal's judgment on the application for leave to appeal was issued.

[3] Associate Professor Wiles did not obtain leave to appeal the Employment Court's judgment and further submissions were then filed by both parties.²

[4] Ultimately, Associate Professor Wiles seeks a contribution to her legal costs in the substantive case of \$349,450.67, which includes an uplift to reflect that Associate Professor Wiles is not registered for GST purposes.³ She also seeks \$6,325 as a reasonable contribution to her costs on her application for costs (including an uplift for GST), and disbursements totalling \$24,477.64 including GST. The disbursements sought largely relate to expenses associated with witnesses, printing costs and the Court hearing fee.

[5] In summary, Associate Professor Wiles submits:

- (a) She was the successful party before the Employment Court and therefore entitled to costs.
- (b) A starting point in calculating those costs is using the guideline scale and categorisation 3C.⁴ She says, however, that there should be a substantial uplift to scale costs.
- (c) Although she did not 'get home' on every point pleaded, she says she was nevertheless the successful party when the case is viewed in the round. She submits that success on more limited terms is still success and that there was not a proper basis upon which the usual rule that the

² *Wiles v The Vice-Chancellor of the University of Auckland* [2025] NZCA 42.

³ *Judea Tavern Ltd v Jesson* [2017] NZEmpC 120, [2017] ERNZ 726 at [12]; and *Stormont v Peddle Thorp Aitken Ltd* [2017] NZEmpC 159 at [35]-[37].

⁴ Employment Court of New Zealand "Practice Directions" (1 September 2024) <www.employmentcourt.govt.nz> at No 18.

party who fails with respect to a proceeding should pay costs to the party that succeeds should not apply.⁵

- (d) While the University made a settlement offer, which was without prejudice save as to costs (a Calderbank offer), this offer was not made until quite late in the piece, and although the monetary offer exceeded what Associate Professor Wiles obtained in the Court, it did not include any recognition of the non-financial matters on which Associate Professor Wiles sought vindication. She relies on *Binnie v Pacific Health Ltd* for the proposition that, in a case where justified public vindication of reputation is a material factor in the litigation, looking at just the financial comparison of the offer as against the judgment is too absolute.⁶ She submits that the Calderbank offer is not relevant in considering costs.

[6] Associate Professor Wiles submits that the costs sought are reasonable. The figure she calculates for scale costs on a category 3C basis, but allowing for the fact that Associate Professor Wiles is not registered for GST purposes, is \$208,658.30. Using category 2B, the figure would be \$108,016.05. The amount sought for costs therefore represents an approximate sixty-seven per cent uplift on category 3C costs, and an approximate two hundred and twenty-three per cent uplift on category 2B costs.

[7] Associate Professor Wiles notes, however, that her actual costs totalled \$551,838.32 inclusive of GST, which included a reduction on the fees usually charged by counsel for the time spent. The amount sought is two-thirds of those actual costs, which Associate Professor Wiles says is a reasonable contribution.⁷ She notes for comparison that the University has confirmed that its legal costs and associated expenses on this matter to the year ended 31 December 2023 totalled \$1,416,403.65 inclusive of GST.

⁵ *Weaver v Auckland Council* [2017] NZCA 330, (2017) 24 PRNZ 379 at [26].

⁶ *Binnie v Pacific Health Ltd* [2002] 1 ERNZ 438 (CA) at [11]-[12]

⁷ Relying on *Binnie* at [14].

[8] The University opposes Associate Professor Wiles's application for costs. Its position is:

- (a) Associate Professor Wiles was awarded less by the Court than she was offered by the University in its Calderbank letter of 15 August 2022. This means the starting point is that there is a strong basis for a finding that the University is entitled to costs. However, as both parties had some success in the Court, and Associate Professor Wiles is in an ongoing employment relationship with the University, the University says it is prepared to forgo seeking costs so that costs lie where they fall.
- (b) Notwithstanding that, if the Court is minded to award costs to Associate Professor Wiles, the starting point should be calculated in accordance with category 2B.
- (c) Associate Professor Wiles's costs should be reduced in recognition of the time and resources required by the University to defend her unsuccessful claims.
- (d) Associate Professor Wiles is not entitled to any uplift, and instead any costs awarded should be reduced as her conduct unnecessarily extended the duration of the proceedings and she chose to reject the University's reasonable Calderbank offer.
- (e) In respect of the interlocutory judgments, costs should lie where they fall irrespective of whether the Court is minded to award Associate Professor Wiles costs in relation to the substantive judgment.
- (f) Any disbursements granted to Associate Professor Wiles should be substantially reduced; and
- (g) She should not be granted costs on her costs application, as the University made reasonable without prejudice offers to resolve costs,

after the Court's decision was released, to avoid the need for further costs and/or for the application for costs to be made. As such, the University is entitled to costs on costs but is, again, prepared to forgo seeking costs in the circumstances.

The Court has a discretion as to costs

[9] The Court has a broad discretion as to costs.⁸ The Court must, however, exercise its discretion on a principled basis.⁹

[10] The Court has regard to its guideline scale but must consider the context of each case and the way in which it has been conducted. Equity and good conscience play a part.¹⁰

[11] Costs generally, but do not always, follow the event. In particular, the Court may have regard to any Calderbank offer made to settle the proceedings.¹¹

Associate Professor Wiles was the successful party, but did not succeed on all points

[12] As acknowledged, and as recognised by her application for leave to appeal the judgment, Associate Professor Wiles did not succeed on every point. Associate Professor Wiles was, however, ultimately the successful party. She is entitled to costs.

[13] Nevertheless, in fixing costs, it is appropriate for the Court to recognise that Associate Professor Wiles was not wholly successful.¹² This does not mean the Court should go through a granular assessment of every complaint made by Associate Professor Wiles, but rather that any award should reflect the additional time spent by the University to address the broader issues and claims on which Associate Professor Wiles was unsuccessful.

⁸ Employment Relations Act 2000, sch 3 cl 19; and Employment Court Regulations 2000, reg 68.

⁹ *Victoria University of Wellington v Alton-Lee* [2001] ERNZ 305 (CA) at [47].

¹⁰ Employment Relations Act, s 189.

¹¹ Employment Court Regulations 2000, reg 68(2)(a).

¹² *Weaver v Auckland Council*, above n 5, at [26].

Calderbank offer put to one side

[14] The parties have endeavoured on a number of occasions to resolve the dispute between them. It therefore was not unexpected that there was a Calderbank offer made by the University to Associate Professor Wiles.

[15] By 15 August 2022, when the University made its Calderbank offer, considerable preparatory work had been done and the matter had been set down for a hearing, to commence on 5 September 2022. The Calderbank offer would not impact on costs incurred before the offer was made. Nevertheless, there was significant work done after August 2022, including the hearing itself, which took place in November 2023.

[16] The University's offer included payments for a contribution to legal costs, compensation under s 123(c)(i) of the Act and general damages. Beyond the monetary components of the offer, the University included as terms that there would be a non-disparagement clause and that the terms of settlement (and all details relating to Associate Professor Wiles's litigation against the University) would be confidential.

[17] In making that offer, the University reserved the right to produce the letter in support of an application for costs, stating that if Associate Professor Wiles was unsuccessful, or received an award of less or the same as the sums offered, the University would intend to produce the letter in support of an application for indemnity costs, or alternatively, for a substantial contribution towards its legal costs. It noted that the University's costs would likely be over \$200,000 plus GST and disbursements.

[18] It was unsurprising that the sums offered for compensation and general damages together exceeded the amount that Associate Professor Wiles was awarded in the substantive judgment. It would have been apparent to both parties that there was never any prospect that Associate Professor Wiles would have achieved financial remedies that matched or exceeded her costs or those of the University.

[19] Associate Professor Wiles sought compensation, damages, and penalties. In addition, however, she sought recommendations from the Court as to steps that the University should take to prevent similar employment relationship problems from

occurring again in the future, and declarations regarding the University's alleged breaches of its contractual obligations and its duties of good faith.

[20] In the event, Associate Professor Wiles achieved the declarations that she sought.¹³ In awarding her \$20,000 as general damages (also encompassing compensation under s 123(1)(c)(i) of the Act) the Court noted that, as Associate Professor Wiles had not lost any income as she was still employed by the University, and based on the limited evidence of other harm, the inference was that the main drivers for her in pursuing her case were matters of principle and the potential for non-financial remedies.

[21] In that context, it was surprising that the University's offer to settle did not include any offer in respect of non-financial matters and that any settlement was to be wholly confidential. The offer did not, for example, include any proposal for an agreed statement covering such things as the University's commitments with respect to health and safety, and the importance of academic freedom, or recognising matters that, in the end, were not contested.¹⁴

[22] The Court in a situation such as this looks at whether it was reasonable for the party to decline an offer in the circumstances. While the monetary component of any offer is very important to such an assessment, other factors may be relevant.¹⁵ In the context of this case, it was reasonable for Associate Professor Wiles to decline a purely financial offer made on the basis that it (and all details relating to Associate Professor Wiles's litigation against the University) would be confidential.

[23] I put it to one side.

Costs on interlocutory matters lie where they fall

[24] There were a number of interlocutory matters between the parties resulting in four judgments.¹⁶ Many of the matters raised should have been resolved between the

¹³ *Wiles v The Vice-Chancellor of the University of Auckland*, above n 1, [180]-[182].

¹⁴ See, eg, at [145], [152].

¹⁵ *Commissioner of Salford School v Campbell* [2016] NZCA 126.

¹⁶ *Wiles v The Vice-Chancellor of the University of Auckland* [2022] NZEmpC 140; *Wiles v The Vice-Chancellor of the University of Auckland* [2023] NZEmpC 45; *Wiles v The Vice-Chancellor of the*

parties, without the need for the Court to become involved. A review of the interlocutory judgments shows that success was mixed, and usually partial only. On balance, the parties achieved a similar level of success. In respects of the interlocutory matters, it is appropriate that costs lie where they fall.

[25] Removing the interlocutory matters from the calculation of scale costs for Associate Professor Wiles, leads to scale costs on a category 3C basis of \$153,202, or with an uplift recognising GST, of \$176,182.30. On a category 2B basis, scale costs would be \$81,977, or with a GST uplift, \$94,273.55.

Category 3C is generally appropriate for scale costs

[26] Under the guideline scale categories are described:

Category 1 proceedings	Proceedings of a straightforward nature able to be conducted by a representative considered junior by the Employment Court.
Category 2 proceedings	Proceedings of average complexity requiring a representative of skill and experience considered average in the Employment Court.
Category 3 proceedings	Proceedings that, because of their complexity or significance, require a representative to have special skill or experience in the Employment Court.

[27] Associate Professor Wiles was represented throughout these proceedings by Ms Stewart and Mr Church. Ms Stewart is a senior employment law practitioner; Mr Church also is an employment law specialist. The University was represented for much of the proceedings by Ms Muir, another senior employment law practitioner, and

University of Auckland [2023] NZEmpC 136; *Wiles v The Vice-Chancellor of the University of Auckland* [2023] NZEmpC 159.

then by Mr Skelton KC, who is a King’s Counsel with particular expertise in employment law. Throughout the proceedings, Ms Muir and Mr Skelton were assisted by other counsel with employment law experience. It was appropriate and necessary for both parties to use representatives with special skill and experience in the Employment Court. I agree with Associate Professor Wiles that, overall, the substantive proceedings were category 3 proceedings.

[28] The bands in the guideline scale are described:

Band A	A comparatively small amount of time is considered reasonable
Band B	A normal amount of time is considered reasonable
Band C	A comparatively large amount of time for a particular step is considered reasonable.

[29] The pleadings here were complex, and the evidence comprehensive. I consider band C is the appropriate band overall.

[30] Accordingly, for the substantive proceedings, I adopt the category 3C figure that excludes costs on the interlocutory matters, but includes recognition of Associate Professor Wiles’s GST status, of \$176,182.30 as the starting point.

Scale costs are fair in the circumstances

[31] In support of her submission that an uplift on scale costs is appropriate, Associate Professor Wiles points to:

- (a) Her actual costs, which she submits were reasonable but greatly exceeded scale costs;

- (b) The conduct of the University, which she says was unnecessarily aggressive and uncompromising; and
- (c) The need, she says, to continue her proceedings in order to obtain vindication of her position.

[32] She says the amount sought is a reasonable contribution to her costs and is consistent with the Court's equity and good conscience jurisdiction in the particular circumstances.

[33] In contrast, the University says it was Associate Professor Wiles's conduct of her case that increased costs. In addition to the rejection of the Calderbank offer, the University points to the claims made in respect of academic freedom, and Te Tiriti, and the time and effort spent on those claims, both of which it says were unsuccessful.

[34] I acknowledge the substantial costs Associate Professor Wiles incurred. I also acknowledge that, in order to achieve the matters of principle that were important to her, she needed to continue with the litigation. Those matters support an uplift in costs.

[35] Against those points, however, I agree that there was significant time and effort spent on the issue of academic freedom and, to a lesser extent, on the claim regarding Te Tiriti. This will be reflected in the fees both parties incurred.

[36] On balance, I am satisfied that the starting costs figure of \$176,182.30 noted above is a fair one for costs in the circumstances of this case. I also allow the disbursements sought in full; all the witnesses gave useful evidence, even if some of that evidence covered matters on which Associate Professor Wiles did not achieve the success she sought.

Costs on costs due

[37] As noted, the parties were encouraged to agree on costs. Ms Stewart promptly advised counsel for the University that Associate Professor Wiles would accept \$175,000 for costs. The University's response was that it considered it was entitled to claim significant costs from Associate Professor Wiles pursuant to the Calderbank

letter, which would likely be in excess of \$500,000 plus GST. It initially offered, on a without prejudice save as to costs basis, to settle costs on the basis that they lay where they fell, but later offered \$65,000 (plus GST) as a contribution to Associate Professor Wiles's costs.

[38] Against that background, I consider it was reasonable and necessary for Associate Professor Wiles to file an application with the Court. I note in particular the University's rejection of Associate Professor Wiles's offer and its insistence that there was "no winning party" to the proceedings. It is in the interests of justice to compensate Associate Professor Wiles's efforts to receive a contribution to her costs.¹⁷

[39] Accordingly, I allow costs for the costs application of \$4,400, being on a category 2B basis for 1.6 days with an uplift to recognise Associate Professor Wiles's GST status.

Costs and disbursements payable

[40] In conclusion, the University of Auckland is to pay Associate Professor Wiles the total sum of \$205,059.94, being \$180,582.30 for costs and \$24,477.64 for disbursements. That sum is to be paid within 21 days of the date of this judgment.

J C Holden,
Judge

Judgment signed at 10.30 am on 29 May 2025

¹⁷ *Nisha v LSG Sky Chefs New Zealand Ltd* [2018] NZEmpC 8, (2018) 15 NZELR 483 at [17]-[18]; and David Bullock and Tim Mullins *The Law of Costs in New Zealand* (LexisNexis, 2022) at [4.23].