

**IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY**

**I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKĀURAU ROHE**

**CIV-2020-404-795
[2021] NZHC 1331**

UNDER	Judicial Review Procedure Act 2016
IN THE MATTER	of an application for judicial review of decisions made pursuant to the Education Act 1989 Part 16 s 224(1)-(6) and the Education Amendment Act 2011 s 224(1)-(6)
BETWEEN	KELLY ALEXANDRA ROE Applicant
AND	THE UNIVERSITY OF AUCKLAND Respondent

Hearing:	30 March 2021
Counsel:	I Rosic and ZA Brentnall for Respondent
Appearance:	KA Roe, Applicant in Person
Judgment:	8 June 2021

**JUDGMENT OF FITZGERALD J
[As to costs]**

This judgment was delivered by me on 8 June 2021 at 2.30pm,
pursuant to Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Date.....

Solicitors: Gilbert Walker, Auckland

To: K Roe, Auckland

Introduction

[1] In a judgment delivered on 3 March 2021, I dismissed Ms Roe’s applications for judicial review of the University of Auckland’s (the University’s) decisions to decline her applications for admission to the Bachelor of Medicine and Bachelor of Surgery (MBChB) in 2019 and 2020.¹

[2] At the conclusion of my judgment, I encouraged the parties to agree costs. They have been unable to do so and this judgment accordingly determines the costs of Ms Roe’s judicial review proceedings.

Applicable legal principles and their application in this case

[3] The starting proposition is that costs follow the event and, therefore, in the ordinary course, will be awarded to the successful party overall.

[4] In this context, I am satisfied that the University was the successful party overall. As noted, I dismissed Ms Roe’s applications for judicial review.

[5] I also note that Ms Roe did not file substantive submissions on the question of costs, though she did file a schedule of costs to be awarded to her as the plaintiff or applicant in her judicial review claims.² But on the basis that the University was the successful party overall, it would be unprincipled to make a costs award *against* it.³ Rather, any suggested disqualifying conduct on the part of a successful party can be recognised by a reduction in the amount of costs that would be otherwise awarded, or in appropriate cases, letting cost lie where they fall.⁴

[6] For these reasons, I decline to make a costs award in Ms Roe’s favour. The appropriate outcome is a costs award in the University’s favour. The issue then becomes the quantum of that award.

¹ *Roe v University of Auckland* [2021] NZHC 368.

² For example, Ms Roe’s schedule claims costs for commencing a claim.

³ See, for example, *Weaver v Auckland Council* [2017] NZCA 330, (2017) 24 PRNZ 379 at [28].

⁴ *Water Guard NZ Ltd v Midgen Enterprises Ltd* [2017] NZCA 36 at [13].

[7] The University seeks scale costs on a 2B basis, plus disbursements, totalling \$21,859 (as set out in the schedule to this judgment). The University refers to authority to the effect that as a matter of principle, self-represented litigants should be subject to the same costs awards as any other party.⁵ The University also refers to recent examples of the Court awarding 2B costs (as well as increased costs) against unsuccessful self-represented applicants for judicial review.⁶

[8] Counsel for the University acknowledges that the courts will sometimes depart from the general costs rule in judicial review proceedings, including where the applicant established a ground of review but failed to obtain a remedy in the exercise of the court's residual discretion. The normal costs principles may also not apply in cases in which the events at issue were so unusual that it was inevitable there would be an application for judicial review, or on matters of distinct public importance.

[9] The University submits that no such special circumstances arise in this case. It notes that Ms Roe failed to establish any ground of review she pursued and says that her application was dismissed following a straightforward determination and application of the law.

[10] I am not satisfied there are any special circumstances which warrant departure from the ordinary costs rules in this case. Ms Roe's applications for judicial review were focussed on her own applications for admittance to the MBChB degree for the 2019 and 2020 years. Determination of the applications was not therefore of broader or special importance.

[11] Nevertheless, I am satisfied that it is appropriate to reduce somewhat the costs award to be made in the University's favour. First, I do not consider it appropriate to certify for second counsel's appearance at the hearing. The amount of \$1,195 for step 35 will therefore be excluded from the award.

[12] I also consider it appropriate to reduce the amount awarded for step 32, preparation for an affidavit hearing. In the ordinary course, this would be awarded on

⁵ *Oceanic Palms Ltd v Danforth Nominees Ltd* CA179/05, 15 December 2005 at [18].

⁶ Such as *Prescott v Thompson (No. 3)* [2020] NZHC 1858 at [9].

the basis of two days at the relevant scale rate. In this case, however, the University's written submissions were predicated on the basis that the University had the power to determine eligibility criteria for the various programmes and courses offered by it. As the University's oral submissions developed at the hearing, however, it was accepted that "eligibility" for admission to any programme was prescribed by the (then) Education Act 1989 (the Act) (the relevant statute in force at the time), and in particular s 224 of that Act. It was accepted in counsel's oral submissions that in the case of domestic students aged 20 years and over, and where a limited entry programme is under subscribed, the University would not have the power to deem certain students "ineligible", such students in those circumstances being entitled to enrol in the programme. As was clear in this case, however, the MBChB was a limited entry programme and the evidence confirmed that both the 2019 and 2020 programmes were significantly over subscribed.

[13] I therefore concluded that the University lawfully applied the "recency requirement" (as described in my substantive judgment at [5](b)) to Ms Roe's 2019 and 2020 applications. I observed, however, that Ms Roe was strictly correct that in certain correspondence, the University had used the term or concept of "eligibility", when it did not in fact have a power to impose *eligibility* criteria on domestic students aged 20 years or over.⁷

[14] Given the (slight) shift between the University's written submissions and the matters accepted on its behalf at the hearing itself, I consider the appropriate course is that the daily allowance for step 32 be reduced from two days to one day, and therefore for an amount of \$2,390 to be awarded for that step.

[15] There is accordingly an award in favour of the University against Ms Roe in the sum of \$18,274 which includes a disbursement of \$110 for filing a statement of defence. The costs are comprised as follows:

⁷ *Roe v University of Auckland* [2021] NZHC 368 at [71]-[72].

Step	Step Number	Days	Total
Commencement of defence by respondent	2	2	\$4,780
Preparation for first case management conference	10	0.4	\$956
Filing memorandum dated 9 October for first case management conference	11	0.4	\$956
Appearance at first case management conference	13	0.3	\$717
Preparing affidavits dated 7 October 2020, 18 November 20, and 21 December 2020 for one day hearing	30	2	\$4,780
Additional allowance for the party who prepared the common bundle	31	0.5	\$1,195
Preparation for affidavit hearing	32	1	\$2,390
Appearance at affidavit hearing for principal counsel	34	1	\$2,390
Overall Total:		7.6	\$18,164

Fitzgerald J

SCHEDULE

Step (Schedule 3, High Court Rules)		Time allocation (days)	Sum
2	Commencement of defence by respondent	2	\$4,780
10	Preparation for first case management conference	0.4	\$956
11	Filing memorandum dated 9 October 2020 for first case management conference	0.4	\$956
13	Appearance at first case management conference on 15 October 2020	0.3	\$717
30	Preparing of affidavits dated 7 October 2020, 18 November 2020 and 21 December 2020 for one day hearing	2	\$4,780
31	Additional allowance for the party who prepared the common bundle (University)	0.5	\$1,195
32	Preparation for affidavit hearing	2	\$4,780
34	Appearance at affidavit hearing on 7 December 2020 for principal counsel	1	\$2,390
35	Appearance at affidavit hearing on 7 December 2020 for second counsel	0.5	\$1,195
Subtotal costs			\$21,749
Disbursements (filing fee for statement of defence)			\$110
TOTAL			\$21,859