

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2015] NZERA Christchurch 79
5429900

BETWEEN MARLENE CAMPBELL
 Applicant

A N D THE COMMISSIONER OF
 SALFORD SCHOOL
 Respondent

Member of Authority: M B Loftus

Representatives: Richard Harrison, Counsel for Applicant
 Scott Wilson, Counsel for Respondent

Submissions Received: 30 October 2014 from Respondent
 12 December 2014 from Applicant

Date of Determination: 15 June 2015

COSTS DETERMINATION OF THE AUTHORITY

[1] On 25 September 2014 I issued a determination¹ concluding Ms Campbell had a personal grievance in that she was unjustifiably disadvantaged by virtue of the manner in which she was suspended from her employment.

[2] Ms Campbell was unsuccessful with a claim she was unjustifiably dismissed and two further disadvantage claims.

[3] This decision was preceded by an earlier determination which saw the school successfully resist an application Ms Campbell be reinstated on an interim basis². She had not been dismissed at the time and sought the nullification of the suspension.

¹ [2014] NZERA Christchurch 151

² [2013] NZERA Christchurch 254

[4] Costs were reserved in both instances and the School now seeks a contribution toward those it incurred on the basis it was essentially successful. In particular it seeks \$5,000 in respect to the interim and \$80,000 for the substantive investigation.

[5] Normally the Authority will use a daily tariff approach when addressing a costs claim (refer *PBO Ltd (formerly Rush Security Ltd) v Da Cruz* [2005] ERNZ 808). The normal starting point is \$3,500 per day and from there adjustment may be made depending on the circumstances.

[6] The interim, as is often the case, took approximately half a day while the substantive investigation took five and half days. The total of six days would, applying the tariff, see a contribution in the order of \$21,000 but as already said the School seeks a greater sum.

[7] In support of its claim the School notes the principle costs follow the event. It was completely successful with respect to the interim application and notes actual costs in excess of \$23,000. The School notes the claim was considered extremely important as it considered the consequences of reinstatement untenable. It also notes the short time frame given to prepare and the fact significant documentation was appended to Ms Campbell's application. Criticism then follows that a significant portion of that turned out to be irrelevant but such an evaluation could not be made till it had been properly perused and considered.

[8] With respect to the substantive proceedings the School claims success with respect to three of the four claims including the most significant – unjustified dismissal. It attributes its one loss to procedural deficiencies before submitting its claim is justified by the fact its *position in investigating the applicant's conduct and dismissing her for serious misconduct was entirely vindicated*.

[9] The School notes total costs in excess of \$145,000 excluding GST and disbursements totalling another \$5,471.10 which it justified on the basis of the work required by the presence of some 20 witnesses and in excess of 1000 pages of documentary evidence.

[10] The School then goes on to submit a significant increase in the tariff is justified by two factors. The first is the existence of a significant Calderbank offer which Ms Campbell rejected. The second is Ms Campbell's conduct of the case.

[11] The Calderbank offer was made in good time with it being forwarded weeks before the first briefs had to be filed. Ms Campbell was offered \$75,000 but rejected the offer within 2 days. An increased offer followed but it was rejected within hours.

[12] The School notes the bulk of its costs were incurred after the offers were made and numerous Court and Tribunal decisions would suggest that is a valid basis for increasing the tariff.

[13] The School then turns to the conduct of the case which it says substantially and unnecessarily increased its costs. It portrays Ms Campbell's claims as repetitive and unclear before submitting that while many assertions were not fully addressed in submission they still had to be considered and defended. It notes an inability to evidence a disadvantage, let alone an unjustified one, in respect of the first allegation³ and my comment it was difficult to ascertain what underpinned the third disadvantage claim.⁴ It is also submitted significant portions of the evidence were irrelevant and other parts thereof were assertions and submissions as opposed to evidence.

[14] Ms Campbell also adopts the daily tariff approach as her starting point but asserts it should be reduced and the school be awarded something in the order of \$15,000.

[15] In support of this she notes:

- a. While it is accepted there was a Calderbank offer it did not provide for the remedy Ms Campbell was seeking – namely reinstatement as opposed to financial compensation;
- b. Costs are not to be punitive and Ms Campbell has already suffered considerably both financially and in respect to her career;
- c. There is no suggestion in the determination the claim was ill-advised or that despite the lack of success it did not have some merit.

[16] With respect to the Calderbank I note the Employment Court is no longer endorsing a steely approach⁵ but instead suggesting their existence is simply a factor

³ [2014] NZERA Christchurch 151 at [45]

⁴ Ibid at [53]

⁵ *Health Waikato Ltd v Elmsly* [2004] 1 ERNZ 172 (CA)

to be considered when exercising the discretion in respect to costs.⁶ That raises the fact Ms Campbell had a degree of success, albeit marginal, and that the Employment Court takes issue with a situation that sees the benefits of success eroded by the cost of attaining that success.⁷ There is also the fact that while the amounts offered were considerably more than those attained the offer did not address the question of reinstatement and it was apparent from Ms Campbell's conduct at the investigation that that was the only remedy in which she was interested. Again, though, that must be balanced against the fact she was totally unsuccessful in that respect.

[17] Her conduct does, however, reflect on the second of the School's reasons as to why the tariff should be increased. As was said at paragraph [62] of the substantive decision Ms Campbell failed to understand what it was I had to determine. Her conduct and answers given in the investigation led me to conclude she was totally incapable of understanding anyone may have had cause to question her conduct and she was determined to prove she was blameless. She was constantly passing notes to counsel and asking that Ms McMillan pursue points that were of little or no relevance. This extended the hearing time significantly and I must say this matter should never have taken six days.

[18] Once again though I must balance the inclination to increase the tariff with the fact Ms Campbell had one successful claim and in that respect the School behaved badly. I also have to note Ms Campbell will effectively pay for extending the investigation by virtue of the fact the time taken, as opposed to that which it should have taken, will be reflected in any costs award made.

[19] There is then the argument Ms Campbell has suffered financially. That is obviously true but the argument fails to convince me the tariff should be reduced. A perusal of the copious amount of correspondence would again suggest Ms Campbell's apparent inability to understand her employer had grounds to question her performance escalated costs. She was not averse to generating a significant portion of this and willing to accept the resulting cost. I must also note she still has the ability to fund a continuation of the litigation in the Court.

[20] Having considered the submissions I conclude it is the School which should be the beneficiary of a costs award. Its level of success totally overwhelmed

⁶ See for example *Mattingly v Strata Title Management Limited* [2014] NZEmpC 15

⁷ For example *Metallic Sweeping (1998) Limited v Ford* [2010] ERNZ 433 and *Mattingly*

Ms Campbell's. I also consider the conflicting arguments as to why I should either increase or decrease the tariff effectively cancel each other and the prudent course of action is to apply the tariff.

[21] Accordingly I order the applicant, Marlene Campbell, to pay the respondent, the Commissioner of Salford School, the sum of \$21,000 (twenty one thousand dollars) as a contribution toward the cost the School incurred in successfully defending the bulk of Ms Campbell's claims.

M B Loftus
Member of the Employment Relations Authority