



# Employment Court of New Zealand

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## Commissioner of Salford School v Campbell [2015] NZEmpC 186 (20 October 2015)

Last Updated: 22 October 2015

### IN THE EMPLOYMENT COURT CHRISTCHURCH

[\[2015\] NZEmpC 186](#)

EMPC 186/2015

IN THE MATTER OF a challenge to a determination of the

Employment Relations Authority

BETWEEN THE COMMISSIONER OF SALFORD SCHOOL

Plaintiff

AND MARLENE CAMPBELL Defendant

EMPC 280/2014

AND BETWEEN MARLENE CAMPBELL Plaintiff

AND THE COMMISSIONER OF SALFORD SCHOOL

Defendant

Hearing: (on the papers filed on 24 and 25 August, 21 and 22 September and 5 October 2015)

Appearances: R Harrison, counsel for Marlene Campbell

S Wilson, counsel for The Commissioner of Salford School

Judgment: 20 October 2015

JUDGMENT OF JUDGE B A CORKILL

### Introduction

[1] This judgment resolves two issues as to costs.

[2] The first arises from a challenge to a costs determination of the Employment

Relations Authority (the Authority).

MARLENE CAMPBELL v THE COMMISSIONER OF SALFORD SCHOOL NZEmpC CHRISTCHURCH [\[2015\] NZEmpC 186](#) [20 October 2015]

[3] An application by Ms Campbell for an interim reinstatement order was unsuccessful. Then in its substantive determination, the Authority upheld one only of Ms Campbell's four disadvantage grievances; the Authority determined that the decision to suspend Ms Campbell was not justified and the Commissioner was ordered to pay \$5,000 as compensation for

humiliation, loss of dignity and injury to

feelings.<sup>1</sup> Ms Campbell's dismissal grievance was dismissed. In its costs

determination, the Authority determined that the Commissioner had successfully defended most of Ms Campbell's claims; Ms Campbell was ordered to pay the Commissioner \$21,000 as a contribution to costs incurred in connection with both investigation meetings.<sup>2</sup>

[4] In the challenge now brought by the Commissioner it is asserted that Ms Campbell should have been ordered to pay \$5,000 in respect of her unsuccessful application for an interim reinstatement order. In respect of the investigation meeting it was asserted that having regard to a Calderbank offer made in a timely way before the investigation meeting, the issue was to be approached on the basis of awarding two-thirds of actual and reasonable costs since the date of that offer being

\$80,000; alternatively, the daily tariff should be increased to \$10,000 per day, and an award of \$70,000 costs should be made.

[5] For Ms Campbell, it is submitted that having regard to the ultimate outcome of her claim in the Court, it is appropriate to conclude that vindication has only now been achieved. It was not unreasonable for her to decline the Calderbank offer made for the Commissioner. Having regard to her success in the challenge of the determination, costs should follow that event. The Authority's approach in applying the daily tariff rate was correct. It was asserted that Ms Campbell should receive costs based on six hearing days, that is \$21,000; if the Commissioner's Calderbank offer should be given some acknowledgment, then this could be reflected in a

decrease to the tariff amount.

<sup>1</sup> *Campbell v The Commissioner of Salford School* [2014] NZERA Christchurch 151.

[6] The second issue which the Court is required to resolve relates to costs incurred with regard to Ms Campbell's challenge. In resolving her claim, I determined:<sup>3</sup>

a) The decision to suspend Ms Campbell was not a conclusion which a fair and reasonable employer could have reached in all the circumstances, so that her disadvantage grievance was established.

b) The decision to dismiss Ms Campbell was not a conclusion which a fair and reasonable employer could have reached in all the circumstances, so that her dismissal grievance was established.

c) Remedies should be awarded. I directed that Ms Campbell should be paid lost wages from a date which was two months after her dismissal on 6 March 2014, until she obtained alternate work on 22 January 2015, reduced by 30 per cent for contributory conduct.

d) Compensation for hurt, humiliation and loss of dignity was ordered in the sum of \$22,400, after allowance for contributory conduct.

[7] I also found that as Ms Campbell had succeeded in her challenge, she was entitled to costs.<sup>4</sup> Ms Campbell has now made an application for payment of

66 per cent of her actual costs being \$52,113.60 plus GST, and disbursements of

\$7,760.60 including GST. It was submitted that although a Calderbank offer was made after the issuing of the Authority's determination and before the hearing in the Employment Court, the offer was not so significant as to justify a reduction in the amount sought.

[8] For the Commissioner it was submitted in response that Ms Campbell should receive no costs award in respect of the Court proceedings, having regard to what is asserted to be an unreasonable refusal of three substantial Calderbank offers of settlement, made at an early stage prior to the Authority's investigation meeting and prior to the hearing of the challenge. The Commissioner submits that the effect of

Ms Campbell's refusal of the Commissioner's offer is to reverse the costs position so

<sup>3</sup> *Campbell v The Commissioner of Salford School* [2015] NZEmpC 122 at [351]- [354].

that Ms Campbell is liable to make a payment for costs to the Commissioner, being

66 per cent of the Commissioner's actual and reasonable costs in defending the proceeding, which is the sum of \$67,261.26.

[9] Because the Calderbank offers made for the Commissioner prior to the investigation meeting are central to a consideration of costs both in the Authority and in the Court, it is appropriate to deal with the cost issues in chronological sequence. I therefore begin by resolving the challenge of the Authority's costs determination.

**Legal principles: costs in the Authority**

[10] The starting point is cl 19 of sch 3 of the Act, which confers wide discretionary powers on the Court in these terms:<sup>5</sup>

### 19 Power to award costs

(1) The Court in any proceedings may order any party to pay any other party such costs and expenses (including expenses of witnesses) as the court thinks reasonable.

(2) The Court may apportion any such costs and expenses between the parties or any of them as it thinks fit, and may at any time vary or alter any such order in such manner as it thinks reasonable.

[11] The discretion as to costs in the Authority is to be exercised judicially and according to principle. As was confirmed by the full Court in *PBO Limited (formerly Rush Security Limited) v Da Cruz*,<sup>6</sup> the power to order such costs is

available to both the Authority and the Court.<sup>7</sup>

[12] That decision also approved the basic tenets which are appropriate for the Authority to apply when considering an application for costs in the Authority. These include:<sup>8</sup>

- There is a discretion as to whether costs be awarded and in what amount.
- The discretion is to be exercised in accordance with principle and not arbitrarily.

<sup>5</sup> See also reg 68(1) of the [Employment Court Regulations 2000](#).

<sup>6</sup> *PBO Ltd (formerly Rush Security Ltd) v Da Cruz* [[2005\] NZEmpC 144](#); [[2005\] ERNZ 808 \(EmpC\)](#).

<sup>7</sup> At [21]. See [Employment Relations Act 2000](#), cl 15, sch 2 and cl 19, sch 3.

- The statutory jurisdiction to award costs is consistent with the equity and good conscience jurisdiction of the Authority.
- Equity and good conscience is to be considered on a case by case basis.
- Costs are not to be used as a punishment or as an expression of disapproval of the unsuccessful party's conduct although conduct which increase[s] costs unnecessarily can be taken into account in inflating or reducing an award.
- It is open to the Authority to consider whether all or any of the parties' costs were unnecessary or unreasonable.
- ... [C]osts generally follow the event.
- ... [W]ithout prejudice offers can be taken into account.
- ... [A]wards will be modest.
- ... [F]requently costs are judged against notional daily rates.
- The nature of the case can also influence costs and this has resulted in the Authority ordering that costs lie where they fall in certain circumstances.

[13] A full Court recently confirmed that these principles remain appropriate:

*Fagotti v Acme & Co Limited*.<sup>9</sup>

[14] As was acknowledged by Judge Inglis in *Booth v Big Kahuna Holdings Limited*, "... the legal costs of preparing for and attending at an investigation meeting should be modest."<sup>10</sup> Parties who choose to incur costs in excess of the current notional daily rate of \$3,500 are "entitled to do so but cannot confidently expect to recoup additional sums."<sup>11</sup>

[15] There are several Court of Appeal decisions which have dealt with issues as to the effect of Calderbank offers. I refer to two. The first of those is *Health Waikato v Elmsly*.<sup>12</sup> There the Court of Appeal in the context of discussion as to the cost effectiveness of a claim for either \$102,000 or \$137,000 where \$150,000 had

been expended said:<sup>13</sup>

<sup>9</sup> *Fagotti v Acme & Co Ltd* [[2015\] NZEmpC 135](#), at [114].

<sup>10</sup> *Booth v Big Kahuna Holdings Ltd* [[2015\] NZEmpC 4](#) at [15].

<sup>11</sup> At [17].

<sup>12</sup> *Health Waikato v Elmsly* [[2014\] 1 ERNZ 172](#).

A comparison between resources committed and the actual result (an award of damages of \$15,000) is all the more stark. Access to justice and reputational considerations mean that a cost benefit analysis of litigation of this sort cannot be confined solely to economic considerations. Nonetheless, we think that a more sensible approach by the defendants to the making of *Calderbank* offers and steely responses by the Courts where plaintiffs do not beat *Calderbank* offers would be in the broader public interest.

[16] This theme was developed by the same Court in *Bluestar Print Group (NZ) Limited v Mitchell*, when it stated:<sup>14</sup>

[19] We accept that there may be cases where vindication through seeking a statement of principle in the employment context may be relevant to the exercise of the Court's discretion. Thus the relevance of reputational factors means that costs assessments are not confined solely to economic considerations. But equally, an offer to pay compensation at a level that is reasonable might well be regarded as conveying a distinct element of vindication to the plaintiff.

[20] We consider that the potential for vindication to be a relevant factor does not mean that the developed jurisprudence under the High Court Rules costs regime should be ignored. We reject Mr Churchman's submission that the principles applicable to *Calderbank* offers should be adjusted or ignored in employment cases merely because of the nature of the employment relationship and because employees may in certain cases be motivated in part by the desire for vindication. As this Court has previously said a "steely" approach is required. It has been repeatedly emphasised that the scarce resources of the Courts should not be burdened by litigants who choose to reject reasonable settlement offers, proceed with litigation and then fail to achieve any more than was previously offered. Where defendants have acted reasonably in such circumstances, they should not be further penalised by an award of costs in favour of the plaintiff in the absence of compelling countervailing factors. The importance of *Calderbank* offers is emphasised by reg 68(1). It is the only factor relevant to the conduct of the parties specifically identified as having relevance to the issue of costs.

[17] With particular reference to costs in the Authority, this Court stated in

*Mattingly v Strata Title Management Limited*:<sup>15</sup>

[27] Where an offer of settlement has been made by a party to litigation and the other party unreasonably rejects that offer that should be taken into account in assessing costs. That is because costs have been wasted going to trial. This principle has been endorsed by the Court of Appeal as appropriate in assessing costs in litigation in the Employment Court and that a "steely approach" ought to be adopted. No such statement of approval has yet been made by the Court of Appeal in relation to the assessment of costs in the

14. *Bluestar Print Group (NZ) Ltd v Mitchell* [2010] NZCA 385, [2010] ERNZ 446, (footnotes omitted).

15. *Mattingly v Strata Title Management Ltd* [2014] NZEmpC 15, [2014] ERNZ 1, (footnotes omitted).

Authority. It may be that a somewhat diluted approach is appropriate in that forum having regard to the statutory imperatives identified above, and in light of the Court's observation in *Da Cruz* that Authority awards would be "modest". What is clear, however, is that the effect of an offer is ultimately at the discretion of the Authority, and the Court on a *de novo* challenge, having regard to the circumstances of the particular case.

[18] In *Fagotti*, a full Court confirmed that the remarks of the Court of Appeal about a "steely" approach to *Calderbank* offers expressed in *Bluestar Print Group* applies to the Authority's first instance jurisdiction as well as to the Court's appellate role.<sup>16</sup>

### **The Authority's costs determination**

[19] The Authority commenced its consideration of the costs issues by confirming that Ms Campbell's application for the interim reinstatement took approximately half a day, while the substantive investigation took five and a half days for both hearings. The Authority recorded that the Commissioner's costs were in excess of \$145,000 excluding GST, and disbursements totalled \$5,471.10. There had been 20 witnesses and in excess of 1,000 pages of documentary evidence. The Authority referred to the Commissioner's *Calderbank* offers, stating that these were made in good time before the substantive hearing but were rejected.

[20] The Authority found that Ms Campbell had a marginal degree of success. Reference was also made to dicta in *Mattingly v Strata Title Management Limited*,<sup>17</sup> where Judge Inglis held that it is not the function of a costs award to address any perceived deficiencies in the relief otherwise ordered to a successful party, much as it was not the function of a costs award to punish an unsuccessful party.

[21] The Authority went on to note that whilst the amounts offered in the *Calderbank* offers were more than those attained, the offer did not address the question of reinstatement which was a key remedy for Ms Campbell. Against that, however, had to be balanced the fact that her application for reinstatement was

unsuccessful.

<sup>16</sup> *Faggoti v Acme & Co Ltd*, above n 9, at [109].

<sup>17</sup> *Mattingly v Strata Title Management Ltd*, above n 15 at [13].

[22] The Authority Member was critical of Ms Campbell's conduct at the investigation meeting to the point where he concluded:<sup>18</sup>

[Ms Campbell] was totally incapable of understanding anyone who 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.

[23] The Authority then considered a range of further factors such as the fact that Ms Campbell had succeeded on one matter and in that respect the school had behaved badly; and that any extension of the length of the hearing was a factor that would affect the quantum of costs which Ms Campbell would have to pay. These matters did not justify increasing the tariff. Turning to whether the tariff should be reduced, the Authority acknowledged Ms Campbell had suffered financially, but in part that was due to her inability to understand her employer had grounds to question her performance, a factor which in the Authority's opinion escalated costs.

[24] The Authority concluded that although costs should be paid to the Commissioner, the factors justifying an increase of the tariff and the factors justifying a decrease of the tariff balanced each other. Consequently it was appropriate for the Commissioner to be paid the sum of \$21,000 as a contribution towards her costs in successfully resisting most of Ms Campbell's claims.

## Issues

[25] Both parties have filed comprehensive evidence and submissions in support of their respective cases, as summarised earlier. I shall deal with specific points where relevant. From the pleadings, the evidence and the submissions, it is apparent that the issues are these:

a) Should an order for costs in respect of Ms Campbell's application for interim reinstatement be made, and if so, on what basis?

b. Should either party be awarded costs in the Authority, and if so, on what basis having regard to:

<sup>18</sup> *Campbell v The Commissioner of Salford School*, above n 2, at [17].

- the outcome;
- the extent of actual costs incurred; and whether a tariff approach should be adopted;
- the Calderbank offers which were made; and
- the conduct of the case.

[26] Before dealing with each of those issues, I make two preliminary points. The first is that although the Commissioner obtained an order for costs in the Authority, she has challenged that determination on a de novo basis. The consequence of doing so is that all issues as to costs in the Authority are at large, and require reconsideration by the Court.

[27] Secondly, both parties have approached the issue of costs in the Authority on the basis of the outcome of the challenge. It was submitted by each counsel that the outcome which is to be assumed when considering the various costs issues is the outcome as determined by the Court, not the outcome as determined by the Authority. I agree that this is the correct approach, since the effect of [s 183\(2\)](#) of the [Employment Relations Act](#) (the Act) is that once the Court has made a decision, the determination of the Authority is set aside and the decision of the Court on the matter stands in its place. It would be artificial to proceed on any other basis. I respectfully agree with the dicta of Judge Shaw to this effect in *Ruddlesden v Unisys New*

*Zealand Limited*.<sup>19</sup>

## ***The application for interim reinstatement***

[28] The question of costs in respect of the reinstatement application was not dealt with separately by the Authority. The

length of the investigation meeting, half a day, was included in its overall assessment of costs in favour of the Commissioner which was calculated on the basis of six days. The net effect was to award the Commissioner costs for half a day investigation of the interim application, based on the normal tariff; that is, the sum of \$1,750. The Commissioner now seeks an award of \$5,000, having regard to the extent of work involved.

19 *Ruddlesden v Unisys New Zealand Ltd* WC 5/05, 18 February 2005, at [9].

[29] In response, counsel for Ms Campbell, Mr Harrison, submits that either costs should lie where they fall, or in the alternative, not exceed the daily tariff since the extent of information placed before the Authority was appropriate in the circumstances and was not the subject of any criticism by the Authority. Counsel also referred to an undertaking as to timing in respect of the investigation which the Commissioner was conducting. The Authority held that since the investigatory process would be completed before the next school year, the balance of convenience favoured the school. This factor led to the application being dismissed. Mr Harrison argued that in fact the undertaking was not complied with, and this should be relevant for costs purposes.

[30] The final point which I have just summarised should be amplified since it must be at the forefront of my consideration of the cost issues relating to the application for interim relief. In its determination of that application, the Authority weighed various factors which each party had raised on the topic of reinstatement. It concluded that there were two particular factors that tipped the balance in the Commissioner's favour. The first was that Ms Campbell wished to be reinstated immediately so that she could properly farewell children at a final assembly which was to take place the day after the determination (that is, 12 December 2013), and then work towards reintegrating herself within the school community. Those goals, the Authority found, were not achievable in the near future. External resources would need to play a part in the process, and it was highly unlikely that an appropriate programme could be put in place so that an immediate return to work

could be implemented.<sup>20</sup>

[31] The second key factor related to the provision of an undertaking by the Commissioner to the Authority that she could complete the investigatory process before the new school year. The Authority said that should the Commissioner fail in this objective, she should be aware that the Authority would be "more than amenable

[to] revisiting its conclusion".<sup>21</sup>

<sup>20</sup> *Campbell v The Commissioner of Salford School* [2013] NZERA Christchurch 254 at [50]-[51].

<sup>21</sup> At [57].

[32] In fact, the investigation process was not completed within that timeframe. The report of the investigator, Mr Bevan, was not provided until 7 February 2014; and the first disciplinary meeting with Ms Hornsey did not take place until

14 February 2014. Then the subsequent processes took place. Eventually, Ms Campbell was notified of her dismissal on 6 March 2014, by which time the school year was well under way.

[33] On my review of the materials before the Court, one of the factors which contributed to delay was that Mr Bevan was significantly involved in the preparations for the application for interim relief. Consequently he was not able at that time to advance the investigation itself. That delay was foreseeable at the time of the investigation meeting in mid December 2013. I find that had Mr Bevan not been involved in this preparation, it is probable he could have produced the draft report he submitted to the Commissioner on 13 December 2013, well prior to that date. Mr Harrison also submitted that the Commissioner was away for two weeks in January 2013, an absence she had known about at the time of her appointment in November 2012. However, there is no evidence that this contributed to delay in resolving matters – although it might have if the investigation process had been concluded by late 2012, which could have been the case if the investigation had not dealt with the application for interim relief.

[34] The result was that despite the undertaking that had been given to the Authority, the investigation was not concluded within the anticipated timeframe.

[35] Given the warning which the Authority Member gave regarding the importance of the undertaking as to timing, I conclude that this factor is relevant to the assessment of costs. That is because had the Authority been aware that the investigation would not be concluded prior to the commencement of the next school year, there may have been a different outcome to the application for interim reinstatement.

[36] I find that Ms Campbell lost the opportunity of arguing persuasively that she should succeed in her application for reinstatement and lost the opportunity thereby of obtaining an order for costs. Assessed on lost opportunity principles, this is a

factor which should be taken into account when determining whether any order for costs should be made.

[37] But for this factor, I would have concluded that costs should follow the event, and that an uplift of the tariff to \$7,000 per day was justified, thus entitling the Commissioner to an order for costs in the sum of \$3,500 for the half day devoted to the Authority's investigation of the application for interim relief.

[38] However, taking into account the issue relating to the representations made as to timing, I conclude that in all the circumstances there should be no order as to costs to reflect the lost opportunity which Ms Campbell sustained.

***Costs relating to the Authority's investigation meeting: the outcome***

[39] Counsel for the Commissioner, Mr Wilson, submits that while Ms Campbell achieved more success in the Court than she did in the Authority, she again failed in her bid to be reinstated, and that this is a decisive factor when considering costs with regard to the investigation meeting.

[40] In response, Mr Harrison submitted that although four disadvantage grievances were dealt with by the Authority, the first of those was the only one that was not pursued on the challenge. The second grievance related to Ms Campbell's suspension, which was the subject of a successful challenge. The third grievance related to aspects of the Commissioner's investigation process; those concerns were upheld when the Court dealt with the challenge in respect of the unjustified dismissal claim. Ms Campbell again advanced her dismissal grievance which succeeded. It was accordingly submitted that the challenge was successful for Ms Campbell on all major points which were before the Authority, and on the same evidence.

[41] Mr Harrison also argued that although an order or reinstatement was not obtained, Ms Campbell nonetheless achieved some vindication, and was able to clear her name. In particular, reliance is placed on the fact that a Complaints Assessment Committee (CAC) of the Education Council of Aotearoa New Zealand had recently considered the complaint in light of this Court's judgment.

[42] This was a reference to the fact that on 29 September 2015, the CAC wrote to Ms Campbell stating that it would not be considering further the circumstances of the dismissal having regard to the conclusions reached by this Court, although it noted the observations as to performance issues. That conclusion means that Ms Campbell has retained her registration as a teacher. Accepting, as Mr Wilson submits, that the CAC is an independent body which is charged with the responsibility of reaching its own conclusions with regard to complaints before it, it is nonetheless apparent that the decision of the Court was relevant for purposes of the CAC's deliberations. When Ms Campbell gave her evidence, she told the Court she was concerned as to the professional implications of her dismissal; the professional implications of the dismissal were an obvious reason for the bringing of the challenge. Accordingly, I consider that it is appropriate to have regard to the outcome of the complaint which was lodged after the dismissal, when assessing costs.

[43] In all the circumstances, I find that Ms Campbell achieved a positive outcome by advancing her challenge and that in the usual way costs should follow the event, subject to consideration of other factors which the parties have identified in their submissions or evidence.

***Should a tariff approach be adopted?***

[44] Ms Campbell's application proceeds on the basis that the application of the Authority's normal daily tariff of \$3,500 per day is appropriate. No uplift is sought.

[45] The starting point, therefore, for the five and a half days of the investigation meeting is the amount of \$19,250.

***The Calderbank offers***

[46] It is next necessary to summarise the detail of the Calderbank offers which were made prior to the investigation meeting which commenced on 15 May 2014.

[47] On 7 April 2014, the Commissioner's lawyers proposed resolution on a Calderbank basis as follows:

- a) A payment of \$75,000 would be made to Ms Campbell, \$35,000 of which would be paid under [s 123\(1\)\(c\)\(i\)](#) of the Act.
- b) Ms Campbell would discontinue her proceedings with no issue as to costs.
- c) The settlement and/or matters relating to it would be confidential as between the parties.
- d) The settlement would constitute a full and final settlement of all issues. e) The offer would remain open for seven days.

[48] On 9 April 2014, Ms Campbell's lawyers responded, also on a Calderbank basis, as follows:

- a) Ms Campbell would accept the offer made by the Commissioner's lawyers, providing she was also reinstated to her position as Principal of Salford School.

b) Alternatively, Ms Campbell would resolve her claim on the basis of a payment totalling \$200,000, \$30,000 of which would be paid pursuant to [s 123\(1\)\(c\)\(i\)](#) of the Act; the Commissioner would also make an agreed public statement to the effect that Ms Campbell's suspension and dismissal were not justified but that the parties had agreed she would not return to Salford School; the parties would also agree to a process for dealing with the Teacher Council issues.

[49] On 17 April 2014, the Commissioner's lawyers responded declining the offer

and counter-offering on this basis:

a) A payment of \$100,000 would be made to Ms Campbell, \$35,000 of which would be paid under [s 123\(1\)\(c\)\(i\)](#) of the Act.

b) There would be an agreed public statement recording that the parties had reconciled their differences, acknowledging the detrimental effects the suspension and dismissal had on Ms Campbell and her career, and respecting Ms Campbell's graciousness in stepping aside to allow the school to determine its own future.

c) And in all other respects the Commissioner's previous offer would apply.

[50] On the same day, Ms Campbell's lawyers responded declining that offer, stating that it did not deal adequately with the two issues that were important to her, either reinstatement or a public acknowledgment that her dismissal was unjustified. It was contended that in fact the Commissioner's offer required Ms Campbell to be party to a public statement which stated that the Commissioner's actions were justified.

[51] Mr Wilson submitted that the counter-offer made for Ms Campbell on

9 April 2014 should be assessed on the basis that she was prepared to settle without there being an agreement as to reinstatement. However, it is necessary to note that this was only on the basis that a substantial payment of \$200,000 would be made, accompanied by a public statement that acknowledged that her dismissal was not justified. It is clear that vindication was a distinct and significant element of the negotiation from Ms Campbell's perspective.

[52] When considering the final Calderbank offer against the Court's judgment, it is necessary to detail the remedies which Ms Campbell successfully obtained. The figure for lost wages has now been agreed between the parties. The Court is advised that the effect of the Court's order is reimbursement for 38 weeks lost wages at a salary of \$2,260.85, being at total of \$85,912.30 which less the 30 per cent contribution fixed by the Court results in a balance of \$60,138.61, before tax. Having regard to the compensation which the Court ordered under [s 123\(1\)\(c\)\(i\)](#) of

\$22,400, the total of the financial remedies is \$82,538.61.

[53] The final offer made for the Commissioner was on a full and final basis and was thus inclusive of costs. It is accordingly necessary to add to the sum of the financial awards which were obtained, a sum that can properly be attributed to preparation for the investigation meeting as at the date of the offer, based on the Authority's tariff approach.

[54] Ms Campbell stated that \$76,687.83 was expended in relation to the investigation meeting, which I infer includes preparation as well as representation at the meeting. That suggests considerable preparation so that a substantial proportion of the tariff sum of \$19,250 should be regarded as relating to the preparation to the date of the offer; I fix it in the sum of \$10,000.

[55] The result is that on the one hand I must consider the Court's findings that the suspension and dismissal were not justified, together with a notional judgment sum of \$92,500; and on the other hand I must consider the offered sum of \$100,000, along with the other terms which were offered.

[56] Emphasising the necessity to adopt a "steely approach", it was submitted for the Commissioner that the quantum of compensation offered was at a level which conveyed a distinct element of vindication.

[57] I do not consider the final offer that was made for the Commissioner would have achieved this. Because of the intense publicity which had surrounded her suspension and dismissal, Ms Campbell sought an outcome that would allow some restoration of her reputation. The final Calderbank offer that was made for the Commissioner on 17 April 2014 would not have achieved that. First the terms of settlement and all matters relating to it were to be confidential (this term was contained in the first Calderbank offer of 7 April 2014 and was repeated in the final offer of 17 April 2014); and the proposed agreed public statement did not acknowledge that the dismissal was not justified, which was obviously important for Ms Campbell.

[58] A yet further issue which is relevant on the topic of vindication relates to the outcome of the disciplinary complaint which had been lodged with the Education

Council following Ms Campbell's dismissal. In my view this was a significant matter, since it was relevant to Ms Campbell's ability to maintain her registration as a teacher, and thus enable her to continue to practice in her chosen profession. In the Calderbank offer that was advanced on Ms Campbell's behalf, it had been proposed that there should be an agreed process for dealing with the complaint. The Commissioner's second Calderbank offer would not have addressed the issue of the



[68] Beginning with the first of these, I do not consider that there should be an allowance for GST. As I indicated in *Wills v Goodman Fielder New Zealand Limited*,<sup>24</sup> the Court has on some occasions in the past considered it appropriate to

award GST if the recipient of the order is unable to recover that liability.<sup>25</sup> The

alternative position is that which is adopted in the High Court where costs between parties is treated as GST neutral since an unsuccessful party making contribution to costs is not paying for a service provided to it by a successful party.<sup>26</sup> In *Air New*

*Zealand Limited v Kerr*,<sup>27</sup> Judge Ford held that such an approach is preferable

because it provides overall clarity, consistency and certainty of approach; and that any circumstances which might otherwise have justified the inclusion of GST in an assessment of costs can be ameliorated by the Court through an uplift in its eventual award beyond the standard 66 per cent starting point. I respectfully agree with that conclusion. Accordingly, I adopt a GST neutral approach.

[69] Typing services in the sum of \$2,126.25 has been charged. For the Commissioner it is submitted that the typing of documents normally comes under the category of business overheads allowed for as part of counsel's hourly rate, or as part of an administration fee. I consider the hourly rate of \$350 plus GST per hour to be reasonable in respect of counsel's services; and as no administration fee has been charged, it is appropriate to consider typing as a discreet issue. It is, however, an amount which is rather more significant than I would have anticipated having regard to the volume of typing which the case required, which was mainly for briefs of

evidence. I allow \$1,500 plus GST.

<sup>24</sup> *Wills v Goodman Fielder New Zealand Ltd* [2015] NZEmpC 30 at [23].

<sup>25</sup> *Davidson v Christchurch City Council* [1995] NZEmpC 95; [1995] 1 ERNZ 523 at 528-529; *Booth v Big Kahuna Holdings Ltd* [2015] NZEmpC 4 at [49]- [52].

<sup>26</sup> *Burrows v Rental Space Ltd* [2001] NZHC 770; [2001] 15 PRNZ 298 (HC) at [14]. See also *Thoroughbred & Classic Car Owners' Club Inc v Coleman*, (unreported), CA203/93, 25 November 1993 (CA) at

2-3.

<sup>27</sup> *Air New Zealand Ltd v Kerr* [2013] NZEmpC 237 at [36]- [37].

[70] Next, I deal with the issue of travel, totalling \$2,126.25, which relates to expenses incurred through the use of out-of-town counsel. I accept the submission made for the Commissioner that Ms Campbell chose to appoint out-of-town counsel. Adopting the same approach as I adopted in *O'Connor v Auckland University Students' Association Inc*,<sup>28</sup> I disallow this disbursement.

### **Calderbank offer**

[71] The main submission made for the Commissioner with regard to costs in the Court relates to the Calderbank offers. Mr Wilson submits that having regard to the two Calderbank offers made by the Commissioner prior to the investigation meeting, and a further offer made on 11 February 2015, the Commissioner is entitled to a costs award.

[72] I have already concluded that it was not unreasonable for Ms Campbell to have rejected the second Calderbank offer made prior to the investigation meeting. The same conclusion must be reached with regard to that offer for the purposes of the hearing of the challenge.

[73] The offer made for the Commissioner on 11 February 2015 was in these terms:

a) The Commissioner would discontinue her claim for costs against

Ms Campbell in the Authority.

b. The Commissioner would pay \$50,000 to Ms Campbell, \$35,000 of which under [s 123\(1\)\(c\)\(i\)](#) of the Act.

c) The settlement was to be confidential.

d. The settlement was to constitute a full and final settlement of all issues between the parties.

[74] Mr Wilson submits that adding the amount of costs order made by the

Authority, this offer was in effect worth \$71,000. I do not consider that approach to

28 *O'Connor v Auckland University Students' Assoc Inc* [\[2014\] NZEmpC 185](#).

be correct, since it is Ms Campbell who has now obtained costs in the Authority. And arguably when comparing the judgment sum allowance should be made for Ms Campbell's costs in the Court to the date of the February 2015 offer.

[75] Even putting these issues to one side, the financial offer made was significantly less than the judgment sum. Nor did it address the reputational issues which I have discussed earlier. It was understandably declined.

[76] On 18 February 2015, Mr Harrison responded to this offer by stating that Ms Campbell was pursuing reinstatement, and remained committed to education. Accordingly, the Commissioner was requested to consider a proposal which would include reinstatement together with reasonable conditions such as appropriate advice and guidance; reimbursement of lost remuneration and other benefits as between the date of dismissal and reinstatement, less monies earned in the intervening period; and an agreed process to transition Ms Campbell back into the role including an announcement that would be made as part of the process. Provisions as to confidentiality, non-disparagement and the terms being in full and final settlement would apply, along with withdrawal of the challenge. Costs incurred to date, including those in the Authority, would lie where they fell. Counsel advises there was no response to this offer.

[77] I have carefully reviewed the history of Calderbank offers, and I am not satisfied that it is appropriate to conclude Ms Campbell should have accepted any of them, or that they were of sufficient benefit to Ms Campbell as to justify an adjustment from the starting point of two-thirds of actual and reasonable costs. Accordingly, the issue of costs in the Court must be resolved without regard to them.

### ***Conclusion as to costs in the Court***

[78] Having regard to my consideration of the issues raised by the Commissioner as to Ms Campbell's application for costs, I conclude that the amount sought by Ms Campbell for her costs, \$52,113.60 which is 66 per cent of her actual costs is reasonable; the Commissioner is directed to pay this sum to Ms Campbell. GST is not payable.

[79] I have disallowed one disbursement and reduced another, but allow all others, so that that sum of \$4,801.67 including GST is to be paid by the Commissioner for those disbursements.

### **Summary**

[80] In respect of costs in the Authority, the Commissioner is to pay Ms Campbell a contribution to her costs of \$19,250.

[81] In respect of costs in the Court, the Commissioner is to pay Ms Campbell a contribution to her costs of \$52,113.60, and disbursements of \$4,801.678 inclusive of GST.

B A Corkill

Judge

Judgment signed at 3.30 pm on 20 October 2015