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Fagotti v Acme & Co Limited [2015] NZEmpC 135 (5 August 2015)

Last Updated: 12 August 2015

IN THE EMPLOYMENT COURT WELLINGTON

[\[2015\] NZEmpC 135](#)

EMPC 8/2015

IN THE MATTER OF a challenge to a determination of
the
Employment Relations Authority

BETWEEN DAVIDE FAGOTTI Plaintiff

AND ACME & CO LIMITED Defendant

Hearing: By written submissions filed on 25 March and 21 and 29
April

Court: 2015

Chief Judge GL Colgan Judge ME Perkins Judge AD Ford

Appearances: B Buckett, counsel for plaintiff
S Turner and S Clark, counsel for defendant

Judgment: 5 August 2015

JUDGMENT OF THE FULL COURT

[1] Davide Fagotti has challenged, by hearing de novo, the costs determination of the Employment Relations Authority,¹ awarding him \$4,500 in costs and \$71.56 as a disbursement, following his successful personal grievance. The challenge raises particular issues about Calderbank offers in proceedings in the Authority and provides an opportunity for the Court to review generally the Authority's practices about costs. That exercise was last undergone 10 years ago in *PBO Ltd (formerly*

Rush Security Ltd) v Da Cruz.²

¹ *Fagotti v Acme & Co Ltd* [2014] NZERA Wellington 131.

² *PBO Ltd (formerly Rush Security Ltd) v Da Cruz* [2005] NZEmpC 144; [2005] ERNZ 808 (EmpC).

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[2] The parties agreed to the challenge being dealt with by written submissions which have now been made to the Court.

The Authority's determinations

[3] In a determination issued on 22 July 2014,³ the Authority upheld Mr Fagotti's personal grievance that he had been dismissed unjustifiably. The Authority also concluded that Acme & Co Limited (Acme) had bargained unfairly with Mr Fagotti for his individual employment agreement covering his employment at Acme's café known as Prefab. The Authority awarded Mr Fagotti remedies including compensation for lost remuneration of \$2,098, compensation for non-economic loss (hurt and humiliation) of \$5,000, and compensation for unfair bargaining of \$1,500.

[4] Mr Fagotti subsequently claimed a full indemnity of his legal costs which came to more than \$20,000 (including GST). Alternatively, the plaintiff claimed a costs' award of two-thirds of actual and reasonable costs incurred (plus GST).

[5] Acme opposed Mr Fagotti's costs application, submitting to the Authority that costs should lie where they fell. The company pointed out that the case was unremarkable in all respects and that Mr Fagotti did not succeed in all his claims. It submitted to the Authority that it had found that Acme had acted in good faith and, in particular, mistakenly but genuinely believed it was entitled to rely on a trial period to dismiss Mr Fagotti without justification. Acme said that it had attended mediation with Mr Fagotti and told the Authority that it had made three "very reasonable offers of settlement which the applicant chose to reject".

[6] In determining costs, the Authority relied on the now long and well established judgment of this Court in *PBO Ltd (formerly Rush Security Ltd) v Da Cruz*.⁴ It referred to the notional daily tariff of \$2,000 acknowledged in that full Court judgment, which, we understand, currently stands at \$3,500. The Authority considered that Mr Fagotti was generally successful in his claims and that the only

one on which he might be said to have been unsuccessful was that Acme's unfair

³ *Fagotti v Acme & Co Ltd* [2014] NZERA Wellington 78.

⁴ *Da Cruz*, above n 2.

bargaining constituted an unjustified disadvantage personal grievance. It recorded that Mr Fagotti was, however, awarded compensation for the unfair bargaining.

[7] The Authority referred to Calderbank offers that had been made, both ways, over the period from September 2013 to May 2014. Mr Fagotti's case was that Acme unreasonably declined four offers made by him to resolve his case and said that these refusals justified an increase in what would otherwise be a costs award to be made to him.

[8] The Authority recorded that Mr Fagotti's last proposal to Acme to resolve his personal grievance, on a 'without prejudice except as to costs' basis, was on 21 May

2014. Mr Fagotti proposed that he be paid the sum of \$5,000 compensation under s

123 of the [Employment Relations Act 2000](#) (the Act), together with \$12,500 as a contribution towards his costs, in return for discontinuing his proceedings. This was not accepted by Acme.

[9] The Authority considered Acme's last Calderbank offer to Mr Fagotti made on 31 October 2013. It concluded that if he had accepted it, Mr Fagotti would have been better off monetarily than he was after the Authority's determination. Acme's last offer to the plaintiff was for the sum of \$2,500 under [s 123](#) of the Act and a contribution towards his costs of \$3,500 (plus GST). Acme's case was that after Mr Fagotti's rejection of this 31 October 2013 offer, he incurred further legal costs exceeding \$18,000, leaving him in net deficit even after the Authority's awards were taken into account.

[10] The Authority did not accept Acme's arguments generally about its offers. It said that it had awarded Mr Fagotti \$4,598 more in total than Acme had offered as compensation on 31 October 2013. It held that even when the company's offer of a contribution to costs was included, this was still short of Mr Fagotti's success by

about \$2,098. The Authority said:⁵ "That is significant and I decline to take

ACME's offers into account in assessing an appropriate amount of costs to award to

Mr Fagotti."

⁵ *Fagotti*, above n 1 at [12].

[11] The Authority concluded:⁶

The costs incurred by both parties would have been considerably less if ACME had taken a more pragmatic approach to Mr Fagotti's offer to resolve the matter in October 2013. I find this justifies an uplift to the daily tariff. It does not, however, justify Mr Fagotti's claim for indemnity costs. There was no "exceptionally bad" behaviour by ACME that would warrant such an award.

[12] The Authority considered that the costs that Mr Fagotti had incurred were more than reasonable for an investigation meeting that occupied less than a full day. Nevertheless, it took its daily tariff of \$3,500 as a starting point and added an uplift of \$1,000 to this. The Authority declined to make an additional award towards the costs incurred by Mr Fagotti in making his application for costs. That is how the Authority came to award \$4,500 with the additional \$71.56 being the disbursement of the Authority's filing fee.

Background

[13] To consider the costs award in its context, it is necessary to examine in some detail the background events. As already noted, there was a series of offers and counter-offers of settlement of the case. These occurred beginning shortly after Mr Fagotti filed his personal grievance claims in the Authority on 28 August 2013. All offers were made "without prejudice except as to costs". So, although they were not disclosable before the Authority's substantive determination was given, they are now no longer privileged.

[14] First, on 18 September 2013, Acme offered Mr Fagotti the sum of \$3,000 to settle the case. This consisted of \$2,500 for compensation under [s 123](#) of the Act and

\$500 (plus GST) towards costs.

[15] Two days later, on 20 September 2013, Mr Fagotti counter-offered to settle for \$10,000 in [s 123](#) compensation, and \$3,500 (plus GST) towards costs. Mr Fagotti's lawyers' letter made reference to the then recently decided case of *Salad*

*Bowl Ltd v Howe-Thornley*⁷ which the lawyers said was relevant to the matter of

⁶ At [14].

⁷ *Salad Bowl Ltd v Amberleigh Howe-Thornley* [2013] NZEmpC 152, [2013] ERNZ 326.

Acme's liability. Miss Buckett, counsel for the plaintiff, points out that the *Salad Bowl* case was key to the Authority's determination of Mr Fagotti's grievances, including the finding that he had been dismissed unjustifiably. So, Miss Buckett submitted, the defendant was on notice from an early stage that the case law was against it.

[16] On 24 September 2013 Acme adjusted its settlement offer by both decreasing the sum for compensation to \$2,000 and increasing the allowance towards costs to

\$3,500 (plus GST).

[17] On 1 October 2013 Mr Fagotti counter-proposed that he receive \$6,000 in s

123 compensation and \$3,500 (plus GST) towards legal costs. On 31 October, Acme responded by increasing its previous offer but this time consisting of \$2,500 in [s 123](#) compensation and \$3,500 (plus GST) towards legal costs. As already mentioned, this was Acme's last offer to settle the litigation.

[18] On 7 November 2013 Mr Fagotti responded by offering to settle for \$7,500 in [s 123](#) compensation and \$4,000 (plus GST) towards legal costs.

[19] On 21 May 2014 Mr Fagotti made a further varied offer of settlement: he proposed that he receive \$5,000 in [s 123](#) compensation and \$12,500 (plus GST) towards legal costs. On 5 June 2014 Acme declined Mr Fagotti's [s 21](#) May 2014 offer.

[20] No further offers of settlement were made either way before the Authority's investigation and determination of the case. Although involving numerous offers and counter-offers, we understand that this is not an atypical background to litigation of this sort in the Authority.

The case for the plaintiff on the challenge

[21] The plaintiff has proposed six questions for determination by this Court. They are:

- Did the Authority err in applying a notional tariff-based costs award with a minimal uplift?
- Did the Authority err in not exercising its discretion to award a substantially higher award of costs, having regard to the offers of settlement and the actual costs incurred?
- Was the Authority correct in failing to exercise its discretion to award a substantially higher award of costs because it deemed them to be unreasonable?
- Was justice done between the parties by the Authority?
- Can the Court substitute its decision in relation to costs?
- What is an appropriate award of costs?

[22] The plaintiff identifies the following legal principles which he says are applicable to this case.

[23] First, [s 183](#) of the Act provides that the Court must make its own decision on a challenge to a determination of the Authority.

[24] Second, Miss Buckett, for the plaintiff, submits that under cl 19 of sch 3 to the Act, the Court is empowered to award costs in any proceeding and in any amount which it thinks reasonable. This being a challenge to a determination of the Authority, however, we consider that the question is not the application of cl 19 of sch 3 but, rather, of cl 15 of sch 2 governing the Authority's jurisdiction and powers. This provides:

15 Power to award costs

(1) The Authority may order any party to a matter to pay to any other party such costs and expenses (including expenses of witnesses) as

the Authority thinks reasonable.

(2) The Authority 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.

[25] Next, Miss Buckett submits that the Court's role on a challenge such as this

is set out in the following passage taken from the judgment in *Da Cruz*:⁸

... The role of the Court on a challenge to costs is to stand in the shoes of the Authority and to assess de novo the evidence relating to the costs award in that forum in order to judge what is an appropriate award in light of all considerations which are relevant to the Authority.

[26] The plaintiff also identifies the following principles from the *Da Cruz* case:

- The exercise of the discretion to award costs is to be undertaken in accordance with principle and not arbitrarily.
- Without prejudice offers to settle can be taken into account.
- The statutory costs jurisdiction is consistent with the Authority's equity and good conscience jurisdiction.

- Equity and good conscience is to be considered on a case by case basis.
- Conduct which has increased costs unnecessarily can be taken into account to inflate what would otherwise be an award.

[27] Finally, as regards general principles, Miss Buckett submits that each case must be treated on its own facts.

[28] None of the foregoing propositions is particularly controversial, and we do not disagree with them. Nor did the defendant do so.

[29] Next, however, counsel for the plaintiff criticises the Authority's "tariff"

approach and its application in this case. Miss Buckett said:

In practice the tariff approach seems to have taken precedence and been slavishly applied as a mantra by the Authority with scant/no regard to the circumstances of the case and the requirements of the Authority to do justice between the parties.

8 *Da Cruz*, above n 2, at [19].

[30] No data were presented to support Miss Buckett's submission that the daily

notional tariff has been applied in this way by the Authority.

[31] Miss Buckett submits that although the full Court in *Da Cruz* contemplated that a tariff approach would not be the sole one to be followed by the Authority, its adoption of a tariff approach has distracted the Authority from the exercise of its discretion to award costs in equity and good conscience. Miss Buckett argues that this case is an example of the frequency of the Authority's failure to consider overall justice between the parties and to give effect to Mr Fagotti's entitlement "to reap the benefits of his success without a heavy burden of costs for which he has become liable ... due to the conduct of the other party or where such have been incurred unnecessarily or unreasonably."

[32] Miss Buckett submits that the Authority was obliged to go beyond its tariff in the exercise of its discretion to award costs in that amount, especially where the circumstances indicated the existence of extenuating factors such as Calderbank offers and unnecessary or unreasonable conduct of one of the parties.

[33] Miss Bucket emphasises what she submits was Acme's "wilful disregard of clearly established law" and that Mr Fagotti incurred costs needlessly for which he is liable to pay his lawyer. Counsel submits that the case was clear cut and unambiguous, the law having been settled but which the defendant, through counsel, "chose to ignore". Miss Buckett is very critical of Acme's decision to even mount a defence to the claim, having had pointed out to it what counsel suggests was binding and recent authority on the question at the heart of the case. Counsel submits that: "In a more sinister vein it is open to inference that the intent of the Defendant was to deliberately put the Plaintiff to cost, as a deterrent to prosecuting his claim."

[34] Next, Miss Buckett identifies a number of what she claims are errors in the Authority's reasoning. First, counsel submits that having found that multiple and significant offers of settlement had been made by Mr Fagotti, there was a relevant applicable Calderbank offer made by him as a result of which costs would have been less if Acme had taken a more pragmatic approach and accepted it. Counsel submits

that the Authority erred in these circumstances by applying its notional daily tariff with a minimal uplift.

[35] Next, counsel submits that in declining to award indemnity costs, the Authority wrongly applied the judgment of the Court of Appeal in *Bradbury v Westpac Banking Corp*⁹ in that "exceptionally bad behaviour" was not required to support indemnity costs but, rather, it was "in wilful disregard of known facts or clearly established law" as Miss Buckett had submitted to the Authority.

[36] Next, counsel for Mr Fagotti submits that the Authority failed to exercise its discretion in relation to costs because it said they were unreasonable. Associated with this, the plaintiff says that the Authority failed to apply equity and good conscience to its decision and, in particular, failed to recognise the outcome of its costs decision so far as the plaintiff was concerned. Miss Buckett submits that the Authority failed to identify why the plaintiff's costs were said to have been unreasonable and to give reasons for that conclusion. Counsel submits that the defendant also would have incurred costs and that the Authority ought to have ascertained the level of those in order to provide a comparison in assessing the reasonableness of Mr Fagotti's costs. The plaintiff says that the Authority also failed

unjustifiably to make an award of costs incurred in the preparation of the submissions made on costs.

[37] Next, as regards settlement offers generally, Miss Buckett highlights the judgments of the Court of Appeal on this question in *Health Waikato v Elmsly*¹⁰ and *Bluestar Print Group (NZ) Ltd v Mitchell*.¹¹ In the former, the Court of Appeal emphasised the need for the employment institutions to consider seriously settlement offers “in the broader public interest” and, in the latter case, it reiterated this, saying:¹²

In the employment context it has also recognised ... that the public interest in the fair and expeditious resolution of disputes would be undermined if a party were able to ignore a Calderbank offer without any consequences as to costs.

⁹ *Bradbury v Westpac Banking Corp* [2009] NZCA 234, [2009] 3 NZLR 400.

¹⁰ *Health Waikato Ltd v Elmsly* [2004] NZCA 35; [2004] 1 ERNZ 172 (CA).

¹¹ *Bluestar Print Group (NZ) Ltd v Mitchell* [2010] NZCA 385, [2010] ERNZ 446.

¹² At [18].

[38] Turning to Mr Fagotti’s claim to indemnity costs, Miss Buckett for the plaintiff accepts that the appropriate test was set by the Court of Appeal in *Bradbury* in which non-exhaustive categories were identified. Counsel highlights the consideration where the case involves “wilful disregard of known facts or clearly established law”. In this regard, Miss Buckett submits that Acme’s opposition to Mr Fagotti’s claim was unmeritorious and frivolous and it was only at the Authority’s investigation meeting that Acme’s “defence of ignorance was first revealed”. Miss Buckett invites the Court to find that Mr Fagotti’s claim was so clearly correct on a plain reading of the legislation and case law, that Acme never had a defence to it. So, Miss Bucket submits, Acme’s resistance to the claim had no merit whatsoever and the time of the plaintiff and the Authority was taken up unnecessarily. The plaintiff submits that this warranted an order for indemnity costs.

[39] Turning to the plaintiff’s alternative claim to an indemnity award (a reasonable contribution to actual and reasonable costs), Miss Buckett invites the Court to follow the judgment of the Court of Appeal in *Binnie v Pacific Health Ltd*.¹³

Mr Fagotti says that his legal costs amounted to \$24,944.94 (including GST of \$3,253.69) for:

- drafting letters;
- undertaking without prejudice correspondence;
- preparation for an attempt at mediation;
- drafting a statement of problem;
- drafting briefs of evidence and evidence in reply;
- drafting a subpoena;
- preparation and attendance at the investigation meeting;

¹³ *Binnie v Pacific Health Ltd* [2003] NZCA 69; [2002] 1 ERNZ 438 (CA).

- drafting submissions and submissions in reply; and
- drafting costs submissions for the Authority.

[40] The plaintiff says that of the \$24,944.94 legal representation costs payable by him to his lawyer, about \$3,000 (plus GST), related to the costs of preparation for, and attendance at, mediation which he accepts are “usually not recoverable” unless that has been directed by the Authority. He does not claim mediation costs. Although we do not consider that this question is closed, Mr Fagotti’s election not to claim mediation costs means that it will not be decided in this case.

[41] Miss Buckett identifies a judgment of this Court¹⁴ in which, she says, the Court held that costs should not render a decision nugatory; in other words, any award of compensation must still have value after costs have been taken into account. Counsel submits that an award based solely on the Authority’s daily tariff nullifies the compensation awards to Mr Fagotti and is unfair. Miss Bucket submits:

There is no justifiably good reason why a successful party in the Authority should not recover a reasonable contribution to the reasonably incurred actual costs of presenting the case to the Authority. The minimal tariff-based approach taken by the Authority in this case is contrary to the principle that everyone should have access to justice and that awarding successful parties a small percentage of their reasonably incurred costs indirectly acts as a financial barrier to receiving justice. The result of the award is that the Plaintiff has lost the benefit of the remedy he was awarded.

[42] Other more general arguments advanced by Miss Buckett for the plaintiff include the following.

[43] What is said to be the current inconsistency of approach by the Authority in awarding costs, is a barrier to justice. Next, in inviting the Court to give general directions about a consistent approach by the Authority, counsel submits that the full Court judgment in *Da*

Cruz “has become a cloak shrouding the Authority’s discretion, acting often against the interests of justice between the parties and access to justice.” Next, counsel submits that “[i]nvariably the employee Plaintiff does not

have the same access to fiscal backing as does the employer Defendant” and that

14 *Cliff v Air New Zealand Ltd* AC47A/06, 17 November 2006.

“[t]his inevitably creates a power imbalance and inhibition to access justice.” Counsel relies on s 3(a)(ii) of the Act requiring the Court to acknowledge and address the inherent inequality of power in employment relationships. Next, counsel for the plaintiff submits that the Court should approach these questions “not from the Authority perspective but from a position as the Court would”. That starting point is said by Miss Buckett to be two-thirds of actual and reasonable costs with an uplift towards indemnity costs in appropriate circumstances.

[44] The final point taken by counsel for the plaintiff concerns Goods and Services Tax (GST) on costs awards. The plaintiff seeks an award of costs that is inclusive of GST. That tax added to his lawyer’s fee is not recoverable by him as he is not GST-registered. In this regard, Miss Buckett relies on the judgment in

*Davidson v Christchurch City Council*¹⁵ and the more recent judgment in *Booth v*

Big Kahuna Holdings Ltd.¹⁶

The defendant’s submissions

[45] Summarised, the defendant’s position is that the costs claimed by the plaintiff for a matter the hearing of which lasted less than one day, are unreasonable and excessive; that the plaintiff is not entitled to an award of costs (although the defendant has accepted that it must pay and has paid the amount awarded by the Authority); and that this is an appropriate case for costs to lie where they fall.

[46] First, the defendant says that the plaintiff’s claims in documents filed vary unreliably. For example, the defendant says that in the statement of claim the plaintiff says that he incurred costs of \$19,211.25 (exclusive of GST); then, in her submissions, counsel for the plaintiff repeats this figure but then refers to a GST inclusive subtotal of \$21,691.25 to which is then added a GST component claiming, the defendant submits, a double GST figure amounting in total to \$24,944.94; then, later in the plaintiff’s submissions, counsel for the defendant say that the plaintiff claims to have incurred costs of \$18,681.25 (exclusive of GST and disbursements).

Finally, the defendant submits that the origin of this last figure is not clear or what is

¹⁵ *Davidson v Christchurch City Council* [1995] NZEmpC 95; [1995] 1 ERNZ 523 (EmpC) at 528-529.

¹⁶ *Booth v Big Kahuna Holdings Ltd* [2015] NZEmpC 4 at [51].

claimed by the plaintiff to be “\$12,454.15 (plus GST) in relation to the “two-thirds”

figure contained in paras 84 and 86(b) of those submissions.

[47] The defendant begins with some fundamental propositions with which we do not disagree. First, on a challenge by hearing de novo such as this, the Court is required to assess what is an appropriate award of costs in light of all the circumstances relevant to the proceedings in the Authority.¹⁷ Second, cl 15 of sch 2 to the Act gives the Authority the power to award costs as it thinks reasonable. That is a broad discretion but is one, nevertheless, to be exercised on principle and not arbitrarily.

[48] Next, the defendant says that there are a number of principles which were stated by the full Court in *Da Cruz* which have not altered in the past 10 years and should not be changed by this judgment. These include:

- the Authority’s discretion extends to both whether costs will be awarded and, if so, the amount;
- costs are not to be punitive or an expression of disapproval of a party’s conduct, although conduct which has increased costs unnecessarily can be taken into account in considering an award;
- costs will generally follow the event;
- frequently, the Authority may assess costs against a notional daily rate;
- the nature of the case can influence questions of costs; and
- awards will generally be modest.

[49] In *Da Cruz*, the Court considered that “there is nothing wrong in principle with the Authority’s tariff based approach so long as it is not applied in a rigid

¹⁷ *Da Cruz*, above n 2, at [19].

manner without regard to the particular characteristics of the case.”¹⁸ It is correct, also, as counsel for the defendant pointed out, that the full Court in *Da Cruz* recommended that cases in the Authority should be approached economically and with regard to the amount likely to be recoverable in the event of success as the Court said then in *Da Cruz*:¹⁹

... we urge representatives of parties to be conscious of the costs that are accumulating as a matter proceeds. Cases should be approached economically and in a way that is likely to leave a successful party with a satisfactory outcome. There is an overall need to ensure that costs being incurred are reasonable in the light of the amount that is likely to be recovered as remedies and costs from the Authority.

[50] This is sometimes referred to as the principle of proportionality.

[51] The defendant says that the Authority's current notional daily rate is \$3,500. That has been confirmed recently by a judgment of this Court, *Stevens v Hapag- Lloyd (NZ) Ltd*.²⁰ As in the case of the plaintiff's initial submissions, these are unremarkable and we agree with them. We understand that the Authority may be about to review the amount of that daily rate but it is the principle and its application, rather than the exact amount, with which this case is concerned. But Acme, too, has

some controversial points to make.

[52] Next, the defendant says that it proposed to the Authority that Mr Fagotti's substantive grievance could be determined without an investigation meeting, on the papers filed. It says that counsel for the plaintiff sought an investigation meeting.

[53] The defendant rejects what it says is the plaintiff's proposed approach to setting costs that these should ensure that the remedies provided by the Authority are not negated by the successful litigant's costs of representation.

[54] This matter was addressed in *Mattingly v Strata Title Management Ltd*.²¹

¹⁸ *Da Cruz*, above n 2, at [46].

¹⁹ At [47].

²⁰ *Stevens v Hapag-Lloyd (NZ) Ltd* [2015] NZEmpC 28 at [94].

²¹ *Mattingly v Strata Title Management Ltd* [2014] NZEmpC 15 at [13]- [14].

... It is not the function of a costs award to address any perceived deficiencies in the relief otherwise awarded to a successful party, much as it is not the function of a costs award to punish an unsuccessful party.

[14] It is clear from a reading of the Act as a whole, reinforced by the

2004 amendments, that the legislative intention is for employment relationship problems generally to be resolved in a cost effective, non- technical and practical way by the Authority. The highly nuanced approach to assessing costs advocated for on behalf of the plaintiff (which is set out in more detail below) sits uncomfortably with this overarching imperative and the evident purposes (and benefits) of a daily tariff approach applied in the general run of cases.

[55] Moving from what the defendant submits ought to have been the proper considerations in awarding costs to Mr Fagotti, it next says that the correct outcome in the Authority ought to have meant that each party met his or its own costs without contribution from the other, sometimes said to be allowing costs to lie where they fall. In support of this submission, the defendant says that there were no complex legal issues in the case and that neither extensive evidence nor extensive submissions were required.

[56] Next, the defendant says that the plaintiff was not wholly successful in his claims, the Authority concluding that he did not have a separate personal grievance for unjustified disadvantage, and that he achieved only modest monetary awards for his unjustified dismissal. Further, the defendant says that it acted in good faith and that its directors "mistakenly, but genuinely, believed it was entitled to rely on the

trial period provision of Mr Fagotti's employment agreement to dismiss him."²²

[57] The defendant says that it engaged in the proceeding before the Authority actively and constructively, contrary to the plaintiff's assertion and this included attending mediation and making "three very reasonable offers of settlement" which were rejected by the plaintiff.

[58] The defendant denies refusing to continue settlement discussions after 5 June

2014 as the plaintiff alleges. It says that it advised that the plaintiff's costs claims

remained a barrier to settlement and sought unsuccessfully to have the plaintiff compromise on these.

²² *Fagotti*, above n 1 at [4].

[59] The defendant denies, also, the plaintiff's assertion that it "deliberately put the Plaintiff to cost, as a deterrent to prosecuting his claim".

[60] For the foregoing reasons, the defendant says that neither party should contribute to the costs of the other.

[61] Addressing the plaintiff's claim to an indemnity award for costs, the defendant rejects the plaintiff's position that the Authority wrongly applied the judgment of the Court of Appeal in *Bradbury v Westpac Banking Corp*.²³ Counsel for the defendant emphasised the decision of the Court of Appeal that indemnity costs "are exceptional and require exceptionally bad behaviour" in litigation.

[62] Nor, the defendant submits, should costs reflect a party's conduct in the litigation. That is a matter for compensatory or penal orders that costs should focus on conduct in litigation. That was emphasised by the Court, for example, in *Prins v Tirohanga Group Ltd*:²⁴

I do not accept that the defendant's improper conduct in employment (however egregious) should be marked by a greater than usual award of costs. The defendant's wrongs have been marked already by both a monetary penalty and compensatory awards. I accept, however, that improper conduct in the course of litigation may be, and indeed often should be, reflected in costs: ...

[63] Counsel for the defendant submits that none of the examples or similar conduct identified by the Court of Appeal in *Bradbury*, are present in this case. These absences include the making of allegations of fraud, knowing them to be false and/or irrelevant; particular misconduct that causes loss of time to the Court and other parties; commencing or continuing proceedings for some ulterior motive; doing so in wilful disregard of known facts or clearly established law; and making allegations which ought never to have been made or unduly prolonging a case by groundless contentions.

[64] The defendant submits that it conducted itself appropriately in the litigation. It says that this is not a case where it had no defence but nevertheless denied liability

²³ *Bradbury*, above n 9.

²⁴ *Prins v Tirohanga Group Ltd* EmpC Auckland AC 27/07, 16 May 2007 at [4].

or put the plaintiff to the expense of proving quantum, and then prosecuted further proceedings such as appeals and applications for rehearing.²⁵ The defendant emphasises that it properly conceded that if the trial period purportedly in place was without legal effect, Mr Fagotti's dismissal was unjustified. The Authority itself held that this was a "proper and helpful concession".²⁶

[65] The defendant denies that its defence of the plaintiff's claims in the Authority was in wilful disregard of clearly established law, unmeritorious or frivolous as the plaintiff has alleged. It says that the remedies claimed by the plaintiff were out of step with average awards to employees in such cases and, therefore, its defence of the proceeding was reasonable.

[66] Turning to the Calderbank offers, the defendant first reminds the Court that the rejection of the Calderbank offers does not automatically expose the unsuccessful party to an award of indemnity costs. Rather, it goes to the discretionary considerations of assessing the contribution to be made to the successful party's costs.²⁷ Next, the defendant says that the Court of Appeal's injunction to take a

"steely" approach to Calderbank offers in *Bluestar Print Group (NZ) Ltd v Mitchell*²⁸

was directed to Employment Court proceedings and these remarks were not intended to have broader application to proceedings in the Authority.²⁹

[67] The defendant submits that even where there has been an unreasonable refusal of a Calderbank offer, indemnity costs are still rarely awarded and generally reserved for cases where a party's conduct has been especially egregious.³⁰

[68] Addressing the plaintiff's reliance on his Calderbank offers of 1 October and

7 November 2013 (albeit the latter by letter dated 7 October 2013), the defendant says that, including the Authority's award of costs, the plaintiff benefited globally by

\$13,169.56 by the decisions in his favour delivered by the Authority. The defendant

submits, however, that the Authority's costs award should not be included in the

²⁵ See, for example, *Reid v New Zealand Fire Service Commission (No 2)* [1998] NZEmpC 302; [1998] 3 ERNZ 1237 at 1260.

²⁶ *Fagotti*, above n 3, at [2].

²⁷ *Diver v Geo Boyes & Co Ltd* HC Hamilton CP58/93, 20 May 1998 at 24.

²⁸ *Bluestar Print Group*, above n 11.

²⁹ *Booth*, above n 16 at [16].

³⁰ *Stevens*, above n 20 at [97].

comparison because this has been challenged by the plaintiff. The defendant submits that the appropriate comparative figure is the amount of compensation awarded by the Authority under its substantive determination, \$8,598. The defendant submits that this is less than the value of Mr Fagotti's offers to settle (\$9,500 plus GST offered on 1 October 2013 and \$11,500 plus GST offered on 7 November 2013). As a fall-back position, the defendant says that even if these offers may affect the question of costs in the Authority, they do not support a claim for indemnification of those.

[69] The defendant relies also on the judgment of this Court in *Jinkinson v Oceana Gold (NZ) Ltd* to the effect that a party who is slow or reluctant to discuss settlement ought not thereby necessarily have to pay a greater award of costs if that party is ultimately

unsuccessful.³¹ To do so, the Court held in *Jinkinson*, would be to “punish that party for its actions and that is not a proper function of an award of costs.”³²

[70] The defendant says, indeed, that in this case it did not exhibit an unreasonable attitude to the plaintiff’s settlement offers. It made its own counter-offers but, ultimately, the question of a contribution to the plaintiff’s legal costs was seen by it as a barrier to settlement because of what it perceived to be the plaintiff’s unreasonable demands.

[71] The defendant contests the plaintiff’s argument that it caused him unnecessary costs by pursuing claims that “were knowingly hopeless and unmeritorious”. The defendant says that it tried to settle the litigation but in doing so it was entitled to reject the plaintiff’s offers, given the level of costs sought and the fact that the remedies sought by the plaintiff were “out of step with the average amount awarded to employees in cases where employers have not been entitled to rely on a trial period.”

[72] Turning to its own Calderbank offers, the defendant emphasises that it made three of these between mid-September and the end of October 2013. It submits that

³¹ *Jinkinson v Oceana Gold (NZ) Ltd* [2011] NZEmpC 2.

³² At [42].

the Authority failed to give any or at least sufficient weight to the fact that, had the plaintiff accepted any of these offers, he would have been in a significantly better position financially than after delivery of the Authority’s determination.

[73] The defendant’s first Calderbank offer was made on 18 September 2013 and

proposed a payment of \$2,500 under s 123(1)(c)(i) of the Act, and a contribution of

\$500 plus GST towards Mr Fagotti’s costs. After this was rejected by the plaintiff, the defendant’s next offer was made on 24 September 2013. It reduced the amount of compensation under s 123(1)(c)(i) (\$2,000) but increased significantly the contribution towards legal costs (\$3,500), making a total of \$5,500 as compared to the total of its previous offer of \$3,000. The defendant’s final Calderbank offer was made on 31 October 2013. It restored the level of the first settlement figure under s

123(1)(c)(i) (\$2,500) and maintained the previous contribution towards costs \$3,500 (plus GST), making a total of \$6,000, \$500 more than its previous offer.

[74] We comment that whilst the changes to the proposals categorised as contributions towards costs may be an understandable reflection of the plaintiff’s increasing legal costs as time went on, the adjustments to the amount to be categorised as s 123(1)(c)(i) compensation are enigmatic, at least without explanation. Quite how the compensation thought to be payable for the consequences of a past dismissal, and the largely past consequences of that, can be adjustable significantly up and down as time goes on, is counter-intuitive, at least without an explanation, either conveyed to the plaintiff at the time the offer was made or even subsequently in submissions on this challenge. While it is true that both categories of sums offered by the defendant did not involve questions of tax deduction, so that the amount available to the plaintiff was the full amount offered (subject to whatever agreement the plaintiff reached with his solicitors as to his own legal fees), there is a sense that the defendant was working to a ceiling above which it was not prepared to pay. This appears to have had little or no regard to the plaintiff’s actual losses it proposed to compensate him for. More usually, in our experience, such Calderbank offers by a defendant to a plaintiff consist of a single amount said to include GST and costs. That is especially so where there are no taxation implications as in this case.

[75] The defendant asserts that, by reference to the plaintiff’s invoices which have now been disclosed to the Court, his legal costs to 31 October 2013, when the defendant’s final Calderbank offer was made, were less than \$500 (excluding GST). It says, therefore, that its three Calderbank offers covered more than adequately the legal costs which had been incurred by the plaintiff at the time of their making. So, the defendant extrapolates, using its 31 October Calderbank offer as an example, had the plaintiff settled on those terms, Mr Fagotti would have received about \$5,000 net, that is after the payment of his legal fees. The defendant says, however, that following the plaintiff’s rejection of that 31 October offer, Mr Fagotti incurred further legal costs of \$18,749 (plus GST). In a further extrapolation, the defendant says that by proceeding to investigation and determination, and after his legal costs were paid, the plaintiff must have been left in deficit (that is owing his solicitors) by more than \$10,000. The defendant says that even after the Authority’s costs award totalling \$4,571.56, the plaintiff’s deficit was still more than \$5,500.

[76] The defendant notes, also, that it appears that the plaintiff has now incurred further costs in the matter of this challenge of \$3,230 (excluding GST) which is almost twice as much as the costs award made by the Authority itself. The defendant says that it appears that the plaintiff is continuing to incur costs that are disproportionate to any potential award, now having a deficit (by the defendant’s calculation) of more than \$8,800 (excluding GST), the consequences of which the defendant says should not be visited upon it.

[77] Therefore, the defendant submits that the plaintiff’s rejection of its Calderbank offers was unreasonable and submits that costs should now be left to lie where they have fallen.

[78] Next, the defendant says that the plaintiff has provided insufficient detail to establish an approach to costs assessment based on a reasonable contribution to costs reasonably incurred, rather than a notional tariff basis. The defendant says that this would require the Court (in this case) and the Authority (in others) to undertake an assessment, first, whether costs were actually incurred and, if so and then, whether they were incurred reasonably. The defendant says that this approach is necessary in the Court as illustrated, for example, by the judgment in *Pathways Health Ltd v*

Moxon.³³ The Court in that case noted the absence of “useful information about the time and effort required by counsel to prepare the

defendant's case for the investigation meeting and to otherwise represent [him] in the investigation process." In *Moxon* the Court had received copies of time records from counsel but concluded that they were "jumbled and in no sensible order. No explanation or analysis of them was provided and I found them of no practical use."³⁴

[79] The defendant submits that in this case even less information has been provided: for example, there are no time records but the plaintiff has provided only a high-level description of the type of work completed, without any explanation or analysis of the time involved or how costs were calculated.

[80] Next, the defendant criticises the plaintiff's position on GST recovery. It says that Mr Fagotti is seeking to recover GST on top of the amount sought for costs. The defendant submits, however, that because it has not paid either the plaintiff or the plaintiff's lawyers for any service, it should not be required to pay GST on any amount awarded.

[81] The defendant says that its position is consistent with most but not all employment law cases which have determined that GST should not be included in calculating an award of costs. It cites, as one example, the judgment in *Watt v Downer Construction PNG Pty Ltd*.³⁵ The defendant also says that High Court decisions favour the same approach, citing *Burrow v Rental Space Ltd*.³⁶

[82] The defendant acknowledges that this Court took a different approach in the recent case of *Booth* where GST was included in the costs award to avoid inequities.³⁷ The defendant nevertheless submits that in the circumstances of this case, GST is not relevant.

[83] Referring to questions of GST in relation to the Authority's notional daily

tariff, this sum (currently \$3,500) is said to be inclusive of any GST the party

³³ *Pathways Health Ltd v Moxon* [2013] NZEmpC 18 at [39].

³⁴ At [39].

³⁵ *Watt v Downer Construction PNG Pty Ltd* EmpC Wellington WEC46A/97, 10 December 1997.

³⁶ *Burrows v Rental Space Ltd* [2001] NZHC 770; (2001) 15 PRNZ 298.

³⁷ *Booth*, above n 16, at [55].

seeking costs may have incurred. To add GST to this notional daily sum would be to

increase the daily tariff "on an ad hoc, unprincipled basis" to \$4,025.

[84] The defendant says that the Employment Court's approach to costs, where the starting point is two-thirds of costs actually and reasonably incurred but adjustable up or down, is presumed to include any GST paid whereas in the Authority the focus is not on what costs were actually incurred but, rather, the notional daily tariff, plus whether there are factors that may justify an uplift from or a decrease to that tariff but irrespective of GST implications. The defendant submits that in almost all cases (except those rare cases of an award of full indemnity costs) a costs award will only ever be a contribution towards the amount actually incurred and, therefore the defendant submits, GST is not relevant to what constitutes a fair contribution.

[85] In the circumstances of this case, the defendant says that if the Court considers it appropriate to make an award of costs against the defendant, GST should not be added to that award despite the plaintiff having paid a goods and services component on top of his legal bill.

[86] Finally, addressing disbursements, the defendant cavils at having to pay what is described as an "Administration Fee" of \$32.25 included on one of the plaintiff's lawyer's invoices because there is no information about what this is or whether it is a true or notional disbursement. The defendant submits that if it appears to be a "normal office overhead", then it should not be recoverable on a costs order, following such judgments as *New Zealand Professional Firefighters Union v New*

Zealand Fire Service Commission.³⁸

Plaintiff's submissions in reply

[87] These, too, were extensive but we will attempt to summarise them. The plaintiff says that the defendant's significant reliance on case law is unhelpful because it ignores the conduct of the defendant in this particular case and the justice

of the parties' cases. The plaintiff says that the proceeding should have been settled

³⁸ *New Zealand Professional Firefighters Union v New Zealand Fire Service Commission* NZEmpC Wellington WC9A/08, 3 October 2008 at [31], *Jinkinson* above n 31 at [47].

well before the Authority's investigation and this should have been the primary consideration of the Authority and should now be of the Court. The plaintiff says that there is no sound reason given why the defendant rejected the plaintiff's reasonable settlement offers and required Mr Fagotti to proceed to an investigation and determination by the Authority.

[88] Miss Buckettt relies on the observations of the Chief Justice in the recent

Supreme Court case of *Helu v Immigration and Protection Tribunal*.³⁹

Conscientious decision-makers commonly seek to organise their exercise of statutory powers of decision according to sequences, tests,

and balances which they take from close analysis of the statutory text and scheme. Such methodology allows them to demonstrate fidelity to the legislative purpose and promotes consistency and better justification of conclusions. Care is needed however, to ensure both that the methodology is consistent with the terms of the statute and that it avoids over-refinement through such elaboration, especially when contextual value-judgment is inescapable. The risk then is not only that the methodology may mask the ultimate value-judgment required with a show of objective rationality, but that it may itself compel outcomes which would not be accepted if the choice for the decision-maker was recognised to be constrained only by the need to reach the decision he or she believes to be right after taking into account all considerations contextually relevant.

[89] In terms of this case, we understand counsel to say that the Authority ought to have been, and ought in future to be, influenced by the circumstances and justice of each particular case in respect of which it might be asked to award costs. Conversely, Miss Buckett submits that the Authority should not rely, at least as frequently and intensively as the plaintiff says it does, upon formulas and generalised methodologies and especially upon across-the-board awards based on crude and often inadequate methods.

[90] The plaintiff says that the determining factors on a costs award should be, first, the justice between the parties; and second, as that is aligned with the statutory objectives including, in this case, s 3 of the Act.

[91] The plaintiff says that his costs were both reasonable and appropriate to bring his case to the Authority for decision.

39 *Helu v Immigration and Protection Tribunal* [2015] NZSC 28 at [1].

[92] Next, the plaintiff confirms that his actual costs incurred amount to

\$21,691.25 (excluding GST which is to be added to them or parts of them). The plaintiff confirms that he accepts that the costs of voluntary mediation were not recoverable, thus reducing his actual overall costs to \$18,681.25 (plus GST). Finally, the figure of \$12,454.15 (plus GST) is said to be two-thirds of the mediation-reduced fee.

[93] Next, the plaintiff says that the defendant, in spite of having been put on notice in mid-September 2013 that recently decided case law was against it,⁴⁰ and “with the aid of highly sophisticated legal advice”, the defendant nevertheless chose to contest his claim to having been dismissed unjustifiably. The plaintiff says that the defendant should not be entitled “to capitalise on its own default in choosing to pursue what was obviously an unmeritorious and unjustified defence.”

[94] The plaintiff argues that the defendant, aware that the law was against it and in spite of several “reasonable settlement offers” from the plaintiff, “which would have left the Defendant in a substantially better position than it now finds itself in”, chose to contest all aspects of Mr Fagotti’s claim.

[95] The plaintiff submits that the judgment of the full Court in *Da Cruz* upon which the Authority relied, in applying a notional daily tariff approach to the determination of costs, did not prohibit absolutely the application by the Authority of the Court’s approach on matters before it of taking a starting point of 66 per cent of actual and reasonable costs incurred. The plaintiff submits that in this case the Authority ought to have exercised its discretion in the interests of doing justice between the parties to depart from the notional daily tariff approach.

[96] The plaintiff submits that any additional costs incurred were the result of the defendant’s conduct in refusing to acknowledge that the law was against it and suggests that its pursuit of a futile case was undertaken as a deterrent to the plaintiff himself continuing. As counsel for the plaintiff puts it: “The case is a matter of public interest to deter the “Goliaths” with larger purses from frustrating legitimate

claims being pursued.”

40 *Salad Bowl*, above n 7.

[97] So, in this sense, the case comes down to one of the Court’s determining which party was more responsible, and which more reprehensible, in rejecting the offers of settlement of the other.

[98] The plaintiff says that the defendant’s assertion now that costs should lie where they fall “beggars belief and is completely contrary to principle]. It says that this was not alluded to in the defendant’s statement of defence and is not required to be addressed by the Court.

[99] Next, the plaintiff contends that the defendant’s rejections of “reasonable offers” amount to a failure of its duty of good faith.

[100] The plaintiff says that the defendant’s offers of settlement were not reasonable and that he received significantly more compensation than was ever offered by the defendant as was indeed noted by the Authority in its costs determination at [12].

[101] The plaintiff says that he received awards from the Authority which totalled

\$13,169.56 in addition to having the vindication of his dismissal found to be unjustified. Following *Gini v Literacy Training Ltd*,⁴¹ the plaintiff says that his success cannot be measured in monetary terms alone. Even in those terms, however, he says that he received 39 per cent more than was the subject of the 1 October 2013

Calderbank offer, a significant increase.

[102] The plaintiff challenges the defendant’s assertion that the awards sought by him were “out of step”. His claim for compensation under s 123(1)(c)(i) was for a sum between \$5,000 and \$10,000. He was awarded the lower of these figures. His claim was to a figure

within the range proposed and awarded by the Authority.

[103] The plaintiff says that it would not be in the interests of justice that he succeeded in his claims to unjustified dismissal and unfair bargaining and yet is out of pocket overall. Further, the plaintiff says that it is not mandatory for counsel to

provide details of time involved and charge-out rates when seeking costs. In *Binnie*

41 *Gini v Literacy Training Ltd* [2013] NZEmpC 25.

the Court of Appeal observed: “Obviously this kind of information may help ... but in the end the Court, when considering whether actual costs are reasonable, has to make a judgment ...”.⁴²

[104] The plaintiff confirms that he is not GST registered and, following *Davidson v Christchurch City Council*⁴³ and *Booth*,⁴⁴ says he is entitled to GST on the costs award. He submits that the defendant company can offset the GST component of its own costs by claiming them as a business expense.

Discussion

[105] Counsel for the defendant urges the Court to reject the methodology advocated for by the plaintiff that it should “approach the costs not from the Authority perspective but from a position as the Court would.” We agree with the defendant that the issue on the challenge is the correctness of the Authority’s award and that different principles apply to cases and, in particular, costs in the two forums. Of this it was said by the full Court in *Da Cruz*:

[38] In contrast, there is no binding authority on the Employment Relations Authority which impels it to apply the 66 percent guideline. We find that any such authority would run counter to the imperative that it should act without technicality.

[39] There is sufficient difference between the two institutions to warrant the Authority taking a different approach to the question of costs particularly because it, rather than the parties, conducts the investigation of the employment relationship problem brought to it.

[106] We agree with the defendant that the Authority continues not to be bound by the same principles as apply to the Court. As Judge Ford noted in *Carter Holt*

⁴² *Binnie*, above n 13, at [27].

⁴³ *Davidson*, above n 15 at 528-529.

⁴⁴ *Booth*, above n 16 at [51]-[52].

Harvey Ltd v Eastern Bays Independent Industrial Union of Workers:⁴⁵

... not only that the Authority is not bound by the *Binnie* principles but, in general, those principles are inappropriate to costs awards in the Authority as they were expounded in relation to costs incurred in the context of adversarial litigation proceedings in the Court, whereas an investigation meeting conducted by the Authority involves quite different considerations.

[107] We agree with the defendant, also, as Judge Inglis wrote in *Stevens*:⁴⁶

... Proceedings in the Authority are intended to be low level, cost effective, readily accessible and non-technical. It is a first instance hearing that is not intended to have the trappings of the more formal, procedurally constrained processes of the Court. It is plain (including from the Authority’s informed assessment of an appropriate notional daily rate, currently set at \$3,500) that the Authority is not intended to be an overly legalistic or costly forum. This ought, in ordinary circumstances, to reduce the amount parties may reasonably be expected to expend on legal resources. While it is each party’s right to instruct counsel and (if they do) to instruct counsel of their choosing, and to apply significant legal resources to the pursuit or the defence of a claim in the Authority at first instance, that is a choice they make including having regard to the generally applied daily rate. ...

[95] In my view it will generally be inconsistent with the statutory imperatives underlying the legislation for significant costs awards to be imposed on unsuccessful litigants in the Authority. ...

[108] As to the question of the utility and value of a “notional daily rate” for costs, we agree that there is significant value in a commonly applied and well publicised notional daily rate for costs in the Authority. This enables parties and their representatives to assess more accurately from the outset what may be a very important element of the litigation (costs) when undertaking the regular economic analyses that parties and their representatives should undertake during that process. This was put succinctly and recently in the costs judgment in *Booth v Big Kahuna Holdings Ltd* where it was said that parties who elect to incur costs that are likely to exceed the Authority’s notional daily rate are “entitled to do so but cannot

confidently expect to recoup any additional sums”.⁴⁷

[109] We do not agree with the defendant’s submission that the remarks of the

Court of Appeal about a “steely” approach to Calderbank offers expressed in

⁴⁵ *Carter Holt Harvey Ltd v Eastern Bays Independent Industrial Union of Workers* [2011] NZEmpC

13 at [25].

47 *Booth*, above n 16, at [17].

Bluestar Print Group applies only to Employment Court proceedings and not to matters before the Authority. That submission cannot, logically, be correct. The vast majority of matters in which Calderbank offers are considered by the Employment Court are in proceedings brought to the Court by a challenge to the Authority's determination. Calderbank offers are most usually made before the Authority's investigation meeting. So it follows that the Court of Appeal's remarks about the fortitude with which they are approached, should apply also to Calderbank offers before an Authority investigation meeting. They are, therefore, applicable also to the Authority's first instance jurisdiction as well as to the Court's appellate role in the same cases.

[110] As to the defendant's contention that, having tried to settle the litigation, it was entitled to reject Mr Fagotti's offers because his proposals for remedies and costs were "out of step with the average amount awarded to employees in cases where employers have not been entitled to rely on a trial period", we do not agree.

[111] We consider such a comparative exercise to be unduly narrow. To the extent that any comparison can be made between cases that differ factually, the appropriate comparison is between cases of unjustified dismissal and then to the extent that there may be a commonality of issues such as the length of the employment, the means by which dismissal was effected, and the consequences of the dismissal on the employee. To focus solely upon an averaging of a relatively few cases in which an employer has relied unsuccessfully on a trial period to oust the jurisdiction of the Authority, would be erroneous.

[112] Although the implications of Goods and Services Tax on notional daily rate awards have been raised and some submissions made, we do not consider this to be an appropriate case in which to determine questions of its incidence in Authority costs' awards. It affects not only a notional daily rate of costs as the Authority has, but also other awards of costs in the Authority and in all cases in the Employment Court. We would wish to consider argument across a broader spectrum of tax and employment law, and it may be appropriate to have a full court of all judges to determine the issue in the employment jurisdiction generally.

A comment on mediation costs

[113] Because the plaintiff has not sought a contribution towards his costs of attending mediation (voluntarily in the sense of not having been directed by the Authority to do so), we will not determine whether such costs may be included in an Authority award. There are differing judicial views about this, at least in relation to mediations undertaken by mutual agreement before proceedings are issued or pursued in the Authority, or otherwise without the Authority making a statutory direction to mediation. We simply note, however, that there is a respectable argument that such mediation costs may be either recoverable as compensation (by analogy with the special damages for legal representation that the Court of Appeal allowed in *Binnie*) or as costs in the proceeding. The reality of Authority proceedings these days, certainly in personal grievances, is that if parties have not engaged voluntarily in mediation before the matter comes to the Authority, they will almost inevitably be directed by it to do so. Thus, voluntary engagement in mediation may be seen as a necessary part of the process to get a case before the Authority. However, we consider it better to await a fully argued case in which the issue does arise for determination.

Outcome of challenge

[114] We have not been persuaded that the broad principles stated by the full Court in *Da Cruz* should now be departed from or even altered, either in general or in this case in particular. The Authority did not bind itself inflexibly to a daily tariff approach and exercised its broad statutory discretion appropriately. That is seen by its augmentation or uplift of the notional daily tariff to reflect the particular circumstances of Mr Fagotti's case. We find that appropriate account was taken of the settlement offers and counter-offers and their rejections by the parties. We conclude that the Authority was correct to find that costs should follow the event (of Mr Fagotti's substantial success) and that it was right to reject, as we do, the defendant's argument that costs should have been left where they fell. This case is also a particularly apt one of applying the proportionality principle to the costs' award: even if a significant part of the Authority's compensatory awards to Mr Fagotti will be consumed by the costs of his legal representation, recovery of a

portion of these must still be in reasonable proportion to the nature of the plaintiff's success before the Authority and the (unchallenged) awards made to him. This is not a case for indemnity costs.

[115] The answers to the plaintiff's six questions posed of the Court set out at [21]

are, therefore, as follows:

- Question – Did the Authority err in applying a notional tariff-based costs award with a minimal uplift?

Answer – The Authority did not err in applying a notional tariff-based costs award. Although we do not agree that the uplift was "minimal" in all the circumstances of the case, it was nevertheless appropriate for the Authority to have uplifted the notional tariff-based award as it did.

- Question – Did the Authority err in not exercising its discretion to award a substantially higher award of costs, having regard to the offers of settlement and the actual costs incurred?

Answer – No.

• Question – Was the Authority correct in failing to exercise its discretion to award a substantially higher award of costs because it deemed them to be unreasonable?

Answer – The Authority correctly determined not to award a substantially higher amount for costs including because it considered, correctly, that the plaintiff's actual costs were both unreasonably high and disproportionate to the amounts in issue and recovered.

• Question – Was justice done between the parties by the Authority?

Answer – Yes.

• Question – Can the Court substitute its decision in relation to costs?

Answer – Yes if, on a challenge, the Court considers the Authority's

determination of costs to be erroneous, but in this case it was not.

• Question – What is an appropriate award of costs?

Answer – The award made by the Authority, that is \$4,571.56 (including disbursements).

[116] For the foregoing reasons, the plaintiff's challenge is dismissed. Pursuant to s 183(2) of the Act, the Authority's determination is set aside and this judgment stands in its place. The plaintiff is awarded the same amounts as he was in the Authority, \$4,500 in costs and \$71.56 as a disbursement. In all the circumstances, it would not be just to make any further award of costs in this Court. Therefore, on the challenge, each party is to meet its own costs of representation without contribution by the other.

GL Colgan
Chief Judge
for the full Court

Judgment signed at 5.20 pm on Wednesday 5 August 2015

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