



# Employment Court of New Zealand

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## Fox v Hereworth School Trust Board [2016] NZEmpC 39 (15 April 2016)

Last Updated: 20 April 2016

IN THE EMPLOYMENT COURT WELLINGTON

[\[2016\] NZEmpC 39](#)

WRC 5/13

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

AND IN THE MATTER   of an application for costs

BETWEEN                EMMA YUEN SEE FOX Plaintiff

AND                        HEREWORTH SCHOOL TRUST  
                                 BOARD  
                                 Defendant

Hearing:                By memoranda filed on 16 February, 13 and 29 March,  
                                 and 7  
                                 and 13 April 2016

Appearances:        D Traylor, counsel for plaintiff  
                                 L Blomfield, counsel for defendant

Judgment:             15 April 2016

### COSTS JUDGMENT OF CHIEF JUDGE G L COLGAN

[1] The plaintiff, having been successful in her claims to unjustified dismissal and, in part, successful in recovering compensation, seeks an order for contribution to her legal costs.<sup>1</sup> Despite the Court having given the parties an opportunity to attempt to settle this question themselves, they have been unable to do so. The plaintiff's application extends also to costs in the Employment Relations Authority because, although it found in the Hereworth School Trust Board's (the Board's) favour, that determination<sup>2</sup> has been reversed on appeal by this Court.

[2] The Authority ordered Mrs Fox to pay the Board \$21,000 as a contribution towards the defendant's costs of a three-day Authority investigation in September

<sup>1</sup> *Fox v Hereworth School Trust Board* [2015] NZEmpC 206.

<sup>2</sup> *Fox v Hereworth School Trust Board* [2013] NZERA Auckland 45.

EMMA YUEN SEE FOX v HEREWORTH SCHOOL TRUST BOARD NZEmpC WELLINGTON [\[2016\] NZEmpC 39](#) [15 April 2016]

2012. Although Mrs Fox acknowledges that she was represented substantially by her husband during the Authority proceedings she says that the legal advice fees and other expenses incurred by her amounted to \$4,300.32 (including GST). She seeks reimbursement of that sum from the defendant for the proceedings in the Authority.

[3] The plaintiff's costs of legal representation in this Court between February

2013 and November 2015 amounted to \$287,268.23 (including GST). The plaintiff was represented by senior counsel (Peter Churchman QC) and his junior, David Traylor. Both the engagement of senior counsel and the presence of a junior were reasonable in all of the complex and difficult circumstances of the case. The defendant, too, was represented by a senior practitioner with a junior (Stuart Webster and Lara Blomfield respectively), an arrangement which would similarly not be open to any reasonable criticism.

[4] The plaintiff having been substantially successful, at least on liability questions although not entirely in terms of remedies, Mrs Fox is entitled to an order for costs against the defendant. The defendant does not oppose this. The initial question is to determine what were actual and reasonable costs incurred by the plaintiff.

[5] First, the plaintiff's actual costs have been revealed (above) as being almost

\$290,000. There is no challenge to the accuracy of those costs or their makeup. Rather, the more difficult question is whether those were reasonable costs in all the circumstances, for the purpose of asking the defendant to contribute to them, in all the circumstances. The defendant says they were not.

[6] The hearing of the case occupied seven days in Hastings which was the venue nearest to the school and most of the witnesses. It was necessary for counsel for the plaintiff to travel from Wellington. There were also a number of interlocutory matters dealt with by the Court before the case was ready to begin, most on papers filed but at least one in court in Wellington.

[7] These interlocutory proceedings resulted in no fewer than seven preliminary judgments, each of which required the filing of one or more applications,

memoranda, affidavits and submissions and, in at least one case, appearances before the Court. In addition to the seven days of hearing already mentioned, there were six East light volumes of documents totalling nearly 1,000 pages. Ten witnesses gave evidence, although only three of them were called by the plaintiff. The substantive judgment runs to 84 pages and even then does not deal, at least in detail, with a number of peripheral issues, raised principally by the plaintiff, especially before she was legally represented. By the Employment Court's standards, it was a lengthy and intensive case.

[8] The plaintiff divides up her claim for costs (and, in particular, whether there should be any uplift from a starting point of two-thirds of these) into different periods in the litigation.

[9] For the first, from 11 February 2013 to 30 September 2013 and 1 May 2014 to 16 July 2014, the plaintiff says that she incurred legal costs of \$72,096.73 (including GST). She says, nevertheless, that nothing that occurred during those periods justifies any adjustment up or down from the two-thirds starting point, so that her application for contribution at that rate is \$48,016.42 (including GST).

[10] Next, the plaintiff says that in the period 1 October 2013 to 13 April 2014, she incurred legal fees of \$38,799.50 although no GST was payable, I assume because the plaintiff was by then no longer residing in New Zealand. This is the period during which the majority of interlocutory proceedings were argued and decided. As the plaintiff points out, in relation to the applications for non-party disclosure and the defendant's challenge to the plaintiff's objection to disclosure,

neither party was entitled to costs.<sup>3</sup> In respect of the remaining interlocutory

proceedings, each party enjoyed a measure of success.<sup>4</sup> To reflect this, the plaintiff proposes an adjustment down from the two-thirds starting point. She seeks a contribution of 33 per cent of her actual costs for this period, or \$12,803.84.

[11] Next, the plaintiff relies on an offer of settlement conveyed to the defendant

on 11 July 2014 which was made "without prejudice save as to costs". In addition to

<sup>3</sup> *Fox v Hereworth School Trust Board* [2013] NZEmpC 219 at [25]; *Fox v Hereworth School Trust*

*Board* [2014] NZEmpC 33 at [38]; *Fox v Hereworth School Trust Board* [2014] NZEmpC 44.

<sup>4</sup> *Fox v Hereworth School Trust Board* [2013] NZEmpC 24.

rejecting the Board's offer of settlement contained in its letter of 9 July 2014 which is not relied on by it now, the plaintiff counter-proposed a settlement on the following terms:

- That there would be a consent judgment of the Court including a statement that Mrs Fox had been dismissed unjustifiably (both procedurally and substantively);

- that the defendant would pay Mrs Fox six months' salary;

- that the Board would pay Mrs Fox the sum of \$20,000 pursuant to s

123(1)(c)(i) of the [Employment Relations Act 2000](#) (the Act), what is

known by the shorthand of 'distress compensation';

- that the Board would pay a contribution to Mrs Fox's costs in the

Employment Court proceedings (upon receipt of an invoice) of up to

\$70,000 (plus GST);

- that the Board would refund to the plaintiff the sum of \$21,000 paid by her as costs in the Authority;
- that this settlement would be certified by a mediator in a Record of Settlement, fully and finally settling all matters between the parties; and
- that the plaintiff would withdraw her proceedings. [12] Further, the plaintiff's proposal included that:
  - money held as security for costs by the Employment Court would be returned to Mrs Fox;
- that the parties would not "speak ill of one another"; and
  - that the fact and terms of the settlement would remain strictly confidential to the parties.

[13] A response to this proposal was requested by the plaintiff's solicitors within five days and the proposal would lapse after this deadline. The plaintiff says that there was no response from the defendant at all to that offer before it expired. She now says that the amount of six months' salary at that time would have been

\$29,602. The plaintiff says, therefore, that the total monetary value of her offer to settle was \$151,102.

[14] The plaintiff says that, by comparison, the Court's judgment awarded

\$78,934 for lost remuneration, \$6,666 as [s 123\(1\)\(c\)\(i\)](#) compensation,<sup>5</sup> and set aside the refunding of the Authority's costs' award of \$21,000 which was apparently paid by Mrs Fox and so needs to be credited to her now. The plaintiff says, therefore, that the total value of the remedies awarded by the Court was \$106,600. She says that to this figure there needs to be added a further amount as a likely order for costs as at the date of the settlement offer, in reliance on the judgments in *Rodkiss v Carter Holt*

*Harvey Ltd*<sup>6</sup> and *Sealord Group Ltd v Pickering*.<sup>7</sup> The plaintiff assesses this

additional sum to be \$60,387.68 (based on the figures set out previously). The resulting total (notional) monetary achievement for the plaintiff is \$166,987.68. Therefore, the plaintiff says, she was or will be awarded more by this Court than she offered on 11 July 2014 and therefore seeks to rely on that rejected offer. She says that the terms of the offer were transparent; the period for its acceptance or rejection was reasonable; and, had it then been accepted by the defendant, all issues between the parties would have been resolved at lesser cost to all, including the defendant. The plaintiff says, however, that she is better off by going to judgment and that the defendant forewent the opportunity to be better off by rejecting that offer of settlement.

[15] The plaintiff says that this was both a genuine and reasonable attempt to resolve the matter and one made before the period during which the majority of costs

would have been incurred by both parties. She invites the Court to take the well-

<sup>5</sup> *Fox*, above n 1.

<sup>6</sup> *Rodkiss v Carter Holt Harvey Ltd* [2015] NZEmpC 147 at [34]- [37].

<sup>7</sup> *Sealord Group Ltd v Pickering* [2015] NZEmpC 158 at [18].

known "steely" approach (so described by the Court of Appeal) to assessing those

costs that were incurred by her after the offer expired on 16 July 2014.<sup>8</sup>

[16] In reliance on these principles, the plaintiff says that in the period from 17

July 2014 to 25 November 2015, she incurred legal fees of \$176,372. She seeks a full indemnity of those costs, although to be deducted from them should be legal fees on interlocutory judgments (No 6)<sup>9</sup> and (No 7)<sup>10</sup> in this Court, in respect of both of which she was unsuccessful. These would constitute the sums of \$17,421 and

\$4,252 respectively (totalling \$21,673). That would bring the indemnity contribution for that period down to \$154,699.

[17] Based on the foregoing background, the plaintiff claims a total contribution towards her legal costs of \$215,086.68 (including GST of \$885.71).

[18] The plaintiff invites the Court to compare her claims with the trial guidelines

for costs awards contained in the Court's recent practice direction.<sup>11</sup>

Acknowledging, correctly, that this case is not governed by the guidelines, the plaintiff nevertheless says that an award of costs, calculated by reference to them, is a useful comparison. She submits that, under this guideline trial, the proceedings would fall between categories 2 and 3, that is that they were of above-average complexity and required a representative of skill and experience considered above- average in the Employment Court. Accordingly, it is submitted that the appropriate daily recovery rate to be applied would be one that falls between \$2,230 and \$3,300. The plaintiff postulates a daily rate of \$2,700.

[19] Next, determining a reasonable time to be applied to each step of the proceedings, the plaintiff submits that most steps would fall reasonably within band B (a normal amount of time) although some steps would fall reasonably within band

C (a comparatively large amount of time).

8 *Health Waikato Ltd v Elmsly* [2004] NZCA 35; [2004] 1 ERNZ 172 at [53]; *Bluestar Print Group (NZ) v Mitchell*

[2010] NZCA 385; [2010] ERNZ 446 at [20].

9 *Fox v Hereworth School Trust Board* [2014] NZEmpC 154.

10 *Fox v Hereworth School Trust Board* [2015] NZEmpC 196.

11 Practice Direction – Costs – Guideline Scale, October 2015

<[www.employmentcourt.justice.govt.nz/legislation-and-rules](http://www.employmentcourt.justice.govt.nz/legislation-and-rules)>.

[20] The plaintiff submits that in the list of time allocations, the following steps were required in this proceeding: 1, 11-16, 18-19, 22-25, 27, 28-30 and 32 (in respect of each of the interlocutory matters); and 36-37 and 39-41. She calculates that an approximate total time allocation of 53 days would be warranted. Multiplying that by the daily recovery rate of \$2,700 would result in an award of costs of \$143,100. But the plaintiff's comparative cross-check does not end there.

[21] Next, the plaintiff submits that the Calderbank offer should cause this “scale” figure to be uplifted significantly, saying that by 50 per cent would be reasonable and would result in a costs’ award of just under \$215,000. In these circumstances, the plaintiff submits that the amount sought by her of \$215,086.68 falls within a reasonable range when compared to the trial guideline.

[22] Turning to disbursements, the plaintiff claims \$1,681.81 for “administration fees” and \$28,967.60 for “other expenses”. In respect of those expenses paid in Australian or Canadian dollars, a current exchange rate with New Zealand dollars has been used in the conversion of these.

[23] Other expenses incurred by the plaintiff are said to have been:

- A court filing fee of \$204.44;
- hearing fees of \$3,005.40;
- postage/courier costs and photocopying;
- use of a paralegal assistance with disclosure processes;
- airfares and accommodation for eight nights in Hastings, and associated expenses for both junior and senior counsel - in this regard the plaintiff says that it would not have been possible, or indeed appropriate, for her to have engaged local counsel in Hawke’s Bay;
- costs incurred in the witnessing of affidavits;
  - airfares, accommodation and associated expenses for the plaintiff to attend the hearing in Hastings;
- the cost of hiring videoconferencing facilities to enable the plaintiff's

husband to give evidence from Australia;

- fees paid to PricewaterhouseCoopers (now and hereafter PwC) for:
  - work undertaken to satisfy electronic disclosure obligations (including, in particular, searches of the plaintiff's and her husband's online email accounts);
  - advice relating to the evidence of Sean Feltoe containing technical detail beyond the expertise of the plaintiff's representatives;
  - advice relating to the forensic examination of the defendant's computer system; and
  - the forensic examination of selected aspects of the defendant's electronic disclosure.

[24] These disbursements are said to total \$28,968.49.

[25] Further, the plaintiff claims that she has incurred costs for which she should be reimbursed in relation to resolving post-trial questions of costs. These are said to amount to \$9,869.10 (including GST) in legal fees, and \$137.28 in “administration fees”. The plaintiff seeks a contribution of approximately 50 per cent of these costs and disbursements, being \$5,000.

[26] Now to the Board's submissions. The defendant acknowledges its liability to contribute to Mrs Fox's costs but proposes both that this be limited to a starting point of \$140,000 and that the Court's order allow costs to be paid by instalments over a six to 12-month period.

[27] Turning first to the defendant's liability for costs in the Authority, it submits that the sum requested (\$4,300.32) amounts effectively to an award of indemnity costs in that forum. The defendant says that, for the following reasons, the award claimed by the

plaintiff would be excessive. It says:

- Investigation of Mrs Fox's grievance was made more difficult because of her pursuit of complaints about the integrity of the former Department of Labour's Mediation Service and a variety of other bodies.
- A substantial amount of material was provided to the Authority which was completely irrelevant to its investigation of the parties' employment relationship problems.
- Mrs Fox was said to have adopted a "quarrelsome" approach to the investigation including objecting to it being conducted by various Authority Members, to witnesses supporting the defendant's case, and the plaintiff's requirements about where and whether she would engage in mediation or participate at the Authority's investigation.

[28] In the circumstances, the defendant says that Mrs Fox should be entitled to no more than two-thirds of her costs in the Authority, the amount of \$2,840.

[29] Turning to the more significant question of costs in this Court, the defendant's case is as follows. Accepting, as already noted, that it should pay a contribution towards the plaintiff's costs, the defendant says, nevertheless, that these were unreasonable as is the level of contribution the plaintiff seeks from the defendant. The defendant accepts that the plaintiff's actual costs between

11 February 2013 and 25 November 2015 were \$287,268.23 (including GST of

\$1,341.98, reflecting the overseas domicile for most of that period).

[30] It is uncontroversial that the Court must consider what were the actual and what would have been the reasonable costs in all the circumstances for the successful party. The defendant invites the Court to assess these by two methods. The first is to

take what the defendant was charged in legal fees for the same period and the second is the amount to which the plaintiff would have been entitled if the Employment Court's trial costs guideline practice direction had been applied to this case. The latter is the same approach adopted by the plaintiff although the results are significantly different in each case.

[31] As to the first broad submission, the defendant says that for the period between 11 February 2013 and 25 November 2015, its own legal costs amounted to

\$139,668 (excluding GST). It compares that figure to the plaintiff's GST-exclusive legal fees for the same period of \$285,927. The defendant submits that there is no apparent or cogent reason why the plaintiff's should be more than twice the defendant's legal fees for that period.

[32] The defendant allows for one minor factor, that is some increased expense in communicating with the plaintiff (and one of her witnesses, her husband) who resided outside New Zealand during that period. The defendant says, however, that this would have been a very minor increase in cost and would not have exceeded much the costs of the defendant's need to take instructions from its client's members resident in the Hawke's Bay area. It submits that the guideline scale figure, by the plaintiff's own calculations, would bring up a result of \$143,100, very close to the defendant's own actual legal fees.

[33] In these circumstances the defendant submits that reasonable costs for the plaintiff should be fixed at \$140,000 which represents awards in largely similar cases decided by this Court, including *Phillips v Telecom (NZ) Ltd*,<sup>12</sup> *Rodkiss*<sup>13</sup> and

*Sealord*.<sup>14</sup>

[34] Moving to the question of the contribution to reasonable legal costs of

\$140,000, the defendant's first submission is in response to the plaintiff's approach of dividing the proceeding into three time periods referred to at [8] and following of this judgment. The defendant accepts that the plaintiff's claimed proportions

(variously 66 per cent and 33 per cent for these durations) are appropriate for the

<sup>12</sup> *Phillips v Telecom (NZ) Ltd* AC20/06, 31 March 2006.

<sup>13</sup> *Rodkiss*, above n 6.

<sup>14</sup> *Sealord*, above n 7.

first two identified periods, 11 February 2013 to 20 September 2013, and 1 October

2013 to 30 October 2014. The plaintiff disagrees, however, with the percentage rate set for the final period from 17 July 2014 to 25 November 2015 which commenced with the expiry of the plaintiff's Calderbank offer. In particular, the defendant rejects the plaintiff's proposal of an uplift to 100 per cent of actual costs for this period and submits that the appropriate award should be 66 per cent of reasonable costs for it. That is said to be because the plaintiff's Calderbank offer was not more beneficial to the defendant than the judgment subsequently obtained if the principles relating to costs' awards are properly applied to determine a likely order as to the plaintiff's costs at the date of the settlement offer.

[35] For ease of reference, I repeat the essential terms of the plaintiff's Calderbank offer at that stage. It sought six months' salary (\$29,602), distress compensation under [s 123\(1\)\(c\)\(i\)](#) of the Act (\$20,000), a contribution to the plaintiff's costs to that point of \$70,000 (exclusive GST) or \$80,000 (including GST), and reimbursement of the \$21,000 in costs already paid by the plaintiff to satisfy the

Authority's costs' order. The defendant says that the total value of the plaintiff's offer was therefore \$151,102.

[36] By comparison, the defendant says, the plaintiff was awarded, by judgment,

\$78,934 as compensation for lost income, \$6,666 as compensation under [s 123\(1\)\(c\)\(i\)](#) of the Act, and the reimbursement of the Authority's costs of \$21,000. The defendant says that the total value of these remedies is \$106,600 but to which must be added a probable notional order as to costs at the date of the settlement offer in July 2014. The defendant also reminds the Court that when calculating these amounts, the plaintiff has applied contribution rates of 66 per cent and 33 per cent to legal fees *actually* incurred by her over that time, whereas the defendant says that a lesser *reasonable* fee should be the basis of those deductions.

[37] So, the defendant says, taking an actual and reasonable starting figure of

\$140,000, deductions at the rates of 66 per cent and 33 per cent, as set out previously, would produce figures of:

- \$35,136 for the periods 11 February 2013 to 30 September 2013 and 1

May 2014 to 16 July 2014;

- \$18,909 for the period 1 October 2013 to either 30 April or 30 May

2014 (the submissions use both months); and

- \$75,392 for the period 17 July 2014 to 25 November 2015.

[38] These figures have been proposed by the defendant in each case by dividing

\$140,000 by the plaintiff's total costs of \$287,268.23, and then multiplying that figure in each case by the plaintiff's incurred legal fees of \$72,096.73, \$38,799.50 and \$154,699 respectively for each period.

[39] The defendant submits that this would result in a notional costs' award to be added to the Calderbank offer, producing a costs component to the point of the offer's rejection by the defendant, of \$79,189.

[40] The defendant says, therefore, that in addition to the total value of the remedies awarded by the Court (\$106,600) must be added a likely order as to costs as at the date of the settlement offer's expiry which, being 30 April or May 2014 (see above at [37]), ought to be set at \$29,420. This, in turn, results in a total figure for the Calderbank offer of \$136,030 which is less than the total value of the actual Calderbank offer (\$151,102).

[41] The defendant submits, therefore, that the plaintiff cannot rely on the Calderbank offer and its rejection, to seek either an uplift in the Court's award of costs or, especially, an order for indemnity costs for the period following the expiry of that offer. The defendant says that even if the outcome that the plaintiff achieved at hearing was better than the offer (which the plaintiff denies), it does not follow that Mrs Fox is entitled to 100 per cent of the costs incurred after the Calderbank offer lapsed. That is because rejection of the Calderbank offer does not automatically result in an award of indemnity costs in favour of the offeror. The defendant submits that it may, in appropriate cases, go so far as to give an uplift in

the contribution to be made to the successful party's costs and the offer and all

relevant circumstances must be considered in that calculation.<sup>15</sup>

[42] Next, the defendant submits that it cannot be said to have acted unreasonably in not accepting the Calderbank offer. That is said to be for three reasons. The first is that the terms of the offer required the defendant to accept that Mrs Fox had been dismissed unjustifiably and to pay a significant contribution towards the costs she had paid to that point. That contribution was of \$80,500 towards total costs which to that point amounted to \$110,896, even although sufficient information to make that calculation has only now been revealed. The defendant invites the Court to assess the reasonableness of the plaintiff's offer against the defendant's own legal costs to that point which had been (excluding GST) \$51,918.

[43] The second ground for concluding that the Calderbank offer was not rejected unreasonably is that it was not a genuine effort by the plaintiff to compromise but was, rather, "one-sided" and amounted in reality to an offer of very little by the plaintiff. In this regard the defendant relies on two analogous cases, *George v*

*Auckland Council*<sup>16</sup> and *Foai v Air New Zealand Ltd.*<sup>17</sup>

[44] Finally, the defendant says that the plaintiff's offer effectively assessed the

Board's prospects of success as nil, even although it had succeeded in the Authority.

[45] In those circumstances, the defendant submits that it was not unreasonable for it to decline the offer at the time and having regard to its prospects of success in defending the claim against it. So, the defendant submits, there should be no uplift in the costs awarded for the period after the offer lapsed. Rather, the rate of contribution should continue to be 66 per cent of reasonable costs for that period.

[46] The defendant points out that the plaintiff's reference to the Court's trial scale guideline also includes an uplift of 50 per cent

applied to the base figure “in order to account for the Calderbank letter”. However, the defendant submits that the plaintiff

has in fact applied that same uplift to all steps in the proceeding, a plainly flawed

<sup>15</sup> *Hamon v Coromandel Independent Living Trust* [2014] NZEmpC 108 at [21].

<sup>16</sup> *George v Auckland Council* [2014] NZEmpC 100 at [64]- [68].

<sup>17</sup> *Foai v Air New Zealand Ltd* [2013] NZEmpC 50 at [17].

approach. Ms Blomfield submits that any uplift should only be applied to the steps taken after the Calderbank offer was not accepted and, as already noted, even then disregarded in the outcome.

[47] Next, counsel for the defendant invites the Court to stand back to consider the overall fairness of any costs awarded and, in particular, not to lose sight of the plaintiff's conduct and its contribution towards her grievance, to the general mistrust between the parties engendered by Mrs Fox, and to the scope of issues that the Court was required to consider during the hearing and determine. Ms Blomfield reminds me that Mrs Fox attributed incorrect sinister motives to several of the defendant's representatives and adamantly read into statements made by them the worst possible intentions of their makers. Counsel submits that Mrs Fox then refused unreasonably to acknowledge the possibility of an alternative and innocuous meaning for those statements and relied upon them in justification for her refusals to meet with the defendant or its representatives. Further, counsel submits that the tone and content of Mrs and Dr Fox's communications with the defendant did not assist her cause and that, finally, Mrs and Dr Fox were probably the source of the information from which the “aromabadlaugh” emails were created, contrary to their assertions that they had no connection to these. Counsel submits that this conduct contributed to the situation that gave rise to Mrs Fox's grievance, which had required reductions of the remedies that would otherwise have been awarded to her.

[48] Without penalising the plaintiff further, the defendant submits that these elements of the “success” enjoyed by the defendant should be reflected in the costs awarded.

[49] That conduct has, however, been reflected in the remedies that were granted to the plaintiff for her unjustified dismissal. Those incidents were not factors in the conduct of the case in court which should cause an award of costs to be reduced. To do so would be to penalise doubly Mrs Fox for the same conduct. Although adopting much of the defendant's case on costs, I will not do so in this respect.

[50] Turning to the disbursements claimed by the plaintiff, the defendant notes

that these total \$28,967.60 although what are referred to as “administration fees”,

amounting to \$1,681.81, appear not to be sought. I accept that this is an appropriate omission from disbursements to be claimed: payment of an administration fee or service charge for general office services is not generally recoverable as a disbursement and should be included in a firm's fee.<sup>18</sup> The defendant submits that a significant proportion of these disbursements account for accommodation and travel of junior and senior counsel (\$4,681.71) and professional fees charged by PwC

(\$13,662.77) for electronic analysis of email and similar records.

[51] The defendant submits that air fares and accommodation for out-of-town counsel are usually not awarded unless it was impracticable for the plaintiff to have arranged local representation. The defendant submits that the plaintiff is wrong to say that it was neither possible nor appropriate for her to engage and instruct suitable counsel in Hawke's Bay.

[52] In this regard, I would have to say that the defendant itself had probably engaged the leading and most experienced employment law practitioners in Hawke's Bay. Without diminishing the quality of the Bar in that region, I think it is fair to say that there are few, if any, similarly experienced and senior practitioners and, in these circumstances, it was not unreasonable for the plaintiff to instruct Wellington solicitors and a Wellington-based Queen's Counsel to conduct her case. It follows that this is not a case in which the engagement of counsel of choice can be said to be entirely the responsibility of the plaintiff in respect of which the defendant should not be called upon to contribute. Those costs were an unfortunate but appropriate consequence of the location where the litigation arose. The defendant made significant savings by having the case heard in Hastings. Whether the case warranted the engagement of a Silk, and of two counsel at the hearing, is a separate question which I have already decided was appropriate and reasonable.

[53] The defendant submits, correctly, that little information has been provided by the plaintiff to justify a significant disbursement of more than \$13,500 to assist the plaintiff in satisfying her obligations of electronic disclosure in accordance with the defendant's request and, in particular, relating to Dr Fox's online email accounts.

The defendant submits that this work ought to have been capable of performance at a

<sup>18</sup> *Air New Zealand Ltd v Kerr* [2013] NZEmpC 237 at [33].

relatively modest cost and that a contribution to the PwC account of \$2,000 would be appropriate in all the circumstances.

[54] Turning penultimately to whether the plaintiff should be awarded costs on her costs' application, counsel for the defendant submits that there are different approaches to this question among the Judges of this Court. Examples of those include *Hamon*<sup>19</sup> in which Judge Inglis declined to award costs, and *Sealord*<sup>20</sup> in which Judge Ford awarded a contribution although excluding attendances between counsel in endeavouring to resolve issues of costs.

[55] Ms Blomfield submits, in this regard, that if the Court is minded to make an award, that should be in the order of a contribution of

\$1,000 towards what appear to be the plaintiff's costs in addressing the costs' matter of \$5,450.50.

[56] Finally, the defendant submits that the Court should make its costs' award payable by instalments over a six to 12-month period, because of its inability to make an immediate and full payment, even of the costs that it accepts must be awarded against it. That raises a legal question which needs to be decided separately.

### **Costs' orders postponement or by instalments?**

[57] Does the Court have the power to make a costs' order, as the defendant requests in this case, either by instalments or by fixing a date in the future for the payment of those costs?

[58] There is some judicial uncertainty about this question, some cases having affirmed the power<sup>21</sup> but at least one more recent case, the *Stevens* case having

questioned seriously whether the Court is empowered to do so.<sup>22</sup>

<sup>19</sup> *Hamon*, above n 15.

<sup>20</sup> *Sealord*, above n 7.

<sup>21</sup> See, for example, *IHC New Zealand Inc v Robertson* CC19A/00, 30 August 2000 at [23]-[24]; *Reid v New Zealand Fire Service Commission* [1995] NZEmpC 192; [1995] 2 ERNZ 38 at 41, 46.

<sup>22</sup> *Stevens v Hapag-Lloyd (NZ) Ltd* [2015] NZEmpC 137.

[59] It is necessary to address this recent judgment of Judge Inglis in this Court which, although by obiter dicta, casts significant doubt upon the existence of the power to award costs by instalments.

[60] At [38] and following of the judgment, her Honour addressed this matter under a heading "Payment by instalments?". It had been proposed for the party liable for costs that these be paid by instalments of \$500 per month. Judge Inglis took account of both cl 19 of sch 3 and [s 189\(1\)](#) of the Act. The Judge considered that while it was arguable that the statutory discretions were sufficiently broad to enable the Court to impose conditions on the way in which an award was to be met, she had "reservations" about such an approach. That was based upon the existence of other express statutory powers to order payment by instalments (for example, under a compliance order) and the Judge considered that the "mechanics of how an order is to be met seems ... to be distinct from the order itself, and a matter of

enforcement."<sup>23</sup> Further, Judge Inglis considered that [s 189](#) was of limited relevance

to this question because it was predicated on the jurisdictional trigger that its use was to support successful employment relationships and to promote good faith behaviour. She said at [43]: "... In the present case it is difficult to see how either objective is engaged in anything other than the broadest possible sense, given there is no ongoing employment relationship."<sup>24</sup>

[61] I do not consider that the reference to supporting successful employment relationships and promoting good faith behaviour is a jurisdictional trigger to the exercise of the equity and good conscience jurisdiction in [s 189](#), at least in the sense that there can be no recourse to equity and good conscience unless there is an employment relationship to support or in which there should be good faith behaviours.. The section and its predecessor are of long standing and, although

subject traditionally to some restrictions in their application<sup>25</sup>, have always been

applied in appropriate cases across the range of proceedings heard by the Court in its specialist capacity. The vast majority of those proceedings have been, and still are,

ones in which there is no longer any employment relationship or obligation to

<sup>23</sup> At [42].

<sup>24</sup> At [43].

<sup>25</sup> Prohibiting inconsistencies with legislation or with employment agreements.

behave in good faith in an employment relationship. Most cases, by number, are personal grievances and most of those are for unjustified dismissal following the end of an employment relationship. It is very difficult to accept that Parliament meant to exclude equity and good conscience from deciding that majority of court cases, if those requirements are said to be jurisdictional triggers.

[62] Rather, I consider that the overarching objectives of the legislation (to support successful employment relationships and to promote good faith behaviour set out in [s 3](#) (among others), were inserted into [s 189](#), not as exclusory jurisdictional triggers, but to emphasise the importance of equity and good conscience to support those objectives.

[63] Finally, as the Judge noted, it was unnecessary to decide the point in the *Stevens* case because even if she had been satisfied jurisdictionally, an award by instalments would not have been made, at least at the rate proposed by the liable party, which would have taken eight years to discharge.

[64] The Court's general powers to make costs' awards are set out at cl 19 of sch 3

to the Act. This is as follows:

### 19 Power to award costs

(1) The court in any proceedings may order any party to pay to 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.

[65] Two features of cl 19 may be relevant to this question. The first is the phrase at the conclusion of subcl (1) “as the court thinks reasonable”. That may simply refer to the amount of an award of costs and expenses (what I will call a narrow interpretation) or it may extend to allowing for postponement or payment by instalments as the defendant seeks. However, even if that broader meaning is adopted, the test under cl 19 is still to be one of reasonableness.

[66] Second, the power exists in subcl (2) to: “... at any time vary or alter any such order in such a manner as it thinks reasonable”. Although this, even on a

narrow interpretation, clearly empowers the Court to revisit an award of costs that it has previously made to “vary or alter” that award (again on grounds of reasonableness), a liberal interpretation of that provision also may allow for postponement or instalments. Indeed, even if the Court is not permitted to make a postponed order or one by instalments immediately, subcl (2) would allow, in any event, a party to apply to the Court, after the making of a single immediately-payable order, to vary this order in the way that the defendant now seeks. The existence of a liberally-interpreted power to postpone or make an order payable by instalments would avoid the additional delay and expense of having to make a second application to the Court under subcl (2).

[67] Next, [s 189](#) of the Act (“Equity and good conscience”) provides:

### 189 Equity and good conscience

(1) In all matters before it, the court has, for the purpose of supporting successful employment relationships and promoting good faith behaviour, jurisdiction to determine them in such manner and to make such decisions or orders, not inconsistent with this or any other Act or with any applicable collective agreement or the particular individual employment agreement, as in equity and good conscience it thinks fit.

(2) The court may accept, admit, and call for such evidence and information as in equity and good conscience it thinks fit, whether strictly legal evidence or not.

[68] The reference in subs (1) to “In all matters before it”, encompasses not only the Court’s substantive proceedings but also elements of these such as costs. The broadly stated purposes of the application of equity and good conscience under subs (1) (“supporting successful employment relationships and promoting good faith behaviour”) arguably constrain the application of equity and good conscience to those cases or those parts of those cases in which the jurisdiction is used to support successful employment relationships and to promote good faith behaviour. It is arguable that determining costs between parties to unjustified dismissal litigation where their employment relationship ended before the litigation began, may fall outside [s 189\(1\)](#). However, I do not consider that the so-called “equity and good conscience jurisdiction” should be so narrowly interpreted. It is intended to apply to the range of the Court’s functions, only a relatively small proportion of which concern on-going employment relationships. The further constraints on the exercise of that equity and good conscience jurisdiction under subs (1) (that it be not

inconsistent with legislation or any applicable collective agreement or the particular individual employment agreement at issue) are not applicable to this question, at least in this case.

[69] It is notable that on previous occasions when the Court has allowed the postponement of payment of a costs’ order, [s 189\(1\)](#) was not referred to expressly in one. Ms Bromfield for the defendant has referred to the judgment in *Bay Milk Distributors Ltd v Jopson*.<sup>26</sup> That was a case in which a party liable to an order for costs was clearly unable to pay an award of any significance in the circumstances at the time the application for costs was made. The Court concluded, however, that there was a reasonable prospect of future payment and, at paras 7-8, said:

[7] Although the Court will not make an award of costs, the effect of which is to drive a person into, or further into, penury, Mr Jopson’s work record disclosed by evidence in the case is that he is a capable, enthusiastic and committed employee who this Court is confident will be able to work for reasonable remuneration before too long. In these circumstances the plaintiff should not be deprived of costs altogether. The fairest course is to make an order that can be paid off by Mr Jopson as and when he regains remunerative employment. The amount of this order should, however, be commensurate also with his ability to pay in those circumstances.

[8] Accordingly, I make an order that the plaintiff is entitled to a contribution towards its costs and disbursements of this litigation in the sum of \$5,000 payable at the rate of \$50 per week commencing one month after Mr Jopson gains full-time remunerative employment.

[70] The Court made a lump sum order payable at a periodic rate, commencing one month after the liable party gained full-time remunerative employment. The judgment does not contain any analysis of the Court’s power to do so.

[71] In *Order of St John Midland Regional Trust Board v Greig*,<sup>27</sup> following submissions not only from the parties but also on behalf of the Auckland District Law Society and the Employment Law Institute Inc, the Court determined that it and the Authority must have regard, in appropriate cases, to a party's ability to pay an award of costs. That was said to encompass both whether an award should be made

but more especially the amount of such an award. In making that assessment of

<sup>26</sup> *Bay Milk Distributors Ltd* [2010] NZEmpC 34.

<sup>27</sup> *Order of St John Midland Regional Trust Board v Greig* [2004] NZEmpC 83; [2004] 2 ERNZ 137.

equity and good conscience, this was described as having been "a longstanding

principle in this specialist jurisdiction".<sup>28</sup>

[72] I note that among the submissions to the Court in *Greig*, made on behalf of lawyers generally through the (then) Auckland District Law Society, counsel submitted that "... the Court has always taken into account the ability of an unsuccessful party to pay without undue hardship ...".<sup>29</sup> The Court accepted that submission. Not only might a very substantial order for costs against an unsuccessful party prove to be an undue hardship, but so, too, might the immediacy

of payment of an order cause a party undue hardship.

[73] This has been questioned in this Court recently, in *Tomo v Checkmate Precision Cutting Tools Ltd*.<sup>30</sup> After surveying the history of the Employment Court's approach to an inability to pay<sup>31</sup>, Judge Inglis recognised that there may be circumstances where a reduced or no cost order may be made; and concluded that "the interests of both parties, and broader public policy considerations, must also be taken into account."<sup>32</sup> In particular she was concerned that a successful party not be denied the ability to make its own decisions about whether and when to enforce an award. In that case, the aggravating features of the way the plaintiff pursued his

grievance, and the extra costs incurred by the defendant, militated against any reduction.

[74] I would not underestimate, in many cases, the incentive for a successful litigant to whom costs have been awarded, to 'finish the job' by enforcing that award promptly and uncompromisingly. However, in my assessment, *Tomo* is an example of how case-specific or even unique circumstances will determine in any particular whether to adjust an award for impecuniosity. It is more important in my view that the ability to do so exists, than for there to be rules of general application which

might restrict that ability.

<sup>28</sup> At [27].

<sup>29</sup> At [56].

<sup>30</sup> *Tomo v Checkmate Precision Cutting Tools Ltd* [2015] NZEmpC 2 at [22].

<sup>31</sup> At [12]-[20].

<sup>32</sup> At [22].

[75] In favour of the narrow or restrictive interpretation of the power to award costs, there is nothing in cl 19 of sch 3 to the Act which either expressly permits or expressly prohibits the Court from making instalment orders of costs. That does, however, contrast with other specific powers elsewhere in the Act by which the Court can order payments by instalment. For example, s 135(4A) empowers expressly the Authority or the Court expressly to direct payments of penalties by instalments. The absence of a similar express provision in relation to costs is, therefore, an argument that Parliament may have intended the Court or the Authority to not have this power in relation to costs' awards.

[76] As against that, s 221(c) and (d) provides the Court with broad powers to extend times within which things must be done or, even more broadly, to give such directions as the Court may think fit to expedite proceedings. It may be thought that the existence of these broad powers meant that a specific power in cl 19 of sch 3 to make an order for costs payable other than immediately and fully, was unnecessary

[77] The argument against doing more than simply setting a sum for payment of costs in all cases contemplates that a discretion (including as to when that payment will be made and, if so, by instalments) is a function of the enforcement process. So, for example, if a party against whom an order for costs has been made is unable to satisfy that order immediately, the argument is that enforcement measures (for example by bankruptcy or company insolvency procedures) taken in other courts will be able to provide sufficient flexibility including by orders for instalment payments, to provide a just outcome in any particular case.

[78] As against that, it is counter-intuitive that another court or debt enforcement agency, without much, if any, knowledge of the parties' circumstances and of the circumstances of the case that led to the making of the costs' order, will be in a better position than the Employment Court (or the Employment Relations Authority) to make a better informed or more just decision about such questions. That is not to mention the additional cost and delay to which the parties would be put in an enforcement proceeding in another jurisdiction.

[79] Further, to take the example thrown up by this case, it would not be just, the defendant having paid the plaintiff the awards made

against it, that it should now be at risk of very substantial financial difficulties by the potential enforcement of a costs' award, potentially putting at risk a viable school, the employment of other staff, the interests of students and their families, and of the community in which the school is located, simply for want of the reasonable exercise of a power of postponement of payment of costs and by instalments.

[80] I have concluded that a combination of the Court's powers under cl 19, and ss189 and 221 do allow for costs to be payable by instalments or at a postponed date if a party's circumstances, established by evidence as it has been in this case, mean that this is the most just course in a particular case. That broad discretion extends to making it a condition of payment by instalments that interest may be added to outstanding such arrangements.

### Decision

[81] I find largely, but not completely, for the defendant's arguments, already set out, on the question of costs. That is, the award it accepts it should pay is a fair and reasonable contribution to reasonable costs of the plaintiff's representation.

[82] For these reasons, first, I allow the plaintiff's claim for Authority costs of

\$4,300.32 in its entirety. This consists principally of disbursements so that it is not an indemnity costs' award. The plaintiff was not professionally represented in the Authority.

[83] Next, I fix the figure of \$140,000 as reasonable costs of professional representation of the plaintiff in this Court. That figure is to be reduced by between two-thirds and one-third over the three periods specified in the parties' submissions, representing factors including the plaintiff's lack of success on some interlocutory applications, the Calderbank offer and the excessive concentration by the plaintiff at times on peripheral issues. That produces, as already recorded, a reasonable contribution to reasonable fees of \$79,189 which I propose to round up to \$80,000.

[84] As to disbursements, for the reasons set out I allow the accommodation and travel expenses of two counsel (\$4,681.71) although, in the absence of supporting justification for the PwC fee of \$13,662.77, I will allow the lesser sum of \$7,500. Disbursements allowed therefore total \$12,181.71. There may be interest payable on the outstanding balance of any instalments owing after 2 May 2016.

[85] Finally, on the question of whether costs should be allowed on the preparation for submissions on costs, the defendant has been very largely successful in respect of this discrete issue. In these circumstances, I will not allow any further costs to the plaintiff.

[86] In summary:

- The plaintiff is allowed \$4,300.32 towards her costs in the

Employment Relations Authority.

- The plaintiff is allowed \$80,000 towards her costs in the substantive proceedings in the Employment Court.
- The plaintiff is allowed disbursements of \$12,181.71 (including an allowance towards her fees with PwC of \$7,500).
- Cumulatively, this makes up an order payable by 2 May 2016 of

\$96,482.03

- The defendant may elect either to pay the foregoing costs and disbursements in full by 2 May 2016 or, alternatively, by instalments which will include interest at the rate of 5 per cent per annum on the balance then owing.
- If the defendant elects to pay by instalments, the foregoing costs and disbursements shall be payable as follows:
  - the sum of \$32,160.68 on 2 May 2016;
  - the sum of \$32,565.99 (including interest) on 2 August 2016 and
  - the sum of \$32,971.31 (including interest) on 2 November 2016
- There will be no order for costs on the plaintiff's application for costs.

GL Colgan  
Chief Judge

Judgment signed at 2.30 pm on Friday 15 April 2016