Employment Court of New Zealand

Smithson v Wellington College Board of Trustees [2022] NZEmpC 8 (2 February 2022)

Last Updated: 9 February 2022

IN THE EMPLOYMENT COURT OF NEW ZEALAND WELLINGTON

I TE KŌTI TAKE MAHI O AOTEAROA TE WHANGANUI-A-TARA

[2022] NZEmpC 8
EMPC 289/2019

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
AND IN THE MATTER	of an application for costs
BETWEEN	DIANE SMITHSON Plaintiff
AND	WELLINGTON COLLEGE BOARD OF TRUSTEES Defendant

Hearing:	(on the papers)
Appearances:	B Buckett and M Belesky, counsel for plaintiff C Heaton, counsel for defendant
Judgment:	2 February 2022

COSTS JUDGMENT OF JUDGE B A CORKILL

Introduction

[1] At issue is whether an order for costs should be made against Mrs Smithson in favour of the Wellington College Board of Trustees (the College).

[2] At the conclusion of my judgment which dismissed Mrs Smithson's challenge,1 I expressed the preliminary view that she should pay costs to the College on a Category 2, Band B basis of the Court's Guideline Scale as to Costs (the Guideline Scale).2 I

1 *Smithson v Wellington College Board of Trustees* [2021] NZEmpC 114.

2 "Employment Court of New Zealand Practice Directions"

<https://www.employmentcourt.govt.nz/assets/Documents/Publications/Employment-Court-

encouraged the parties to resolve any costs issues on the basis of this indication, if possible. However, I reserved leave for the issue to be resolved by application to the Court if need be.

[3] In the event, the parties have not been able to resolve costs informally. The College now seeks an order against Mrs Smithson.

The Court's judgment

[4] To set the scene, it is necessary to summarise my findings. I dealt with a broad range of claims that arose from a four-year chronology where, in essence, difficulties arose as to options for Mrs Smithson to return-to-work after she left the workplace on leave following a dispute with a colleague as to the use of school resources.

[5] First, I concluded that the steps taken by the College in tasking an external investigator to investigate the problems which had arisen were the actions of a fair and reasonable employer, and that the approach taken by the Headmaster at the time,

Mr Roger Moses, was not unjustified.3

[6] A second personal grievance related to an assertion of bullying. I was not persuaded that a grievance on the basis of a failure to investigate a bullying allegation was established, or that steps taken with regard to allied health and safety concerns were not those of a fair and reasonable employer.4

[7] A third personal grievance asserted that the College imposed roadblocks to Mrs Smithson's return-to-work, unjustifiably, and that these prohibitions arguably amounted to an unjustified suspension. This allegation was not established as a disadvantage grievance.5

Practice-Directions.pdf> at No 16.

3 *Smithson v Wellington College Board of Trustees*, above n 1, at [222].

4 At [238].

5 At [264].

[8] Next, I considered a grievance which related to the raising of incompatibility issues in 2018. I concluded that the raising of the allegations was among the steps which a fair and reasonable employer could have taken in all the circumstances.6

[9] I then addressed a number of further issues which had been raised in submissions. I found that an assertion the College had engaged in a "cruel game", under a "multi-layered masterplan" was an extreme and unjustified characterisation.7

[10] With regard to a submission that the College had repeatedly withheld key information from Mrs Smithson for long periods of time, I concluded that there were no procedural flaws in that respect.8

[11] An assertion that there had been a breach of privacy and confidentiality was not established.9

[12] It was alleged that the Board of the College had not authorised the Principal, Mr Gregory Fountain, to advance incompatibility concerns, so that there was a delegation problem. I found that there was no evidence to support this conclusion.10

[13] Next, I said I was not persuaded that there had been a breach of a duty of care in respect of Mrs Smithson's unwellness and health issues, as raised by her general practitioner.11

[14] Finally, in respect of a submission that legal advice tendered to the College had dominated the circumstances and was arguably a barrier to positive resolution of the issues between the parties, I found that whilst at times responses given on behalf of the College became legalistic, that was generally in response to adversarial communications sent on behalf of Mrs Smithson.12 I also held that numerous options

6 At [298].

7 At [304].

8 At [310].

9 At [314].

10 At [318].

11 At [323].

12 At [325].

for dispute resolution were attempted. Regrettably, the relationship problems had, so far, proved insurmountable. That had been the central problem.13

[15] I concluded that no aspect of the grievance was established, and the challenge was accordingly dismissed. I commented

on the possibility of facilitation being undertaken, in light of evidence which had been placed before the Court as to how such a process might assist the parties.

[16] In correspondence now placed before the Court, it appears the parties are engaging in such a process.

Submissions

Application for costs by the College

[17] The College sought an order that costs be paid on a Category 2, Band B basis as to the Guideline Scale, in the sum of $49,712. Ms Heaton, counsel for the College, submitted that this sum should be paid to the account of the College's insurer.

[18] Ms Heaton also addressed the issue of costs in the Employment Relations Authority. She referred to the fact that Mrs Smithson had been directed to pay the amount awarded by the Authority for costs in favour of the College, $11,500, to the Registrar to be held in an interest-bearing account until the parties agreed otherwise, or until further order of the Court.14

[19] The payment had been made on 27 May 2020. A request had been made for the sum, plus accrued interest, to be paid to the College, but in the absence of a response, the Court was asked to direct that it be paid.

Response by Mrs Smithson

[20] Ms Buckett, counsel for Mrs Smithson, submitted that a rigid application of the Guideline Scale was not appropriate in this case. She emphasised that the Court has a broad discretion as to costs. A detailed submission was developed to the effect

13 At [327].

14 *Smithson v Wellington College Board of Trustees* [2021] NZEmpC 72.

that an order of costs against Mrs Smithson would constitute undue hardship. Although she had some assets, she had not received wages since March 2019, nor income of any other sort. Evidence filed early on Mrs Smithson's behalf stated that as of December 2020, her lost salary equated to over $250,000.

[21] It was also submitted that it would be unjust, and contrary to the Court's equity and good conscience jurisdiction, to award costs against Mrs Smithson in light of both the statutory objectives to promote and assist employment relationships, and the outcome of the challenge.

[22] Although "technically" Mrs Smithson had failed in her personal grievance claims, her case had not been without merit. She had been successful because it led to the Court encouraging facilitation. This suggestion had broken an impasse between the parties. The proceeding had in fact achieved a positive outcome.

[23] By contrast to Mrs Smithson's position, the College had been "fully funded" throughout the litigation. There was a "funding arrangement" with an insurer, the terms of which had not been disclosed. The difficulty with a funding arrangement is that such an entity invariably affects the control over the litigation and may affect or influence the insured's ability to settle or engage.

[24] Ms Buckett submitted that third-party funding of the College had acted as a disincentive, and an impediment, for resolution of the employment relationship problem. These dynamics had thwarted constructive resolution.

[25] The case for the College had been dominated by steps taken on its part by "the funder's legal representative". The funder had "appointed the representation, held the retainer, and controlled the direction the matter would take".

[26] The fact that Mrs Smithson did not have the same access to fiscal backing created a serious inequity, and a power imbalance, which was an anathema to the statutory scheme governing employment relationships.

[27] It was also submitted that given the passage of time and the extent of losses which Mrs Smithson had already suffered through lost wages over a period of years, she had already been punished. Any award of costs would exacerbate that punishment.

[28] Mrs Smithson filed an affidavit outlining her financial circumstances. In it she says she is on the verge of bankruptcy, and that she owns a home but would have to sell that to meet the amount claimed by the College. After repaying indebtedness secured over that asset, she would be left in a serious situation. Aspects of this evidence were supported by an affidavit from Mr Alan Strawbridge, a Business Adviser.

Reply from the College

[29] Ms Heaton filed a response to Mrs Smithson's submissions. After emphasising that there was no stated opposition to paying out the sum held by the Court, which related to the costs order made by the Authority, that step should now be authorised.

[30] Turning to costs in the Court, it was also noted that after the challenge was filed, there was a consensus between counsel that Category 2 of the Guideline Scale would apply, and that individual steps would be either Band B or C.

[31] Next, Ms Heaton referred to the submissions made as to undue hardship. She said that an issue of potential impecuniosity had arisen when Mrs Smithson's claim was before the Authority in August and September 2019. Advice as to her financial position had been sought. The response given was that the College had provided no evidence to suggest there were liquidity concerns. Any application for security would be opposed and costs sought. Ms Heaton said that despite seeking further information about Mrs Smithson's financial circumstances, none was given.

[32] It was submitted that although Mrs Smithson now says she "technically" has the ability to pay, it appears that ability is limited and would involve the liquidation of an asset such as her home. That information should have been shared when it was sought.

[33] Submissions were also made as to the reliability of Mr Strawbridge's assertion about Mrs Smithson's ability to raise further funding, since it appeared he had assumed an incorrect age for Mrs Smithson when advising as to how much she would be able to borrow for the purposes of an extension of an existing reverse mortgage to fund legal costs. She was in fact in a position where she could borrow sufficient funds to meet the likely liability for costs. It was submitted that any hardship to Mrs Smithson in all these circumstances was not "undue".

[34] With regard to the assertion that Mrs Smithson's hardship was "the direct result of her not receiving income over a protracted period as a result of the circumstances of this case", Ms Heaton submitted that despite going on leave in June 2015, Mrs Smithson was in receipt of salary between that date and 2 May 2016, nearly a full year. Later her pay was reinstated on 22 September 2017 (as the result of a request from the Authority that the parties engage in ADR with Mr Hutchinson) and she remained on the payroll until 13 March 2019. Thus, Mrs Smithson had been on paid leave for nearly two and a half years of the period which followed her departure in 2015.

[35] Mrs Smithson had said in her affidavit that she had used all her retirement savings over the period mid-2015 to early 2021. Ms Heaton submitted that an aspect of this problem would have related to her having to pay her own significant legal costs.

[36] Further, Mrs Smithson remained a registered teacher. It would have been open for her to seek work as a relief teacher. The College would not have opposed this step, but such a possibility was never raised.

[37] Turning to the contention that the College had been assisted by a litigation funder, reliance was placed on dicta in *McCammon v Wellington Free Ambulance Service Inc*, which dealt with a submission that the employer may not have incurred any costs at all because it was insured.15 The Court had held that whether the

15. *McCammon v Wellington Free Ambulance Service Inc* EmpC Wellington WRC28/02, 16 May 2003 at [4].

employer was insured was not a relevant consideration in such an instance; the doctrine of subrogation applied by analogy.16

[38] Reference was then made to the *Waterhouse v Contractors Bonding Ltd* litigation in the Court of Appeal and Supreme Court which dealt with a particular type of litigation funding.17 In that context, the Court of Appeal had expressly stated that litigation funding by an insurance company by subrogation did not engage any particular concerns, a comment which was made with reference to views expressed by the New Zealand Rules Committee.18

[39] Ms Heaton then addressed the submission as to whether the "involvement of the insurer's representative went well beyond defending or settling personal grievance claims raised by the plaintiff" and that "the third party funding" acted in this case as a disincentive and impediment for resolution of the outstanding matters between the parties as the funder had taken "a superior and unusual controlling role in the dispute and beyond". She traversed aspects of the evidence which the Court had considered; she argued the Court's findings showed that the submission was not accurate.

[40] Ms Heaton submitted that the College had engaged in good faith over the years, genuinely trying to preserve the relationship. The raising of incompatibility allegations were, the Court had found, among the steps that a fair and reasonable employer could have taken in all the circumstances.

[41] Accordingly, it could not be said it would be antithetical to the object of the Employment Relations Act 2000 (the Act) to require Mrs Smithson to pay a fair contribution, as represented by the 2B Guideline Scale assessment.

16. The College also relied on statements made in *O'Malley v Vision Aluminium Ltd (No 3)* [1992] 2 ERNZ 1043 (EmpC); and in

Unkovich v Air New Zealand Ltd [1995] 1 ERNZ 336 (EmpC).

17. *Contractors Bonding Ltd v Waterhouse* [2012] NZCA 399, [2012] 3 NZLR 826; and *Waterhouse v Contractors Bonding Ltd* [2013] NZSC 89, [2014] 1 NZLR 91.
18. At [17]; *Class Actions for New Zealand: A Second Consultation Paper Prepared by the Rules Committee* (October 2008) at [20].

Legal principles

[42] The starting point for the assessment of costs is cl 19 of sch 3 of the Act. It confers a broad discretion.

[43] The discretion to award costs must be exercised judicially, and in accordance with that and other well-established principles.19

[44] The Court's Guideline Scale may be a factor in the exercise of the Court's discretion.

[45] In short, the Court has a wide discretion when it comes to costs.20 The discretion is to be exercised judicially and on a principled basis. Any conduct that increases or contains costs can be taken into account.21

Analysis

Insurance/subrogation issues

[46] The position as to the indemnification of an employer by an insurer is uncontroversial in this jurisdiction. As Judge Holden recently said in *Kazemi v RightWay Ltd,* parties often have insurance in place when involved in litigation.22 That fact is not normally relevant to costs issues. There are many authorities to this effect.23

[47] As noted earlier, Ms Buckett referred to the Supreme Court consideration of funding agreements in *Waterhouse v Contractors Bonding Ltd.*24 She drew attention to the finding made in that particular case that the terms of a funding agreement should be disclosed.

19 *Victoria University of Wellington v Alton-Lee* [2001] NZCA 313; [2001] ERNZ 305 (CA).

20 *Elisara v Allianz New Zealand Ltd* [2020] NZEmpC 13, [2020] ERNZ 20.

21 Employment Court Regulations 2000, reg 68.

22 *Kazemi v RightWay Ltd* [2019] NZEmpC 104 at [15].

23 *O'Malley v Vision Aluminium Ltd (No 3),* above n 16, at 1045; *Unkovich v Air New Zealand Ltd,* above n 16, at 340; *IHC New Zealand Inc v Scott* EmpC Auckland ARC 93/05, 18 October 2006 at [20]; *Evolution E-Business Ltd v Smith* [2012] NZEmpC 58 at [11].

24 *Waterhouse v Contractors Bonding Ltd,* above n 17.

[48] The finding related, however, to circumstances in which the terms of such an agreement may be relevant. Included in the examples given by the Supreme Court was an application for stay on the basis of abuse of process by the involvement of a funder. It is to be noted that in that instance, the Court was dealing with the situation of a third-party funder where remuneration was tied to the success of the proceeding and/or who had the ability to exercise some form of control over the conduct of the proceeding. The Court made it clear that the appeal did not concern litigation funded by insurance.25

[49] From these authorities I conclude that the fact the party is insured is not normally relevant to a consideration of costs issues. This is, however, subject to one caveat. If there is in fact evidence of an abuse of the processes of the Court, it would need to consider this problem. In my view, such an issue would fall for consideration under the Court's equity and good conscience jurisdiction.26

Unjust balance?

[50] Ms Buckett effectively submitted that there was such an issue here; she asserted there was an unjust imbalance in the employment interests of the parties. She also argued that such a problem was contrary to the requirements of ss 3 and 4 of the Act, which created positive obligations of good faith. These obligations, she said, had not been satisfied by the College.

[51] In the substantive judgment, I made several findings that are relevant to this assertion.

[52] The first related to the suggestion that the College had engaged in a "cruel game", under a "multi-layered masterplan".

25 At [24]. The same point was made by the Court of Appeal in that litigation, as summarised at [38] of this judgment.

26 In *Waterhouse v Contractors Bonding Ltd,* above n 17, at [32]–[43], the Supreme Court referred to the inherent power of any court

to prevent abuse of process. See also *Southern Response Earthquake Services Ltd v Southern Response Unresolved Claims Group* [2017] NZCA 489, [2018] 2 NZLR 312 at [72]–[73]. In my view, s 189 of the Employment Relations Act 2000 would also provide a proper basis for assessing any such issue.

> [53] I found these statements were unwarranted.27 I was satisfied that the College had been genuine in its many attempts to address the issues relating to Mrs Smithson's return-to-work over a period of years. I said the circumstances were complex and catalysed by an unfortunate relationship between Mrs Smithson and Mrs Maddren. I concluded that the particular submission was an extreme and unjustified characterisation.28
>
> [54] Second, I considered the submission that the legal advice tendered to the College had dominated the circumstances and was arguably a barrier to positive resolution of the issues between the parties. I did not accept this allegation. As already noted, legalistic responses were given by the College, but that was generally in response to adversarial communications sent on behalf of Mrs Smithson.29 Moreover, numerous options for dispute resolution had been attempted, and regrettably the relationship problems had, to that point, proved insurmountable. That was the central problem.30 Nor was I satisfied that roadblocks had been put up by the Collage at every turn, as had been suggested.31
>
> [55] Both parties were represented by experienced employment law practitioners, who advanced their clients' viewpoints vigorously and comprehensively. At times the positions taken were firm. Overall, there was no inequality of arms.
>
> [56] As far as the College is concerned, it is plain that all key decisions were taken by the Board's delegated employees, Mr Moses, or Mr Fountain. I am satisfied they reported to the Board from time to time. Towards the end, members of the Board became more directly involved as the situation became more complex. There was nothing to suggest in the evidence that those senior professionals, or members of the Board, were in thrall to the lawyer who was representing their interests, or for that matter, to the insurer. I am not satisfied that the insurer abused its position, or that Mrs Smithson was the victim of an unfair dynamic as between her and her employer, since she had the assistance of a very experienced employment lawyer.

27 *Smithson v Wellington College Board of Trustees*, above n 1, at [303].

28 At [304].

29 At [325]. See for example the discussion at [214]–[219].

30 At [327].

31 At [262]–[264] and [273].

Success considerations

> [57] Ms Buckett submitted Mrs Smithson had been successful because the Court's decision in directing the parties towards facilitation had broken an impasse, and that without the Court's intervention, the matter would not have progressed. She suggested that this was a satisfactory outcome which benefited both parties. Thus, whilst technically Mrs Smithson failed in her personal grievance claim, her case was not without merit and she had achieved a positive outcome.
>
> [58] Ms Heaton in reply said that if Mrs Smithson had not taken a litigious and adversarial approach, and the parties had not had to engage in the Authority and then the Court proceedings, a return-to-work plan may have been agreed.
>
> [59] Standing back, it is apparent that although the challenge was dismissed, it did result in the Court's judgment replacing the determination of the Authority, which had come close to concluding that Mrs Smithson should be dismissed on incompatibility grounds, even although the College had yet to conclude its process as to those concerns.32
>
> [60] The statement made by the Court that the parties might be assisted by engaging in facilitation arose from expert evidence placed before the Court by Mrs Smithson, for which she is entitled to credit.33
>
> [61] However, the difficulty with the submission is that the entire relationship problem was re-run in the Court. If the object of the exercise was to re-establish good faith options for a return-to-work, notwithstanding the incompatibility issues raised against Mrs Smithson, then a more refined approach could have been adopted. For example, a non de novo challenge could have been brought as to the finding made by the Authority which was considered to be inappropriate and/or unfair. Such a challenge would have been of narrow compass and would not necessarily have required the parties to deal with the entire history of events in detail, which, no doubt incurred significant expense on both sides. It required re-litigation of a long and difficult history.

32 *Smithson v Wellington College Board of Trustees* [2019] NZERA 489 (Member Crichton) at [105].

33 At [331].

> [62] Mrs Smithson is entitled to consideration at the cost stage of having brought a challenge which may have enhanced the possibility of the parties continuing to work through their issues via facilitation. But although that factor may be weighed

into the scales, it is not one which can lead to a conclusion that she was in fact the successful party.

Quantum

[63] Before considering the remaining point raised for Mrs Smithson, which relates to her ability to pay, it is necessary to review the quantum of the claim for costs advanced by the College.

[64] Presumably because of the broader submission made for Mrs Smithson to the effect that she should not be liable for costs, no critique of the College's schedule of costs was undertaken on her behalf.

[65] I have, however, considered its make-up. All items in the schedule are correctly claimed, except for one.

[66] It relates to the sum claimed for appearance at hearing of counsel, claimed under Item 40 of the Guideline Scale. Six days were claimed, perhaps in reliance of the indication given on the front page of the Court's judgment as originally issued. There was an inadvertent error in the expression of those dates, and the judgment has accordingly been reissued. The total is five days, not six; the claim is therefore reduced to $11,950.

[67] In light of these modifications, the corrected total sum is $47,325, rather than

$49,712.

Ability to pay

[68] The issue of ability to pay was reviewed recently in *Elisara v Allianz New Zealand Ltd*, by Chief Judge Inglis.34

34 *Elisara v Allianz New Zealand Ltd*, above n 20.

[69] After referring to previous authorities which dealt with financial hardship in relation to costs orders, she said that the cases did not reflect "a bright line approach" to the exercise of the Court's discretion in respect of financial capacity. Rather, they recognise that there might be circumstances which could justify a departure from the usual approach, which needed to be weighed against other relevant factors, including the interests of the other party, the broader public interest, and the aggravating way in which the losing party had pursued their claim.35

[70] She referred to the observations made in *Scarborough v Micron Security Products Ltd*, as follows:36

There may be a number of reasons why a successful party would wish to have a costs judgment in their favour, despite the opposing party not immediately being in a position to satisfy such an award. They may decide against taking enforcement action, or may wish to wait and see whether at some stage in the future the opposing party's personal circumstances change. Substantially reducing, or eliminating, a costs liability at the stage at which costs are assessed, on the basis of the unsuccessful party's financial position at that particular point in time, denies the successful party the ability to make decisions as to whether, and when, to seek to enforce an award it would otherwise be entitled to.37

[71] I also make the point that in considering whether there should be a departure from the usual approach in light of financial hardship, the court must be furnished with reliable information for the purposes of assessing that claim. A bald assertion of financial pressure is not enough. In this case, affidavit evidence has been tendered, which was essential.

[72] As already recorded, Mrs Smithson says that with insufficient income since 2015, she has had to mortgage her own house through a reverse mortgage and use all her retirement savings.

[73] That statement has to be assessed in light of the point made for the College that Mrs Smithson was on paid leave across that period for nearly two and a half years. That said, there was a long period when no income was received. Moreover, she had

35 At [14] and [15].

36 *Scarborough v Micron Security Products Ltd* [2015] NZEmpC 105, [2015] ERNZ 182 at [38].

37 The Court also referred to similar comments made in *Tomo v Checkmate Precision Cutting Tools Ltd* [2015] NZEmpC 2, [2015] ERNZ 196. See also *Emmanuel v Waikato District Health Board* [2019] NZEmpC 125 at [14].

her own legal costs. In evidence given in 2017, Mrs Smithson said that savings for her retirement had been seriously eroded by legal costs, which she would not be able to make up given her age and imminent retirement.

[74] In further evidence, Mrs Smithson said it is likely she would have to sell her house to meet a costs liability. She says that if she must sell her house to meet a costs liability, she would first have to repay a reverse mortgage she had raised, and then meet the liability. This would leave her in a serious situation. She said that rental costs would exceed the government superannuation she receives, which is currently her only source of income.

[75] According to the evidence placed before the Court as to her circumstances, including age, Mrs Smithson may well have had difficulty in obtaining alternative employment during the period she has been away from the workplace. It is now asserted that the College would not have opposed her taking paid work, notwithstanding her status as employee seeking a return-to-work, but that is something of a hindsight point.

[76] I have already referred to Mrs Smithson's evidence as to the impact of her own legal costs on her current financial circumstances. Although specific details as to her own costs have not been provided, I accept her evidence that her retirement resources have been depleted by those costs.

[77] I turn to the issue of Mrs Smithson's ability to fund an order for costs, if imposed. Her case as to her financial circumstances has been put on the basis that her income is insufficient to pay interest on a loan, and that the only option therefore would be for her to obtain an extension of a current reverse-mortgage.

[78] To support this contention, Mr Strawbridge assumed an age of "under 70" when calculating how much more she could raise.

[79] The evidence before the Court, however, is that Mrs Smithson's age places her in a higher category, so that were she to apply for such an extension this year, she could borrow 30 per cent of the value of her home, rather than the 20 per cent assumed

by Mr Strawbridge. Using the same methodology as otherwise adopted by Mr Strawbridge, the figure she could borrow by way of an extension is well in excess of her current loan. Although such an option is of course a matter for her, the evidence suggests she would not be forced to sell her home immediately, were a costs liability to be ordered.

[80] I recognise, however, that her circumstances could change over time. She may well have to sell her home – which is her main asset according to her statement of assets and liabilities.

[81] The limited equity she could realise from that asset, if extended borrowing had been obtained, would likely lead to significant financial pressure.

[82] Taking these factors into account, there should be a limited reduction of the claimed sum to reflect Mrs Smithson's ability to pay.

Balancing all factors

[83] The starting point of the College's claim is now $47,325.38

[84] Taking account of the practical effect of the challenge as discussed,39 and Mrs Smithson's financial circumstances,40 but balancing those factors against her decision to relitigate all aspects of her claim which proved unsuccessful, there should be some adjustment to the scale amount. I consider her costs liability should be

$37,500.

[85] Mrs Smithson is to pay this sum to the College within six months, or such longer period as the parties may agree. I consider this step to be reasonable in terms of cl 19(1) of sch 3 of the Act, given current circumstances in the community. It will be over to the College to then make such arrangements with its insurer as may be appropriate.

38 Above at [67].

39 Above at [61] and [62].

40 Above at [72]—[82].

[86] With regard to costs in the Authority, the Registrar is to pay the sum which was paid into Court, together with the accrued interest, to the College.

[87] I make no orders as to costs on costs, since no such claim was made, and in any event, this is not an appropriate case for an award of this kind.41

B A Corkill Judge

Judgment signed at 1.00 pm on 2 February 2022

41. See *Booth v Big Kahuna Holdings Ltd* [2015] NZEmpC 4 at [44]–[47]; and *Nisha v LSG Sky Chefs New Zealand Ltd* [2018] NZEmpC 33, [2018] ERNZ 108 at [18].
