

**IN THE COURT OF APPEAL OF NEW ZEALAND**

**CA658/2015  
[2016] NZCA 126**

BETWEEN THE COMMISSIONER OF SALFORD  
SCHOOL  
Applicant

AND MARLENE JANICE CAMPBELL  
Respondent

Hearing: 14 March 2016

Court: Harrison, Wild and Cooper JJ

Counsel: S G Wilson for Applicant  
R M Harrison for Respondent

Judgment: 14 April 2016 at 11.30 am

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**JUDGMENT OF THE COURT**

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- A The application for leave to appeal is dismissed.**
- B The applicant must pay the respondent costs for a standard application on a band A basis and usual disbursements.**
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**REASONS OF THE COURT**

(Given by Cooper J)

[1] The Commissioner of Salford School (the Commissioner) seeks leave to appeal a judgment of the Employment Court awarding costs to the respondent, Ms Campbell.<sup>1</sup>

[2] Ms Campbell had been employed from 2006 as the Principal of Salford School, in Invercargill. In early November 2013 she was suspended, and in December filed proceedings in the Employment Relations Authority. She made an application for interim reinstatement which was unsuccessful. In March 2014 she was dismissed. She then filed an amended statement of problem in the Authority raising four personal grievance claims against the appellant:

- (a) that she had been unjustifiably dismissed from her position as Principal;
- (b) that she had been disadvantaged by the way the complaint against her was investigated;
- (c) that there had been no substantive justification for her suspension; and
- (d) that the process adopted by the Commissioner was inappropriate.

[3] The Authority rejected all of the claims other than the one asserting unjustifiable suspension. In its decision of 25 September 2014 it ordered the Commissioner to pay the sum of \$5,000 as compensation for humiliation, loss of dignity, and injury to feelings pursuant to s 123(1)(c)(i) of the Employment Relations Act 2000 (the Act).<sup>2</sup>

[4] Calderbank offers had been exchanged prior to the Authority hearing. On 7 April 2014, the Commissioner offered to resolve matters on a basis that included a payment of \$75,000. That offer was rejected by letter dated 9 April 2014, in which Ms Campbell offered to accept the payment provided she was reinstated. Alternatively, she indicated she would resolve her claims in return for a payment of \$110,000 to cover her costs, an amount equivalent to six months' salary and \$30,000

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<sup>1</sup> *The Commissioner of Salford School v Campbell* [2015] NZEmpC 186.

<sup>2</sup> *Campbell v The Commissioner of Salford School* [2014] NZERA Christchurch 151.

in compensation together with an agreed public statement to the effect that her suspension and dismissal were not justified.

[5] On 17 April 2014 the Commissioner rejected Ms Campbell's counter offer and offered to resolve the matter by the payment of \$100,000, of which \$35,000 would be a payment made under s 123(1)(c)(i) of the Act, and \$65,000 would be by way of an ex gratia payment that would be subject to PAYE. There was also reference to an agreed public statement by the parties recording that they had reconciled their differences regarding the suspension and dismissal, acknowledging the detrimental effects of the suspension on Ms Campbell and her career and noting the Commissioner's respect for her "graciousness in stepping aside to allow the School to determine its own future." This offer was rejected the same day on the basis that it failed to provide either reinstatement or a public acknowledgement that the dismissal had been unjustified. The case accordingly proceeded before the Authority.

[6] Following the Authority's substantive decision it dealt with the issue of costs in a separate determination dated 15 June 2015.<sup>3</sup> The Authority decided that the Commissioner should have costs, on the basis that she had been far more successful than Ms Campbell in the proceeding. It awarded the sum of \$21,000 as a contribution towards the Commissioner's costs<sup>4</sup> (total costs had been in excess of \$145,000).<sup>5</sup> In fixing that quantum, the Authority had regard to what it described as a "significant Calderbank offer" which had been rejected by Ms Campbell.<sup>6</sup> The Authority noted the offer had been made in good time,<sup>7</sup> and the bulk of the Commissioner's costs had been incurred after the offer was made.<sup>8</sup>

[7] Ms Campbell challenged the Authority's substantive determination in the Employment Court pursuing two claims, one relating to her suspension and the other relating to the dismissal. The Employment Court determined that she had

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<sup>3</sup> *Campbell v The Commissioner of Salford School* [2015] NZERA Christchurch 79.

<sup>4</sup> At [21].

<sup>5</sup> At [9].

<sup>6</sup> At [10].

<sup>7</sup> At [11].

<sup>8</sup> At [12].

established a disadvantage grievance in relation to the decision to suspend her,<sup>9</sup> and that the decision to dismiss her was not a conclusion which a fair and reasonable employer would have reached in all the circumstances.<sup>10</sup> It directed that she be compensated for lost wages from a date two months after her dismissal until she obtained alternative work<sup>11</sup> as well as compensation for hurt, humiliation and loss of dignity.<sup>12</sup> The Court also concluded that she was entitled to costs.<sup>13</sup>

[8] Both parties challenged the Authority's decision on costs. The decision of the Employment Court which is the subject of the present application dealt with costs in both the Authority and the Employment Court. In a fully reasoned judgment Judge Corkill determined that the costs in both forums should reflect the substantive outcome in the Employment Court.<sup>14</sup> There were orders that the Commissioner pay Ms Campbell the sum of \$19,250 for her costs in the Authority<sup>15</sup> and \$52,113.60 being 66 per cent of her actual costs in respect of the Employment Court proceedings.<sup>16</sup> The Judge held that the Calderbank offers should not result in any deduction from the costs otherwise payable.<sup>17</sup>

[9] This outcome reflected the Judge's conclusion that the applicant's rejection of the Calderbank offers was not unreasonable. The Judge subjected each of the offers to detailed examination and rejected a submission made by the respondent that the financial terms of the offer contained a distinct element of vindication. He considered that although the final Calderbank offer made by the Commissioner on 17 April 2014 (including a payment of \$100,000) slightly exceeded the monetary value of the judgment she obtained, it would not have achieved the restoration of reputation that Ms Campbell sought; the terms of settlement and all matters related to it were to be confidential, and there would be no public acknowledgement that the dismissal was unjustified.<sup>18</sup>

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<sup>9</sup> *Campbell v The Commissioner of Salford School* [2015] NZEmpC 122 at [180]–[217].

<sup>10</sup> At [218]–[301].

<sup>11</sup> At [323]–[332].

<sup>12</sup> At [341]–[350].

<sup>13</sup> At [355]; and as quantified by *The Commissioner of Salford School*, above n 1.

<sup>14</sup> *The Commissioner of Salford School*, above n 1, at [27].

<sup>15</sup> At [64].

<sup>16</sup> At [78].

<sup>17</sup> At [46]–[59] and [71]–[77].

<sup>18</sup> At [55]–[57].

[10] The Judge concluded:<sup>19</sup>

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

[11] Section 214 of the Act contemplates appeals to this Court from decisions of the Employment Court only on questions of law. Such appeals are by leave. Leave may only be granted where this Court is of the opinion the question of law involved in the appeal is one that by reason of its general or public importance or for any other reason ought to be submitted to this Court for decision.<sup>20</sup> The questions proposed for the grant of leave in the present case are as follows:

- 2.1 Was there an error of law by the Employment Court Judge in disregarding the appellant's final Calderbank offer on the basis it did not address the personal vindication elements of the respondent's personal grievance claim?
- 2.2 Was there an error of law by the Employment Court Judge in determining that the respondent's conduct of the case in the Authority should not be reflected in costs in the Authority?

[12] In support of the application for leave Mr Wilson argued that the Judge erred in the following ways:

- (a) by failing to take into account the Calderbank offers made on behalf of the Commissioner on the basis that they purportedly did not address the personal vindication elements of the respondent's personal grievance claim;
- (b) by concluding that the Commissioner's final Calderbank offer would not have achieved vindication for the respondent and that the Judge had taken an approach to the assessment of vindication that was overly restrictive;

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<sup>19</sup> At [77].

<sup>20</sup> Employment Relations Act 2000, s 214(3).

- (c) by placing insufficient weight on the respondent's failure to achieve reinstatement in both the Authority and the Employment Court; and
- (d) by failing to have regard to the important public interest in the prompt and economic disposal of litigation by encouraging parties to resolve matters at an early stage.

[13] In our view, the issues raised in support of the application are simply issues concerning the way in which the Judge applied principles which are well settled. In *Bluestar Print Group (NZ) Ltd v Mitchell* this Court held:<sup>21</sup>

[19] We accept that there may be cases where vindication through seeking a statement of principle in the employment context may be relevant to the exercise of the Court's discretion.<sup>22</sup> Thus the relevance of reputational factors means that cost assessments are not confined solely to economic considerations.<sup>23</sup> But equally, an offer to pay compensation at a level that is reasonable might well be regarded as conveying a distinct element of vindication to the plaintiff.

[20] We consider that the potential for vindication to be a relevant factor does not mean that the developed jurisprudence under the High Court Rules costs regime should be ignored. We reject Mr Churchman's submission that the principles applicable to Calderbank offers should be adjusted or ignored in employment cases merely because of the nature of the employment relationship and because employees may in certain cases be motivated in part by the desire for vindication. As this Court has previously said a "steely" approach is required.<sup>24</sup> It has been repeatedly emphasised that the scarce resources of the Courts should not be burdened by litigants who choose to reject reasonable settlement offers, proceed with litigation and then fail to achieve any more than was previously offered. Where defendants have acted reasonably in such circumstances, they should not be further penalised by an award of costs in favour of the plaintiff in the absence of compelling countervailing factors. The importance of Calderbank offers is emphasised by reg 68(1). It is the only factor relevant to the conduct of the parties specifically identified as having relevance to the issue of costs.

[14] Mr Wilson relied on these statements to assert that the Judge had not taken a sufficiently strict approach to the implications of the Calderbank offers. However there is no suggestion in the present case that the Judge did not turn his mind to the

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<sup>21</sup> *Bluestar Print Group (NZ) Ltd v Mitchell* [2010] NZCA 385, [2010] ERNZ 446.

<sup>22</sup> The possibility was discussed by this Court in *Burns v Attorney-General in Respect of the Chief Executive of the Inland Revenue* [2002] 1 ERNZ 576 (CA) at [31].

<sup>23</sup> *Health Waikato Ltd v Elmsly* [2004] 1 ERNZ 172 (CA) at [53].

<sup>24</sup> *Ibid.*

relevant issues. Having considered the effect of the Calderbank offers, he was of the view that the final offer made by the Commissioner would not have achieved the element of vindication that Ms Campbell sought. He was clearly influenced by the fact that the terms of settlement proposed would remain confidential, and by the absence of any public statement acknowledging her dismissal had been unjustified. That was a conclusion to which the Judge was entitled to come on the facts and it involved no error of law.

[15] In our view, the proposed questions of law are not ones that by reason of their general or public importance or for any other reason ought to be submitted to the Court of Appeal for decision. They relate essentially to the manner in which the Judge applied settled law and do not merit further consideration by this Court.

[16] Consequently, the application for leave to appeal is dismissed.

[17] The applicant must pay the respondent costs for a standard application on a band A basis.

Solicitors:  
Duncan Cotterill, Christchurch for Applicant  
Harrison Stone, Auckland for Respondent