IN THE EMPLOYMENT COURT
WELLINGTON

[2016] NZEmpC 97
EMPC 206/2015

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
AND IN THE MATTER	of an application for costs
BETWEEN	WARREN BANKS Plaintiff
AND	HOCKEY MANAWATU INCORPORATED Defendant

Hearing:	(by a submissions-only telephone hearing on 1 July 2016, and memoranda filed on 5, 8, 13, 14 and 18 July, and 1, 2 August 2016)
Appearances:	B Buckett, counsel for the plaintiff P Drummond and R Oakley, counsel for the defendant
Judgment:	5 August 2016

COSTS JUDGMENT OF JUDGE B A CORKILL

Introduction

[1] This judgment deals with an application for costs which follows a judgment delivered by his Honour Judge A D Ford on 21 March 2016,[1] as well as a challenge to a costs determination issued by the Employment Relations Authority.[2] I am dealing with both of these matters due to Judge Ford's recent retirement.

[2] In its substantive decision, the Court concluded that Mr Banks had been unjustifiably dismissed on many grounds; the process failures were described as

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1 *Banks v Hockey Manawatu Inc* [2016] NZEmpC 23; leave to appeal that decision was dismissed by the Court of Appeal on 1 July 2016: *Hockey Manawatu Inc v Banks* [2016] NZCA 300.

2 *Banks v Hockey Manawatu Inc* [2015] NZERA Wellington 127.

significant and unrelenting, and the dismissal was held to be substantively unjustified. When dealing with remedies, the Court declined to make orders for reinstatement or for allegedly unpaid commissions. However, it awarded lost wages, which the parties agreed amounted to $33,761.42, and compensation for humiliation, loss of dignity and injury to feelings of $20,000, both of which were reduced by 10 per cent to reflect Mr Banks' contributory conduct.

[3] After dealing with remedies, Judge Ford reserved costs, stating that if agreement on the topic could not be reached then submissions could be filed. He also found that as his judgment stood in place of the determination of the Authority, Mr Banks' challenge to the Authority's award of costs must also succeed.

[4] Extensive submissions were subsequently filed. For its part, Hockey Manawatu Incorporated (HM) argued that it had limited means with which to meet costs, so both parties were given leave to file evidence on that topic, and they did so. Then, I held a submissions-only hearing by telephone on 1 July 2016 so as to give counsel an opportunity to develop their contentions. Additional memoranda were also filed subsequently.

[5] Ms Buckett, counsel for the plaintiff, submitted that Mr Banks' fair and reasonable costs for representation for the purposes of a hearing, which was held over 12 days, amounted to $131,627.25, plus GST and disbursements. She said that 66 per cent of this sum should be taken and then increased to reflect a Calderbank offer which Mr Banks made. Ms Buckett said there should be a further uplift due to the prolonging of the hearing by steps taken on behalf of HM as well as the late production of a key document. She also submitted that GST should be included in the costs award. Then Ms Buckett said that HM had not made out its case that it did not have the ability to pay the sums it owed to Mr Banks. She also argued that the sums awarded by way of remedy should not be eroded by an insufficient award of costs.

[6] Turning to the challenge in respect of the Authority's costs determination that Mr Banks pay HM $10,500 as a contribution for its costs relating to the investigation

meetings, Ms Buckett argued that the outcome of the substantive challenge was such that an award in Mr Banks' favour should now be made for at least the same sum.

[7] Mr Drummond, counsel for the defendant, challenged many aspects of the submission made for Mr Banks. He submitted that the fees actually invoiced to Mr Banks could not constitute a fair and reasonable starting point for the Court when assessing any liability as to costs; this was apparent, he said, when consideration was given to the fact that the defendant's solicitors together with counsel's costs amounted to $26,593.75, inclusive of GST. He said that HM should not contribute to costs which were incurred by Mr Banks' decision to use out-of-town counsel, and that those lawyers had charged excessive rates. He submitted that the Court should start with a scale amount since Mr Banks' actual costs did not provide a reasonable starting point. Then it should reduce that sum because the hearing was prolonged by the raising of matters that had not been pleaded, and because of the limited means of HM. The costs award should also reflect the fact that Mr Banks had been unsuccessful in his claims for reinstatement and for commissions. He said that the appropriate range would be 30 to 50 per cent starting point which utilised a scale cost calculation; on his calculations that would have been between $10,837 and $18,062.[3]

[8] With regard to the challenge to the Authority's costs determination, he submitted that in all the circumstances, each party should meet their own costs.

Relevant principles

[9] For the purposes of the challenge in respect of the Authority's costs determination, it is first necessary to refer to cl 15 of sch 2 of the Act, which bestows a broad discretion on the Authority to order one party to pay another such costs and expenses as the Authority thinks reasonable. The applicable principles are contained in two full Court judgments: *PBO Ltd (formerly Rush Security Ltd) v Da Cruz*,[4] and

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[3] Mr Drummond's scale calculation contained two arithmetical errors; after correction, Mr Drummond's scale assessment produced a figure of $36,126.

[4] *PBO Ltd (formerly Rush Security) v Da Cruz* [2005] ERNZ 808 (EmpC).

the recent affirmation of the principles in that decision as given by a subsequent full Court in *Fagotti v Acme & Co Ltd*.[5]

[10] In summary, the Court has approved the notional daily rate approach to costs orders in the Authority, but particular circumstances may require the exercise of discretion to either increase or decrease that daily rate, having regard to the particular circumstances.

[11] Clause 19 of sch 3 of the Employment Relations Act 2000 (the Act) governs the award of costs in this Court. Furthermore, reg 68 of the Employment Court Regulations 2000 (the Regulations) provides that in the exercise of its discretion, the Court may have regard to "any conduct of the parties tending to increase or contain costs".

[12] Both parties referred to the well established principles as set out in the Court of Appeal judgments of *Victoria University of Wellington v Alton-Lee;*[6] *Binnie v Pacific Health Ltd*[7] and *Health Waikato Ltd v Elmsly*.[8]

[13] Under these principles, a 66 per cent contribution to the reasonable costs as determined by the Court is normally regarded as fair and reasonable, but that percentage contribution may be adjusted upwards or downwards, depending on the particular circumstances.

[14] I shall now consider the cost issues which arise in light of those principles.

Costs in the Authority

[15] As already indicated, Judge Ford in his substantive decision allowed the challenge brought by Mr Banks as to the costs determination. Ms Buckett argued that given the ultimate outcome, Mr Banks should recover at least the amount originally fixed by the Authority, $10,500, plus an uplift due to the "withholding" of

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5 *Fagotti v Acme & Co Ltd* [2015] NZEmpC 135, (2015) 13 NZELR 1 at [6].
6 *Victoria University of Wellington v Alton-Lee* [2001] ERNZ 305 (CA) at [48].
7 *Binnie v Pacific Health Ltd* [2002] 1 ERNZ 438 (CA) at [14].
8 *Health Waikato Ltd v Elmsly* [2004] 1 ERNZ 172 (CA) at [17].

an important document known to the parties as Document 700. Mr Banks also seeks recovery of a disbursement.

[16] Mr Drummond submitted that whilst the challenge as to the Authority's cost determination had been allowed, the Authority had made a decision open to it on the evidence, and the issue should simply be treated as "cost neutral". He also submitted that a proportion of the time involved in the Authority's investigations related to an issue on which Mr Banks had been unsuccessful, his application for reinstatement, which was considered at two investigation meetings. Finally, he argued that issues relating to Document 700 should not be taken into account when fixing costs in the Authority.

[17] In considering these submissions, I find that costs should follow the event, as is usual; since Mr Banks ultimately succeeded, he should receive a contribution to his costs.

[18] Secondly, it is not disputed that Mr Banks' actual costs would have exceeded the notional daily rate which is normally applied in respect of investigation meetings. Accordingly, I proceed on the basis that what is at issue is the notional daily rate, with the possibility of an uplift for the reasons stated by Ms Buckett.

[19] Thirdly, I do not consider that issues relating to Document 700 should be reflected in an award of costs relating to the Authority's investigation. Whilst it is regrettable that this document was not produced by HM for the purposes of the investigation by the Authority, costs are not awarded for the purposes of punishment. Issues relating to the provision of this document are potentially relevant to the way in which costs were incurred in the Court, and I shall therefore return to that topic later. However, I consider that the issue is irrelevant for the purposes of costs in the Authority.

[20] Fourthly, I accept the submission made by Mr Drummond in respect of the attendances concerning Mr Banks' application for reinstatement. His various applications for reinstatement were unsuccessful at all stages – on an interim basis,[9]

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9 *Banks v Hockey Manawatu Inc* [2014] NZERA Wellington 114.

at the substantive investigation meeting,[10] and in the Court.[11] Ms Buckett submitted that the Court should assume that had the Authority correctly determined Mr Banks' dismissal grievance at a relatively early stage, it was more likely than not that an order for reinstatement would be made. This submission must be considered on the basis of Judge Ford's reasoning, the effect of which was that Mr Banks would not have remained with HM very much longer even had the Board not unjustifiably terminated his employment, so that it was not practicable and reasonable to reinstate Mr Banks.[12]

[21] In my view, the correct approach is to adopt the assessment as to time reached by the Authority in its costs determination which proceeded on the basis of three notional hearing days, but to adjust that assessment on the basis of the ultimate outcomes. Accordingly, I fix costs in the Authority in the sum of $9,000;[13] the disbursement of a filing fee of $71.56 is also to be paid.

Costs in the Court: what are the reasonable costs for the successful party?

[22] Ms Buckett submitted strongly that the actual costs which were incurred with regard to the successful challenge in this Court should be adopted for costs purposes, that is, the invoiced sums of $131,627 plus GST.

[23] I emphasise a point that has been made on many occasions that in assessing what is a reasonable contribution to costs, the Court is not required to consider whether the amount which the successful party was charged by their lawyer was appropriate; rather the question is whether it is fair to adopt this figure when considering the costs liability which the unsuccessful party should meet. That is the sole interest of the Court when considering the actual costs of the successful party.

Scale assessments

[24] Mr Drummond submitted that the adoption of Mr Banks' actual fees as a starting point was inappropriate. As already mentioned, he submitted that the

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10 *Banks v Hockey Manawatu Inc* [2015] NZERA Wellington 62, at [71].
11 *Banks v Hockey Manawatu Inc*, above n 1, at [92].
12 At [87].
13 *Banks v Hockey Manawatu Inc* [2015] NZERA Wellington 127.

amount charged by HM for its representation was a fraction of Mr Banks' costs; he said that his client's costs, together with those of his instructing solicitor were $26,593.75. The inference to be taken from Mr Drummond's submissions is that reference to the amount he would have charged as determined on this basis confirms that the amount charged to Mr Banks was excessive.

[25] However, it emerged during submissions that HM's legal representatives chose to discount their costs. Although no accurate calculation was provided by Mr Drummond as to what HM's costs would have been if there had been no discount, he said that an indication of these could be obtained by carrying out a calculation under schs 2 and 3 of the High Court Rules. He said that because those scale costs are intended to represent two thirds of actual costs, the resulting sum would be grossed up by a third. Because those costs are GST neutral, I assume that it would then be necessary to add an amount to reflect GST. Although the Court was not assisted by a calculation on this basis, it would appear that on a Category 2, Band B basis, and assuming the assistance of second counsel, the result is $68,572.50, which grossed up is $103,897.72, net of GST.[14]

[26] It is convenient at this point to clarify an issue which arose during submissions as to the precise number of hearing days or part days thereof. Mr Drummond said there were 18 half days. Ms Buckett initially said there were 12 days since the intitulment of the substantive judgment reflected this. However, she explained that on three days the Court sat for a half day only. I have reviewed the schedule of sitting hours maintained by the Registrar, and agree that the Court sat for nine full days and for three half days. For the purposes of the calculation under the High Court Rules, the number of days applied for the purposes of items 34 and 35 is appropriately 10.5 days.

[27] Whilst referring to the issue of scale costs, Mr Drummond also referred to the Court's Guidelines as to costs, as contained in its Practice Direction of October 2015.[15] The Guidelines apply to proceedings initiated after 1 January 2016; this proceeding was filed before that date so those Guidelines do not necessarily apply.

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[14] Under sch 3 the relevant items are 2, 10, 13 (twice), 20 (one disclosure notice allowed for), 21, 30, 31 (the defendant prepared the bundle for the Court), 33, 34 and 35.

[15] See figure at [7] above.

Furthermore, Mr Drummond said his charges, if not discounted, would have been formulated under the High Court Rules. Given these circumstances the Guidelines under the Practice Direction are not of assistance in this case when determining a fair and reasonable starting point.

Details of the invoices rendered to Mr Banks

[28] Mr Drummond then made a number of submissions which focused on particular aspects of the way in which Mr Banks' legal charges were rendered; it was argued that these issues also supported the proposition that the actual legal fees incurred should not be used for the purposes of assessing costs in this Court.

[29] He submitted that reducing the charged fees to a daily rate produced a figure of $16,847 per hearing day. This figure appears to have been computed by taking a GST-inclusive total, and dividing it by the apparent number of sitting days, which Mr Drummond said was 18 half days. This is not a particularly helpful analysis, because it is GST inclusive, and because the correct number of hearing days was not utilised. Correcting for those factors the figure is $12,535 per sitting day, 66 per cent of which is $8,273. An analysis which simply divides total legal charges by the number of sitting days is not helpful in this case; more significant is the hourly rates which were adopted, and the actual charges involved in particular aspects of the work which was performed.

[30] Next, Mr Drummond compared the number of hours invoiced (355) with the actual costs rendered; on a GST-inclusive basis, he said this produced a figure of $426 per hour; exclusive of GST the figure is $370.77 per hour. It represents a global charge-out rate for all authors involved. Having regard to the complexity of the proceeding, I do not regard such a figure necessarily as being excessive, but in any event it is more useful to consider individual charge-out rates, and the nature of the attendances which relevant authors undertook.

[31] Mr Drummond was critical of the actual hourly rates of the practitioners involved. Ms Buckett charged $445 per hour plus GST. However, under the High Court Rules, the Category 2 daily recovery rate, a two-thirds figure, is $278 per hour; grossed up the hourly rate is $422 per hour, exclusive of GST. Given the

complexity and difficulty of the proceeding, and the unexpected issues which arose during it that had to be dealt with such as the late production of a key document and the obtaining of information which was the subject of a privilege claim, I regard that hourly rate as being at the high end of the range which is appropriate for this proceeding, but not outside it.[16] Ms Buckett was assisted by Mr Jordan Boyle to a significant extent; although admitted comparatively recently, his charge-out rate was $275 plus GST per hour, an amount which I consider excessive for present purposes.

[32] Then Mr Drummond submitted that there were separate attendances for staff who had undertaken administrative duties; two of those persons' time was invoiced at $175 per hour plus GST, and one at $65 per hour plus GST. In the absence of any explanation as to the nature of the administrative duties and their relevance to the proceedings, such charges should not be taken into account. That said, the extent of those attendances was relatively modest.

[33] Mr Drummond submitted that some other attendances were inappropriately included for the purposes of a cost assessment. Attendances with regard to representation at a Judicial Settlement Conference (JSC) were included. The JSC was conducted because both parties agreed to attend it on a voluntary basis. Agreement was unable to be reached. In the circumstances of this case I do not consider it appropriate to include costs for this event.

[34] It appears that counsel's travel from Wellington to Palmerston North return has been charged out at counsel's normal rate. As I shall explain later, I do not consider that a contribution to the expenses incurred by out-of-town counsel should be recoverable in this instance; consequently counsel's time for travelling should not be included in the costs assessment.

[35] A further matter relates to attendances regarding the preparation of a second amended statement of claim and an application for leave to file it, on 7 March 2016 – four days after the Court reserved its decision. In his judgment, Judge Ford was

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[16] See discussion in *Burrowes v Commissioner of Police* [2015] NZEmpC at [37] – [39].

critical of this late step.[17] This issue will be discussed later in this decision, but I do not regard inclusion of these attendances as being appropriate when fixing costs.

[36] Mr Drummond raised a further factor which he said would justify a reduction; he submitted that any costs award should reflect the fact that Mr Banks was unsuccessful in his claim for reinstatement and commissions, and only partially successful with regard to other claims. I do not accept this submission. A review of the transcript and submissions confirms that a very substantial proportion of the hearing time was devoted to liability issues, on which Mr Banks succeeded.

Conclusion as to assessment of fair and reasonable costs

[37] After considering the above, I conclude the following are the key factors:

a) With the amount charged to Mr Banks, $131,627 plus GST, should be compared the notional calculation using the Schedules to the High Court Rules, which is a figure of $102,858.75 plus GST (this being indicative of the amount which Mr Drummond indicated he and his instructing solicitor are likely to have charged if they had chosen not to discount their fees).

b) Although Ms Buckett's charge-out rate was within a range which was appropriate for a senior lawyer engaged on a case such as the present, the amount charged by her legal assistant was outside an appropriate range for a lawyer of his experience.

c) Attendances have been recorded, and charged for, which it is not appropriate to take into account for present purposes.

[38] Ms Buckett submitted that the Court would be assisted by looking at examples in other cases where the Court had determined what a fair and reasonable starting point was in lengthy cases.[18] The first of the decisions to which reference was made was *Fox v Hereworth Trust Board*.[19] In that instance, actual costs of legal

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17 *Banks v Hockey Manawatu Inc*, above n 1, at [62].

18 *Fox v Hereworth Trust Board* [2016] NZEmpC 39; *Lewis v JP Morgan Chase Bank, N.A.* [2016] NZEmpC 33 and *Kilpatrick v Air New Zealand Ltd* [2016] NZEmpC 29.

19 *Fox v Hereworth Trust Board*, above n 18.

representation were almost $290,000, including GST, where the plaintiff had been represented by senior counsel and a junior. After considering a range of factors including the particular complexities of the case, scale costs and other decisions involving long hearings where actual costs had been reduced to provide a fair and reasonable starting point,[20] the Court determined that the sum of $140,000 represented the appropriate starting point. From the foregoing, it is evident that the circumstances of that case were very different from those of the present.

[39] That analysis illustrates the point that resort to other costs assessments is of limited assistance because individual proceedings tend to be case specific. To the extent that it is useful, I have considered the assessments of reasonable costs made in cases where there were long hearings as referred to by Ms Buckett, as well as others.[21] I am satisfied that the assessment carried out above is appropriate in light of those decisions.

[40] Having regard to all these factors I consider a fair and reasonable starting point for present purposes is $115,000, net of GST.

Calderbank offers

[41] The parties disagree as to whether an adjustment should be made having regard to the ability of the Court to take into account Calderbank offers at the costs stage.

[42] The final awards with which any Calderbank offer should be compared are:

a) For costs in the Authority, HM is liable to pay Mr Banks $9,000.

b) The outcome of the substantive challenge is payment to Mr Banks of lost wages of $30,303.38, and compensation for humiliation, loss of

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[20] *Phillips v Telecom (NZ) Ltd* EmpC Auckland AC20/06, 31 March 2006; *Rodkiss v Carter Holt Harvey Ltd* [2015] NZEmpC 147, (2015) 10 NZELC 79-058 and *Sealord Group Ltd v Pickering* [2015] NZEmpC 158.

[21] *Burrowes v Commissioner of Police*, above n 16 and *The Commissioner of Salford School v Campbell* [2015] NZEmpC 186. An application for leave to appeal the latter decision was dismissed on 14 April 2016: *The Commissioner of Salford School v Campbell* [2016] NZCA 126.

dignity and injury to feelings in the sum of $18,000. Allowance should able be made for costs up to the date of the offer.

[43] The Court is informed that on 31 October 2015, HM made a Calderbank offer on these terms:

a) Lost wages of $8,769.20 would be paid.

b) Compensation for humiliation, loss of dignity and injury to feelings of $11,000 would be paid.

c) The Authority's determination as to costs of $10,500 would be waived.

d) The Authority's substantive determination would be set aside.

e) The dismissal would be "replaced" with a resignation.

f) The parties would agree not to disparage each other to third parties.

[44] This offer was rejected by Mr Banks, who made a counter-offer in these terms:

a) Compensation for humiliation, loss of dignity and injury to feelings of $20,000 would be paid.

b) Fees in the sum of $20,000 plus GST would be paid on production of an invoice.

c) The other non-monetary elements which had been contained in HM's Calderbank offer would apply.

d) The offer was to remain open until "the next step in the proceedings", which I find was the filing of briefs of evidence by 20 November 2015.[22]

[45] Ms Buckett submitted that the verdicts obtained by Mr Banks, which she said totalled $48,303.38, clearly exceeded the amount which he indicated in his

[22] At fixed by Judge Ford in his minute of 26 August 2015.

Calderbank offer for which he would be prepared to settle, $40,000. In fact, as I shall explain shortly, the former figure is greater than that referred to by Ms Buckett after allowance for costs in the Authority and costs in the Court to the date of the offer.[23]

[46] Mr Drummond made two submissions in response. The first was to argue that had Mr Banks accepted HM's Calderbank offer, he would have been substantially better off having regard to the costs that he subsequently incurred. However, the correct comparison must be between the sum as offered on a Calderbank basis, and the awards ultimately obtained together with the allowance for costs to the date of the offer.[24]

[47] The second submission advanced by Mr Drummond was to the effect that it is apparent from the cost records kept by Mr Banks' lawyers that the quantum of costs at the date of the Calderbank offer made on his behalf was $11,653.34 excluding GST, as opposed to the $20,000 (excluding GST) which were claimed. He said the offer was not reasonable because it inflated Mr Banks' costs to a fictional level.

[48] However, Mr Banks' Calderbank offer was to constitute a full and final settlement of all issues, one of which related to costs in the Authority. Although the Court has not been provided with copies of invoices rendered to Mr Banks in respect of the investigation meeting, on the information which is available to this Court I infer that for the two-day investigation meeting and filing of submissions, those costs would have exceeded the $9,000 which is now payable to Mr Banks by HM for the investigation meeting, particularly when one takes into account the fact that costs in the Authority for HM were $43,500 plus GST. Secondly, Mr Banks' Calderbank offer was open for acceptance up to the next step in the proceeding, which is as I indicated earlier would have taken place on 20 November 2015. That is, his Calderbank offer could have been accepted up to that date, by which time his costs for the proceeding in this Court amounted to $23,590 plus GST. On any view Mr Banks' costs in the Authority and the Court exceeded the $20,000 plus GST

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[23] That costs to the date of the offer should be considered, was confirmed in *Rodkiss v Carter Holt Harvey Ltd*, above n 20, at [35] – [37].

[24] High Court Rules r 14.11(3), set out at [49] below.

which he indicated he was prepared to accept. Accordingly I do not accept Mr Drummond's submission that the costs component of the Calderbank offer exceeded actual costs and could not therefore be regarded as a valid or reasonable offer.

[49] In determining whether the Calderbank offer made by Mr Banks was in this case successful, the correct comparison is between:

a) The sums which he stated in his offer he was prepared to accept - $20,000 compensation, and $20,000 plus GST for costs, a total of $43,000.

b) The awards ultimately obtained, together with a notional allowance for costs up to the date of the offer. As already indicated, the financial remedies totalled slightly more than $48,000; costs of $9,000 have been obtained in respect of the Authority's investigation meeting. To those sums must be added a notional amount for fair and reasonable costs up to the date of the offer, which I fix in the sum of $10,000. In all, the total figure for comparative purposes is $67,303.38.

[50] Plainly, the amount offered on a Calderbank basis for acceptance was well short of the ultimate award.

[51] In *Bluestar Print Group (NZ) Ltd v Mitchell*, the Court of Appeal referred to the applicable principles which apply where there is a successful Calderbank offer, as follows: [25]

> [6] … Regulation 68(1) states:
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> > In exercising the Court's discretion under the Act to make orders as to costs, the Court may have regard to any conduct of the parties tending to increase or contain costs, including any offer made by either party to the other, a reasonable time before the hearing, to settle all or some of the matters at issue between the parties.
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> [7] Regulation 6 states that where there is no relevant procedure in the regulations or the ERA, the Court must resolve the issue as nearly as is practicable, in accordance with the High Court Rules.

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

[8] Rules 14.1 – 14.23 of the High Court Rules set out the costs regime. Rule 14.10 states that a party may make a Calderbank offer at any time. Rule 14.11 governs the effect of Calderbank offers on costs:

14.11 Effect on costs

(1) The effect (if any) that the making of an offer under rule 14.10 has on the question of costs is at the discretion of the court.

(2) Subclauses (3) and (4)–

(a) are subject to subclause (1); and

(b) do not limit rule 14.6 or 14.7; and

(c) apply to an offer made under rule 14.10 by a party to a proceeding (party A) to another party to it (party B).

(3) Party A is entitled to costs on the steps taken in the proceedings after the offer is made, if party A–

(a) offers a sum of money to party B that exceeds the amount of a judgment obtained by a party B against party A; or

(b) makes an offer that would have been more beneficial to party B than the judgment obtained by party B against party A.

(4) The offer may be taken into account, if party A makes an offer that–

(a) does not fall within paragraph (a) or (b) of subclause (3); and

(b) is close to the value or benefit of the judgment obtained by party B.

[52] Additionally, as is also clear from *Bluestar*, the Court must have regard to the principle that: [26]

a) The public interest in the fair and expeditious resolution of disputes would be undermined if a party were able to ignore a Calderbank offer without any consequences as to costs; and

b) A "steely approach" is required.

[53] I proceed on the basis of these principles. In my view, neither rr 14.11(3) or (4) apply because those subs-rules deal with the circumstance where an offer is made to a party who later obtains a less advantageous judgment against the offeror; that is not the case here.

[54] Rather it is necessary to consider the guidance contained in r 14.6(3)(b)(v). An aspect of that rule is that the Court may order a party to pay increased costs if it

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[26] *Bluestar Print Group (NZ) Ltd v Mitchell*, above n 25, at [18] and [20].

has contributed unnecessarily to the time or expense of the proceeding or step in it by failing, without reasonable justification, to accept an offer of settlement, whether or not that is in the form of a Calderbank offer.

[55] Did HM fail to accept Mr Banks' offer without reasonable justification?

[56] Mr Drummond submitted it was reasonable to reject the offer because its costs component was excessive and misleading – a submission which I have rejected. In the absence of any further reasons for declining to settle the proceeding on the basis which was suggested, I have regard to the following factors:

a) It was reasonable to infer that the offer involved a compromise of the financial remedies being sought; and it conceded reinstatement which was a remedy that HM strongly opposed.

b) HM held information regarding the merits which should have alerted it to the fact that Mr Banks had a reasonable prospect of bettering the offer at trial.

c) It was foreseeable that costs associated with the trial would exceed, by a substantial margin, the amount required to settle all issues.

[57] In all the circumstances I conclude that there was no reasonable justification for rejecting the offer; Mr Banks' outcome at trial exceeded the basis in which he was prepared to settle so that he is justified in an uplift above 66 per cent. The extent of any uplift, for that reason, however, must be considered together with any relevant factors as to conduct, a topic which I shall now discuss.

Conduct of the parties

[58] There are three conduct issues which the parties have raised:

a) The first relates to the length of the hearing: each party alleges that the other caused the hearing to run significantly over its original time estimate of three days.

b) The second relates to additional attendances occasioned by having to deal with matters which were not pleaded for Mr Banks.

c) The third relates to the production of Document 700.

The hearing significantly exceeded the original time estimates given by counsel

[59] On the basis of the time estimates given by counsel at the initial telephone directions conference, three days were scheduled for the hearing. As already discussed, it ultimately ran to nine full days and three half days, on 12 calendar dates.

[60] Ms Buckett alleges that there was excessive cross-examination on behalf of HM. She also submitted that time was wasted when the Court could only sit on half days due to the unavailability of Mr Drummond when he had other court commitments. Mr Drummond submits that needless time was devoted to issues regarding service of summonses, with regard to IT investigations which should have been conducted prior to the commencement of the hearing; and he strongly denies the ascertain that the hearing was elongated by his unavailability.

[61] I am not satisfied that any of these factors justify an adjustment. Whilst it may be the case that criticisms could be made as to the length of the hearing and whether this was really necessary, the factors raised by counsel are evenly balanced.

[62] It is plain that the case was hard fought, and that all possible points were raised. As far as Mr Banks' application for costs is concerned, the assessment of reasonable costs ($115,000) has taken into account the attendances of his counsel for the duration of the hearing, albeit a long one. Except for the issue of a late pleading, there are no conduct factors on his side which would suggest that the contribution to his costs should be reduced.

The late application to amend

[63] I have already referred to the fact that an application to amend the statement of claim was made after the closing addresses. Judge Ford dealt with this issue in his judgment as follows:[27]

> [61] I deal first with the plaintiff's application to file an amended statement of claim. This can be dealt with relatively briefly. The amendment seeks to make it clear that the thrust of the plaintiff's claim is that from April 2014, HM predetermined a course of action to end Mr Banks' employment. Every subsequent action and decision in relation to Mr Banks by HM, including its decision to dismiss for medical incapacity, was subsequently tainted by that predetermination and/or a contrivance and was circumscribed. In terms of s 103A of the Act, the actions of HM were not the actions which a fair and reasonable employer could have taken in all the circumstances at the time.
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> [62] The application to amend the pleadings in this way will not have come as a surprise to the defendant's counsel. Ms Buckett in her lengthy opening address explained the plaintiff's case in such terms and in the course of the hearing the Court flagged with counsel that it would be appropriate for amended pleadings to be filed. The fact that application was made in an untimely way at the very end of Ms Buckett's closing submissions may have resulted in additional unnecessary work for defence counsel but, if that is the case, then it can be reflected in the eventual costs award.
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> [63] Responsibly, Mr Drummond accepted that his client could not claim to be prejudiced in any way by the late amendment. The test to be applied in relation to such applications is the interest of justice. I am satisfied that the grounds have been made out in the present case and the application to amend is granted accordingly.

[64] In that passage, it was recognised that the application for leave was made in an untimely way, and that it may have resulted in additional unnecessary work for defence counsel which could be reflected in the eventual costs award.

[65] On this point, Mr Drummond said that in his closing submissions, he had identified 19 separate claims where points were raised and argued which were not pleaded. This had resulted in additional hearing time in addressing each of those issues.

[66] I have compared the form of the statement of claim which was the operative pleading for the plaintiff during the hearing, with the further statement of claim filed on 7 March 2016 as referred to by Judge Ford in the above passage. I have also

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[27] *Banks v Hockey Manawatu Inc*, above n 1.

considered the various matters of submission made by Mr Drummond in his closing address. It is apparent that he dealt with many points which had apparently been raised but which were not pleaded. Although the Court had flagged with counsel that it would be appropriate for amended pleadings to be filed, the difficulty was that this did not occur until very late in the piece, so that HM and its counsel were in the unfortunate position of responding to evidence about matters which were apparently to be pleaded, but the scope of amendments had not been clarified by the introduction during the hearing of the intended statement of claim.

[67] I must make some allowance for this factor, although it must be on the basis of the actual fee arrangements for HM; as explained earlier HM was the beneficiary of a discounted invoice from its legal representatives.

The late provision of Document 700

[68] I turn next to the issues relating to the disclosure of Document 700. This document became important. Judge Ford found that it comprised the minutes of a "confidential" special Board meeting which discussed Mr Banks employee circumstances.[28] Later in his judgment, it is evident that this document was instrumental in persuading the Court that the Board of HM did not act appropriately when considering Mr Banks' employment. Instead of putting key issues to him so as to provide a reasonable opportunity for response and then genuinely considering them, the Board held a special confidential meeting which considered options for dismissing Mr Banks; it was held that this tended to suggest that the Board's emphasis was on options for reaching an outcome that would end Mr Banks' employment.[29]

[69] Ms Buckett submitted that the document was not provided until the agreed bundle of documents became available on 14 January 2016, not long before the hearing commenced. She said it was a vital document which should have been produced much earlier, indeed at the investigation meeting, especially as multiple emails had been sent on behalf of Mr Banks during the lead-up to the substantive

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[28] At [22].
[29] At [69] – [71].

investigation meeting requesting production of all relevant documents relating to the dismissal, including Board minutes.

[70] Mr Drummond referred to what appears to have been the first of these requests, which he said, was made "only a day before the substantive hearing in the Authority". The implication was that the reason the document was not provided to the Authority, was because it was made shortly before the investigation meeting. In fact, that particular request was made shortly before the hearing of an application for interim reinstatement, which was investigated on 31 October 2014. The substantive investigation hearing, however, occurred several months later on 24 and 25 February 2015. In light of the various requests which were made, the document could and should have been produced by the time of the investigation meeting. Since it was capable of being located subsequently, HM should have been able to produce it earlier than it did, especially given the multiple requests which were made for such documents.

[71] Mr Drummond also submitted that Mr Banks, who conducted an inspection of documents following service of a formal disclosure notice in the Court proceedings, could have asked for a copy of Document 700 but did not do so. The Court has not been provided with any evidence as to whether the document was in fact available for inspection.

[72] The reality is that the document should have been made available to the Authority and was not; nor is there any evidence that the omission was brought to the attention of Mr Banks' legal representatives when it subsequently surfaced, as would have been appropriate.

[73] In the absence of reliable evidence that the document was produced for inspection in late 2015, I conclude that it was provided late, and that this contributed to an increase of Mr Banks' costs.

Should there be an increase or decrease from the 66 per cent starting point?

[74] To this point I have concluded that there should be an uplift having regard to the Calderbank offer made by Mr Banks, that factors relating to the length of the

hearing are neutral, there should be a discount having regard to the untimely amendment of the pleadings, but there should be an uplift having regard to the late disclosure of Document 700.

[75] The last two factors offset each other. The first factor, the making of a successful Calderbank offer justifies an uplift from 66 per cent of reasonable costs, or $76,900 to 80 per cent, which produces a result of $92,000, net of GST.

Goods and Services Tax

[76] Ms Buckett submitted that a further allowance should be made because Mr Banks is not GST registered, so that he could not recover that component. The essence of her submission was that as the Court is exercising its discretion with regard to the actual costs which Mr Banks incurred, this factor should be considered.[30]

[77] Mr Drummond submitted, in essence, that a scale and therefore a GST neutral approach was appropriate.[31]

[78] Both counsel also submitted that the Court should follow the principles outlined by the Court of Appeal when it recently considered this issue in *New Zealand Venue and Event Management Ltd v World Wide NZ LLC*.[32] The Court was required to fix costs for the purposes of an appeal. It took the opportunity to end what it described as "the uncertainty that has existed for many years over GST on costs and disbursements", by laying down principles which would apply to cost awards under the High Court Rules, and in appeals.[33]

[79] The Court of Appeal considered the position with regard to scale costs, increased costs, and indemnity costs. Of those categories, the second is the most relevant in the present case, since:

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30 As determined in cases such as *Ritchies Transport Holdings Ltd v Merennage* [2016] NZEmpC 223.

31 As determined in cases such as *Air New Zealand Ltd v Kerr* [2013] NZEmpC 237.

32 *New Zealand Venue and Event Management Ltd v World-wide NZ LLC* [2016] NZCA 282.

33 At [5].

a) Although I have had regard to scale costs, this is not a case where a scale approach has been adopted.

b) Nor has the Court concluded that indemnity costs are appropriate.

c) Rather, the approach which I am adopting is to fix an increase above deemed reasonable costs; in my view this is analogous to the increased costs category provided for under the High Court Rules: r 14.6(3). It provides for the exercise of a discretion to increase a costs award where there has been a failure to act reasonably.

[80] On the topic of GST where such an approach is adopted, the Court of Appeal stated:[34]

> The court has an overriding discretion in making costs awards. That includes power to order increased costs. In so ordering, the court uplifts from scale, rather than awarding a percentage of the actual costs incurred; but it may take into account the costs actually incurred by the successful party, including, where applicable, the GST component of those costs.[35]

[81] The authority given for the final observation in this paragraph is dicta contained in *Commissioner of Inland Revenue v National Insurance Company of New Zealand Limited*.[36] There, the Court of Appeal in a tax appeal was required to consider the discretion bestowed under the former r 46 of the High Court Rules. The Court said:[37]

> For National Insurance it was submitted that as a firm rule an award of costs should have GST added to it. That is untenable as a general proposition. The court has an overriding discretion (r 46 High Court Rules), and although that must be exercised in accordance with established principles, it is not to be fettered in such a way as it is proposed. In our view all that needs to be said on this issue is that where a Court decides to take into account the amount of a party's solicitor and client costs, the appropriate figure to use for that purpose is the amount actually payable by that party, including where applicable the GST component of that liability. The amount of the actual award will however remain in the discretion of the Court in the usual way, and in exercising that the court can take into account all other relevant considerations.

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34 At [11].
35 High Court Rules, rr 14.1, 14.6(1)(a), 14.6(3).
36 *Commissioner of Inland Revenue v National Insurance Co of New Zealand Ltd* (1999) 19 NZTC 15, 135 (CA).
37 At [57].

[82] I leave for another occasion the issue of whether this Court is bound by the dicta in *World Wide*.[38] For present purposes I take into account the conclusions expressed by the Court of Appeal. I am satisfied that as Mr Banks is not GST registered and has incurred such a liability, and that there should be an increased allowance to reflect this factor. I will allow for GST on the sum which I fixed earlier, of $92,000. The total award of costs is accordingly $109,250.

Costs awards should not render the recovery of remedies nugatory

[83] Ms Buckett submitted that any award of compensation must still have value after costs have been taken into account. She referred to dicta to this effect in *Cliff v Air New Zealand Limited.*[39]

[84] Whilst that may be a factor which is persuasive in a particular case, it is not an immutable principle. Indeed there are many recent examples where cost orders have been made on a principled basis which has resulted in an uneconomic result for a successful plaintiff. I need only refer to one example, that of *Rodkiss v Carter Holt Harvey Limited*, where Judge Ford summarised the outcome of the case before him on that occasion in this way:[40]

> [99] In the opening paragraph of this judgment I record that Mr Rodkiss had incurred legal expenses totalling $230,313.61. He recovered $51,258.85 under this Court's substantive judgment of 24 March 2015 and under this costs judgment he has recovered an additional $149,500. On those figures he will still be left significantly out of pocket. I say it once that such an outcome is unsatisfactory and of considerable concern. Mr Rodkiss, with justification, must be left wondering whether it has all been worthwhile.
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> [100] It may be timely to respectfully remind counsel practicing in this jurisdiction of the following passage from the judgment of the Court of Appeal in *Alton-Lee* delivered nearly one and a half decades ago:
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> > The parties, and those who practice in this field (where this case cannot be regarded as wholly exceptional) might well reflect on the consequences of conducting litigation without proper focus on the issues and without tight control on the escalation of costs.

[85] I respectfully agree with those observations. I find that cost effectiveness is not, in this case, a consideration which should result in a further uplift.

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38 *New Zealand Venue and Event Management Ltd v World-wide*, above n 32.
39 *Cliff v Air New Zealand Ltd* EmpC Auckland AC47 A/06, 17 November 2006 at [23].
40 *Rodkiss v Carter Holt Harvey Ltd*, above n 20.

Court disbursements

[86] Turning to the claim for disbursements, there is no controversy as to a filing fee of $204.44 (including GST) or hearing fee $4,508.10 (including GST).

[87] There are, however, two items which are in dispute. The first relates to a claim for IT costs, $755.93 including GST. In his judgment, Judge Ford recorded that each party had retained a computer expert to examine HM's computer, but experts had been unable to find the document which was being sought.[41]

[88] To qualify as a recoverable disbursement, a payment must be both necessary to the conduct of the proceeding and reasonable.[42]

[89] Applying that criteria in light of the Court's finding as to the obtaining of the technical evidence, I disallow the disbursement for IT costs.

[90] The second item over which there is disagreement relates to disbursements for out-of-town counsel, namely accommodation and printing costs totalling $3,274.49, inclusive of GST. In support of this submission, Ms Buckett referred to observations of Chief Judge Colgan in *Fox v Hereworth School Trust Board*.[43] That case was described as a complex and difficult matter in the Hastings region where there were few appropriately experienced and senior practitioners who could have represented the successful party, so that it was not unreasonable for the plaintiff to have instructed Wellington solicitors and a Wellington-based Queen's Counsel to conduct her case.[44]

[91] I am not persuaded that a similar finding should be made in this case. Although Ms Buckett correctly submitted that HM took exception to Mr Banks' initial choice of counsel (who like Ms Buckett was based in Wellington), I am not persuaded that a local practitioner of suitable competence and experience was not available to be briefed in Palmerston North. I do not regard the circumstances of this case to be as unusual as those which occurred in *Fox*. I disallow this disbursement.

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41 *Banks v Hockey Manawatu Inc*, above n 1, at [27].
42 *Baker v St John Central Regional Trust Board* [2013] NZEmpC 109, at [43].
43 *Fox v Hereworth School Trust Board*, above n 18.
44 At [3] and [52].

Ability to pay

[92] Mr Drummond submitted that costs should be reduced having regard to the community nature of HM, in combination with its limited means.

[93] To support this submission, evidence was produced by Mr Brian Law, an Accountant who acts for HM. He produced HM's unaudited financial statements for the year ending 31 December 2015, which disclosed total assets of $872,680, liabilities of $93,583 and therefore equity of $779,097. But he said that whilst the organisation had fixed assets with a book value of $541,792, those assets had little value to any third party as they were purpose-specific to HM as a sporting organisation. He also said that adjustments should be made to the current asset figures which led him to conclude there was an excess of current assets over current liabilities of $98,215; deducing working capital for one month of $22,000, the amount available to meet the various costs associated with the litigation was $76,215.

[94] Mr Banks filed evidence in response. He explained that as a former Operations Manager of HM he was well placed to comment on the organisation's financial situation. He referred to the fact that when employed by HM it had a bank loan of $100,000; that the organisation was capable of obtaining a bank loan, if needed. He also said that there were other means by which funds could be obtained.

[95] Mr Banks also produced an affidavit from a Chartered Accountant, Mr Allan Strawbridge. Mr Strawbridge critiqued Mr Law's analysis; he observed that Mr Law appeared to have treated all other creditors as preferential to the sums owed to Mr Banks. He also said that the ongoing financial situation of HM would depend on decisions its management had yet to make, rather than on the historical position.

[96] However, a further development occurred on 26 July 2016, when Mr Banks and a colleague attended HM's annual general meeting, where a copy of the organisation's audited 2015 financial statements were obtained and then placed

before the Court. There are some differences between the sets of audited and unaudited statements.

[97] HM's audited financial statements for the year ending 31 December 2015 disclosed total assets of $875,556, liabilities of $168,309 and equity of $707,247. The unpaid remedies are now included in the statement of financial performance, as was contingent liability for Mr Banks' costs. The loss for the year to December 2015 is now $163,150.

[98] I proceed on the basis that HM had significant equity at December 2015 of $707,247; and there are no non-current (i.e. long-term) liabilities on the balance sheet. Liabilities are described as current, which means they will not fall due immediately, but within 12 months; that is, by December 2016. However, the financial remedies which are included are the subject of an order of this Court, and are susceptible to enforcement procedures.

[99] Although HM's current revenue is lower than in previous years, its expenses, excluding legal expenses, have remained steady. However, for the year to December 2015 there was a significant loss. No doubt that was unsatisfactory to HM's management but the evidence suggests that the organisation has absorbed this loss and continued to operate without requiring extra funds by way of debt or equity injections in 2015. Mr Law said that a further loss is expected for the year ending 2016 unless HM receives grants and/or additional revenues for the hockey community. There is no evidence to confirm whether or not such funding can be obtained. I note that HM has been able to continue operations well into 2016.

[100] I also conclude that information before the Court suggests that HM has the ability to raise additional funds, whether by way of loan, grant or otherwise.

[101] Finally, the audited accounts state that HM has an "employee disputes" insurance policy, and that the insurer has been notified. It is unclear, however, whether the claim has been accepted. Mr Drummond has advised the Court that a claim was lodged in late 2015, and that the insurer has "reserved its position in relation to cover".

[102] Whilst the manner in which financial information was placed before the Court by HM was less than satisfactory – particularly as to the non-disclosure of the insurance policy under which cover might be available, it is evident that financial pressures would be created by the imposition of a significant costs award payment which could be enforced immediately. Counsel were invited to make submissions as to whether the Court should direct that the costs liability be paid by instalments. Ms Buckett indicated that this was not Mr Banks' preferred option, but accepted the Court had the ability to direct payment of costs by instalments; so did Mr Drummond.

[103] I am satisfied that the Court has jurisdiction to proceed in this way. In *Fox*, Chief Judge Colgan found that the Court has an ability to do so having regard to its powers under cl 19 of sch 3 of the Act, and ss 189 and 221, providing there is evidence to support such a possibility, and that it represents a just course in the particular case.[45] He also held that the discretion extends to making it a condition of payment by two instalments that the delayed payments attract interest. I respectfully adopt these conclusions.

[104] Having regard to HM's financial circumstances, I adopt the course followed in *Fox*; HM will have an election either to pay the costs and disbursements as awarded in full by two weeks after the date of the judgment, or alternatively by instalments which will attract interest at the rate of five per cent.

Conclusion

[105] In summary:

a) Mr Banks is allowed costs in the Authority of $9,000 and a disbursement of $71.56.

b) He is allowed $109,250 towards his costs in the substantive proceedings in the Employment Court, and disbursements of $4,712.54.

c) Cumulatively, this produces a total of $123,034.10.

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[45] At [80].

d) HM may elect either to pay the foregoing costs and disbursements in full by two weeks after date of decision (19 August 2016); alternatively it may discharge this liability by instalments which will include interest at the rate of five per cent per annum on the balance then owing.

e) If HM elects to pay by instalments, the foregoing costs and disbursements shall be payable as follows:

- The sum of $41,001.36 on 19 August 2016.
- The sum of $41.601.24 on 18 November 2016.
- The sum of $42,112.53 on 17 February 2017.

[106] No application was made for a contribution to costs in respect of the application for costs; in any event, I would not have been prepared to make such an order in the circumstances of this case.

B A Corkill
Judge

Judgment signed on 5 August 2016 at 12.20 pm