IN THE EMPLOYMENT COURT
AUCKLAND

[2010] NZEMPC 39
ARC 82/08

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
AND IN THE MATTER OF	an application for costs
BETWEEN	RAYMOND CLENDON LEWIS Plaintiff
AND	HOWICK COLLEGE BOARD OF TRUSTEES Defendant

Hearing: by memoranda of submissions filed on 17 March and 14 April 2010

Judgment: 16 April 2010

COSTS JUDGMENT OF CHIEF JUDGE G L COLGAN

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[1] In the substantive judgment delivered on 19 January 2010,[1] finding that Mr Lewis had been dismissed unjustifiably and awarding monetary remedies, I reserved costs. I indicated that, as I understood matters then were, Mr Lewis might be entitled to indemnification for his actual and reasonable costs of legal representation and invited the parties to attempt to settle these themselves. They have been unable to do so and Mr Lewis has now sought to recover all his legal costs amounting to $49,990.

[2] As occurs often, however, there are relevant considerations of which the Court was properly unaware when hearing and determining the merits of a claim. Subsequent disclosure of these considerations may affect significantly whether any

[1] [2010] NZEMPC 4.

order for costs is made and, if so, the amount of such an order. In this case it is now revealed that there were several significant offers of settlement made by

the defendant to Mr Lewis "without prejudice except as to costs" or what are referred to generally as "*Calderbank* offers" that the defendant says should now affect significantly whether Mr Lewis is awarded costs or, even if he is, how much.

[3] I deal first with Mr Lewis's costs in the litigation. As the primary judgment notes, it was only very late in the piece that Mr Lewis retained counsel, although I accept that significant work would have had to have been undertaken at relatively short notice by Mr Henry and Ms Church to first reconstitute the nature of Mr Lewis's case, and then subsequently prosecute this leading up to and at a hearing which occupied four days. These costs amount to $45,000.

[4] In addition Mr Lewis seeks reimbursement of filing and hearing fees. Although the "Filing fees for statement of claim" are said to total $900, I do not think that can be right. The filing fee in the Employment Court on a challenge to a determination of the Employment Relations Authority is $200.[2]

[5] Finally, Mr Lewis seeks reimbursement for the costs of his expert medical witness, Dr Elliott, being $2,375.

[6] Next, I deal with the outcome of the proceeding for Mr Lewis. Following the finding of unjustified dismissal, he was awarded reimbursement of three months' lost remuneration, the precise amount of which was left to the parties to calculate in the first instance but with leave being reserved to fix this amount if required. There has been no exercise of that leave so that I assume, as I would have expected, that this mathematical calculation has been able to be finalised. Although this sum has not been disclosed to me, I accept Mr Harrison's submission that at an annual salary of $67,000, this would have amounted to approximately $16,750. In addition, Mr Lewis was awarded compensation of $10,000 under s 123(1)(c) of the Employment Relations Act 2000 so that his (gross) monetary awards amount to approximately $26,750.

[2] Schedule 3 Employment Court Regulations 2000.

[7] Following a judicial settlement conference chaired by another judge and the contents of which I was, and am, unaware, the defendant made the last of several *Calderbank* offers of settlement of the proceeding to Mr Lewis. This was in a letter dated 26 March 2009 and clearly indicated to Mr Lewis that it was "a last effort to avoid the hearing set down for 20 April 2009." The letter continued: "If you decline and your claim does not result in a judgment that exceeds this offer, then we will produce this offer in support of a claim for costs against you."

[8] The settlement held out to Mr Lewis for his acceptance within the following seven days was as follows:

> 1. The Board will withdraw the dismissal, place you back on the payroll and then terminate your employment by reason of medical retirement. The Board will then take all practicable steps to arrange Ministry approval for the release of your sick leave entitlement as a lump sum as per the medical retirement entitlements under the Secondary Teachers' Collective Agreement. As pointed out previously to you, we are confident of Ministry support for this application providing you agree.
>
> 2. A compensatory sum of $25,000.00 pursuant to section 123(1)(c)(i) of the Employment Relations Act 2000. This is a non-taxable lump sum payment.
>
> 3. Howick College will agree not to pursue costs in respect of the Employment Relations Authority meeting.
>
> 4. The Employment Court proceedings will be withdrawn without issue as to costs and the above agreement will be full and final settlement of any claim that either party may have against the other arising out of your employment at Howick College.

[9] Mr Lewis did not accept the offer and it lapsed. Mr Harrison submits that Mr Lewis's expressed compensatory expectations have always fluctuated between $700,000 and $1 million.

[10] Mr Harrison submits, and I accept, that the value of the conditional medical retirement option rejected by Mr Lewis would have been the equivalent of seven months' salary which, together with the additional one month's salary payable for notional reinstatement, would have amounted to about $44,650 before tax. This is, of course, significantly more than the three months' salary awarded in the judgment. As Mr Harrison submits, also, the offer had the additional benefit of relieving Mr

Lewis of the stigma of dismissal and would have provided him with the opportunity to re-enter the teaching workforce as and when he was fit and well to do so, as I have found he had probably become by the time of the hearing.

[11] If Mr Lewis had been reinstated by this Court, the intangible effects of such an order may have made more complex a comparison between the *Calderbank* offer and the outcome of the litigation. As it stands, however, Mr Lewis has achieved two results. First, he has been found to have been dismissed unjustifiably. But, in effect, the proposal offered to him by the Board of taking medical retirement as opposed to having been dismissed, amounted to much the same thing. Second, the monetary awards achieved in the litigation by Mr Lewis are substantially less than those offered to him in settlement.

[12] Mr Henry, for Mr Lewis, anticipated correctly in his written submissions on costs that the defendant would rely on *Calderbank* letters. Counsel submitted that these were not "true Calderbank letters", saying that the offer of medical retirement and a payment of compensation in return for discontinuing proceedings would have resulted in Mr Lewis being unable to return to work as a teacher. I do not accept that this would necessarily have been the consequence of acceptance of the offer. Had Mr Lewis been able to establish that he had regained his health (as he appeared to have on the medical evidence presented to me by the time of the trial), a premature medical retirement would not have precluded his ability to return to teaching although it may have affected his superannuation entitlements which would, in effect, have been paid out to him upon a medical retirement. Further Mr Henry submits that Mr Lewis was entitled to have a public acknowledgement by the Court that his dismissal was unjustified. While that is so, in reality, the offer of an opportunity to have the end of his employment treated as a resignation or retirement would, in all the circumstances, have been a better outcome than he has achieved in this litigation.

[13] I am conscious also that when this offer was made to Mr Lewis, he was then unrepresented. From my knowledge of the case, however, I think it is improbable that even if he had been represented and had taken professional advice on the *Calderbank* offer and had been advised to accept it, he would not have done so. Mr

Lewis has had a succession of employment lawyers in the course of this litigation, none of whom, with the exception of course of his latest counsel, have lasted very long. Mr Harrison tells me, and I accept, that attempts by the Board to settle these proceedings with Mr Lewis were timed to coincide with when he had professional representation to allow the best possibility of their acceptance. There was, for example, an earlier *Calderbank* offer made to Mr Lewis in May 2008 when the Board's solicitors believed he was advised by a senior and experienced employment law practitioner but which offer was rejected.

[14] The Court of Appeal has counselled the Employment Court to be "steely" in relation to *Calderbank* offers.[3]

[15] In these circumstances, I consider that Mr Lewis should not be entitled to reimbursement of any costs incurred after his refusal of the March 2009 settlement offer. With the exception of the court filing fee of $200, all of the costs claimed for the plaintiff were incurred after that date and I disallow them.

[16] The plaintiff is entitled to reimbursement of $200.

GL Colgan
Chief Judge

Judgment signed at 4.20 pm on Friday 16 April 2010

[3] *Health Waikato Ltd v Elmsly* [2004] 1 ERNZ 172.