IN THE EMPLOYMENT COURT
AUCKLAND

[2012] NZEmpC 186
ARC 72/09

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	VICKI JANE WALKER Plaintiff
AND	PROCARE HEALTH LIMITED Defendant

Hearing:	(on the papers by way of submissions filed 13 July 2012, 7, 17 and 20 August 2012 and affidavits dated 19 July 2012, 15 August 2012 and 26 October 2012)
Counsel:	Esma Brown and Nicole Smith, counsel for the plaintiff Richard Harrison, counsel for the defendant
Judgment:	1 November 2012

COSTS JUDGMENT OF JUDGE A D FORD

Introduction

[1] In my substantive judgment[1] dated 15 June 2012, I dismissed the plaintiff's challenge and invited the parties to endeavour to reach agreement on the issue of costs. Failing such agreement, I invited Mr Harrison, counsel for the defendant, to file a memorandum within 28 days and allowed Ms Walker a like period in which to respond. In a memorandum dated 13 July 2012, Mr Harrison confirmed that attempts to reach agreement on the issue of costs had not been successful. Counsel advised that the defendant's actual costs had amounted to $94,395 (exclusive of GST and disbursements) and it sought an award at 80 per cent of that figure, rounded off at $75,000, plus GST and disbursements totalling $1,036.42. Costs were reserved

[1] [2012] NZEmpC 90.

but Ms Walker would have been entitled to an award of costs in the Employment Relations Authority (the Authority).

[2] On 7 August 2012, the Court received confirmation from Ms Brown and Ms Smith that they had been instructed to act for the plaintiff on the issue of costs and they sought an extension of time, which was not opposed, for the filing of submissions on behalf of Ms Walker in response to those received from Mr Harrison. In their comprehensive submissions in response, counsel for Ms Walker accepted the principles that costs normally follow the event and that the Court must decide, after an appraisal of all relevant factors, at what level it is reasonable for the unsuccessful party to contribute towards those costs. The thrust of the plaintiff's submissions, however, was that due to her financial circumstances, "she does not have the means to pay." The plaintiff submitted that the Court should, therefore, "let costs lie where they fall."

Background

[3] In brief, the background to the litigation was that on 18 December 2007, Ms Walker's employment with the defendant (ProCare) had been terminated for alleged "incompatibility". She had been employed as ProCare's Financial Controller. Ms Walker commenced proceedings in the Authority claiming that her dismissal was unjustified. The Authority, in a determination[2] dated 13 August 2009, upheld her claim and awarded her loss of wages of approximately $2,600 and compensation for non-economic loss in the sum of $11,500. The Authority reserved costs. The Court understands that no application was ever made for costs but that is not an issue before me.

[4] Ms Walker challenged the Authority's determination electing a full hearing of the entire mater (a hearing de novo). The challenge was heard in this Court over a period of 11 days between September 2011 and February 2012. In my substantive judgment I concluded that Ms Walker's dismissal had been justified and, accordingly, she failed in her claim. I specifically noted that, having been successful before the Authority, her decision to challenge the Authority's determination de novo was "a high-risk step to take."

[2] ERA Auckland AA 276/09, 13 August 2009.

[5] This Court has a discretion in relation to the issue of costs. The starting point is cl 19(1) of sch 3, of the Employment Relations Act 2000 (the Act) which provides:

> **19 Power to award costs**
>
> (1) The Court in any proceedings may order any party to pay to any other party such costs and expenses ... as the Court thinks reasonable.

The broad discretion conferred on the Court under that provision is to be exercised judicially and in accordance with recognised principles.

[6] The principles relating to costs awards in this Court are well established. They are based on the Court of Appeal judgments in *Victoria University of Wellington v Alton-Lee*;[3] *Binnie v Pacific Health Ltd*[4] and *Health Waikato Ltd v Elmsly*.[5] The usual approach is to determine whether the costs actually incurred by the successful party were reasonably incurred and once that step has been taken the Court must then decide, after an appraisal of all relevant factors, at what level it is reasonable for the unsuccessful party to contribute towards those costs. The figure of 66 per cent of the reasonably incurred costs is generally regarded as an appropriate starting point and that figure is then to be adjusted upward or downward, if necessary, depending upon relevant considerations.

[7] Regulation 68 of the Employment Court Regulations 2000 has particular relevance to the circumstances of the present case. It provides:

> **68 Discretion as to costs**
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> (1) 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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> (2) Under subclause (1), the Court —
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> (a) may have regard to an offer despite that offer being expressed to be without prejudice except as to costs; but
>
> (b) may not have regard to anything that was done in the course of the provision of mediation services.

[3] [2001] ERNZ 305 (CA).
[4] [2002] 1 ERNZ 438.
[5] [2004] 1 ERNZ 172.

[8] Mr Harrison placed particular reliance on a passage from the Court of Appeal judgment in *Alton-Lee v Victoria University of Wellington*[6] which I set out in full:[7]

> The primary principle is that costs follow the event. As to quantification, the principle is one of reasonable contribution to costs actually and reasonably incurred. These principles reflect a balance involving a number of factors. We mention only some of them. Access to justice considerations point away from automatic full recovery of costs for the successful party. On the other hand, a monetary judgment will often be of little practical moment to a successful party unless the losing party is required to make a substantial contribution to the costs of obtaining it. Further, litigation is expensive, time-consuming and distracting and the requirement that the losing party not only pays his or her own costs but also makes a subsequent contribution to those of the successful party undoubtedly acts as a disincentive to unmeritorious claims or defences. Special rules as to costs which apply where there have been payments into court or *Calderbank* letters encourage settlement.

Submissions

[9] Mr Harrison acknowledged that ProCare's actual costs were "at the higher end" but he submitted that they were reasonable in the circumstances having regard to a number of factors including an "extensive disclosure process"; a "large volume of documentary evidence which was spread over four volumes"; Ms Walker's "conduct of the hearing" and her "extensive evidence in chief", including "her evidence in reply running to 851 paragraphs". Mr Harrison's costs were charged out on a time and attendance basis at a rate of $350 per hour. He submitted that applying the "rule of thumb" test applied by Goddard C J in *Alton-Lee*, of multiplying by three the time spent in Court to reflect time reasonably spent in preparation, would result in a figure of $99,000.

[10] In an interlocutory judgment[8] dated 1 August 2011, I recorded that Ms Walker had informed the Court that the barrister who had represented her at the Authority investigation had ceased to act for her for "financial reasons."[9] It appears from documentation produced in connection with the present costs application that the barrister formally withdrew from acting for Ms Walker on 8 April 2011. Mr Harrison's criticisms, therefore, are directed at Ms Walker who represented herself throughout the Court hearing, assisted for a period by a support person.

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[6] [2001] ERNZ 305 (CA).
[7] At [48].
[8] [2011] NZEmpC 95.
[9] At [8].

[11] Counsel for Ms Walker responsibly accepted that preparation for the hearing and the hearing itself involved a "lengthy and drawn out process". In their submissions they responded to some of the criticisms raised by Mr Harrison but, otherwise, did not directly attack the reasonableness of the costs incurred. I accept, however, that as they were not acting for Ms Walker at the time, it would have been difficult for them to take the matter any further.

[12] Turning to the adjustment exercise referred to in [6] above, Mr Harrison submitted that there were a number of aggravating factors that supported his request for a higher award of costs than the accepted starting point of 66 per cent of the actual and reasonable costs incurred. Mr Harrison's submissions under this head were presented in two parts. First, he raised a number of criticisms about Ms Walker's approach to and conduct of the litigation which counsel submitted, "served to considerably extend the hearing time". Secondly, he dealt with attempts ProCare had made to try and settle the case prior to the Court hearing. The settlement attempts are an important issue. I propose to deal with them separately.

[13] In relation to the conduct of the litigation, in addition to the matters touched upon in [9] above, Mr Harrison claimed that Ms Walker had unnecessarily extended the hearing time by her "insistence on revisiting issues that had very little bearing in the plaintiff's case". He also criticised the "level of vilification' she had directed towards individual witnesses which counsel submitted, "was unnecessary and unproductive". In this regard, Mr Harrison referred to Ms Walker's "very personal attacks" on five of ProCare's witnesses and her cross-examination of ProCare's Chief Executive Officer, Mr Hooton, which ran for over three days and in counsel's words, "had limited probative value".

[14] Mr Harrison referred to examples from the notes of evidence where the Court had encouraged Ms Walker in the course of the hearing to spend time reviewing her questions and making them more focused. He submitted:

> 27. It is submitted that had the plaintiff's case been more focussed and even allowing for the plaintiff's inexperience, hearing time could realistically have been halved and the costs significantly reduced as a consequence.

[15] In response, counsel for Ms Walker submitted:

> [12] Counsel does accept that his honour gave leeway for Ms Walker's self representation, and understands the difficulty for a lay person found within the litigation arena. Ms Walker's inexperience was clearly visible to the Court. However, it is submitted that Ms Walker should not be penalised for her lack of experience.

Discussion on reasonable costs

[16] Often this Court can conclude without too much difficulty whether costs actually incurred in a given case are reasonable within terms of the test recognised in the triumvirate of Court of Appeal cases referred to above but with more complex cases that is not always the position. As the Court of Appeal stated in *Alton-Lee*, however: "... an assessment of what costs are reasonable in relation to litigation is not controlled by the level of costs actually charged."[10] In the recent case of *Kaipara v Carter Holt Harvey Ltd*,[11] Chief Judge Colgan expressed the principle in these terms:[12]

> Assessment of the company's reasonable legal costs is not an exercise in second-guessing the reasonableness or otherwise of its actually legal costs. Rather, the Court must assess what would have been reasonable legal costs to conduct the case for that party in all the circumstances.

[17] With respect, I do not accept that the multiplier approach referred to by Goddard C J in *Alton-Lee*, which Mr Harrison relied on in support of ProCare's claim, is appropriate to a case like the present which involved a de novo challenge to a determination of the Authority. *Alton-Lee* involved a case heard by the Court at first instance with the associated full preparation of all the evidence. In the present case, most of the background preparation would, of necessity, have already been carried out in the lead up to and during the course of the Authority's investigation. This distinction between preparation for a hearing at first instance and a de novo challenge was referred to by Judge Couch in *Williams v The Warehouse Ltd*.[13] There were no unduly complex issues involved in the conduct of the hearing in the present case and, up against a litigant in person, little of Mr Harrison's legal knowledge and advocacy skills would have been seriously tested apart perhaps from his patience.

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[10] At [62].
[11] [2012] NZEmpC 92.
[12] At [39].
[13] AC 32A/08, 17 November 2008 at [10].

[18] Although some brief particulars are provided in Mr Harrison's submissions, the three invoices sent to ProCare which were relied upon in support of the costs claim provide no information to enable the Court to assess the extent to which the actual costs incurred were reasonable. The narration in each invoice simply states: "Professional services during (the relevant month) 2011". In the circumstances, I have turned to the High Court Rules for guidance. The appropriate recovery rate for a category two proceeding would be $1,990 per day. The daily recovery rates provided for in the High Court Rules are said to be broadly two-thirds of the rates that New Zealand practitioners in the relevant categories currently charge to clients.[14]

[19] Based on the daily rate provided for in the High Court Rules along with my overall knowledge of the case and what it involved, and after making what I deem to be an appropriate allowance for preparation, I consider that the legal costs which might reasonably be incurred in conducting the defendant's case during the period covered by the invoices submitted could be assessed at $50,000. The two-thirds starting point in the costs exercise, therefore, before making any adjustment can be rounded off at $33,000. I emphasise that this assessment exercise involves no criticism of the fees actually charged by Mr Harrison. I am confident that ProCare was ably served by Mr Harrison throughout the course of the litigation. Nevertheless, this Court is required to make an assessment, albeit in a somewhat artificial sense, of what would have been reasonable legal costs to conduct the case for the defendant in all the circumstances known to it.

[20] If the aggravating factors advanced by Mr Harrison relating to Ms Walker's approach to and conduct of the litigation were the only relevant considerations, I would not be prepared to make an adjustment to the figure referred to in the previous paragraph. Whilst I accept that criticisms could be levelled at Ms Walker in a number of the respects touched upon by Mr Harrison, it is essential to bear in mind that she was a lay person up against a very experienced barrister in this specialised area of the law. With some exceptions, it can never be easy for a lay litigant to suddenly have to come to grips with the unfamiliar territory of a court hearing and its attendant practices and procedures and all that those terms encompass. Throughout

[14] *McGechan on Procedure* (looseleaf ed, Brookers) at [HR 14.4.01].

the hearing, Ms Walker conducted herself in an appropriately respectful manner and at the end of the day I was satisfied that she did her best to comply with the directions she was given by the Court. The purpose of an award of costs is not to punish an unsuccessful party but to compensate the successful party. For those reasons, if the only relevant considerations were the criticisms directed at Ms Walker's conduct of the proceedings, I would not be prepared to adjust the $33,000 starting point.

The settlement attempts

[21] I turn now to consider ProCare's settlement attempts which involved the making of two Calderbank offers. The barrister acting for Ms Walker filed his challenge to the Authority's determination on 10 September 2009. ProCare's statement of defence was filed on 13 October 2009. On 23 October 2009, ProCare made a "without prejudice except as to costs" offer to settle Ms Walker's claim in full in the sum of $45,000 inclusive of pre-offer legal fees. That first Calderbank offer was rejected by letter dated 23 December 2009. Ms Walker sought $40,000 together with payment of her full legal costs. The ProCare offer was renewed in the same amount on 21 January 2010 but rejected on 25 January 2010.

[22] ProCare then made a further and final attempt to settle the proceedings by way of a second Calderbank offer dated 29 March 2011. That offer was in the sum of $60,000 and again it was inclusive of pre-offer costs. At that stage the barrister acting for Ms Walker had indicated to the Court that he did not have instructions to proceed further in the matter but as he had not formally withdrawn, Mr Harrison requested him to put the proposal to Ms Walker. Ms Walker responded directly to Mr Harrison's letter on 1 April 2011 rejecting the second Calderbank offer and proposing settlement in the sum of $75,000. There were no further offers or counteroffers. The case then proceeded to the hearing which commenced on 14 September 2011.

[23] In reference to the two Calderbank offers, Mr Harrison submitted:

> 31. It is submitted that the *Calderbank* offers were made in a timely manner, the first being soon after the challenge was issued and well in advance of either party incurring costs associated with the challenge. The defendant then promoted a judicial settlement conference and

> when this was not successful, followed up with a further settlement proposal of $60,000 compensation. This was proposed as a net payment as well as giving the plaintiff the opportunity to put some of the compensatory amount towards legal fees. The defendant made all reasonable endeavours to settle on this basis.

[24] The existence of a timely made Calderbank offer which beats the amount recovered by the offeree is a highly relevant factor to any consideration of the issue of costs. In *Elmsly*, the Court of Appeal stated:[15]

> ... we think that a more sensible approach by the defendant to the making of *Calderbank* offers and steely responses by the Courts where plaintiffs do not beat *Calderbank* offers would be in the broader public interest.

In *Bluestar Print Group (NZ) Ltd v Mitchell*,[16] the Court of Appeal re-emphasised that a "steely" approach was required.[17]

[25] Mr Harrison submitted that as ProCare had "adopted the sensible approach suggested by the Court of Appeal in *Elmsly*; the plaintiff needed to take stock of the settlement proposals and likelihood of being able to beat either the initial or second settlement offer, before proceeding with her case." I agree with that submission. The plaintiff clearly did not beat the Calderbank offers and, on the face of it, not only does that mean that the usual costs position is reversed so that the defendant is entitled to costs but also, as Mr Harrison submitted, the rejection of the Calderbank offers can form the basis for seeking a higher contribution towards costs than the usual starting point of 66 per cent of the costs reasonably incurred.

[26] The question then becomes why did Ms Walker not accept the Calderbank offers. Why, for that matter, did she elect to challenge the determination of the Authority in which she had been the successful party?

Ms Walker's costs

[27] The answers to the questions posed in the previous paragraph revolve around the legal costs Ms Walker had already incurred preliminary to and in the course of the Authority investigation. Her present counsel submitted that at the time the first Calderbank offer of $45,000 was made, "Ms Walker's legal costs were in the vicinity

[15] At [53].
[16] [2010] NZCA 385, [2010] ERNZ 446.
[17] At [20].

of $70,000". In an affidavit sworn on 15 August 2012, Ms Walker deposed that at the time of the first Calderbank offer in October 2009 she had already paid the amount of $64,150 to her barrister. She also listed various disbursements she incurred in connection with the litigation totalling $9,577.03. Mr Harrison recognised the problems resulting from Ms Walker's high legal costs prior to the issuance of proceedings in this Court. He submitted:

> 33. One of the obstacles to settlement was the legal fees incurred by the plaintiff in relation to her Authority application. It is acknowledged that these were high, however it is also submitted that it was not for the defendant to compensate for the high cost of representation out of the Authority. The Calderbank offers are in relation to the challenge before the Employment Court and any issues with the plaintiff's previous legal fees could (and possibly still can) be dealt with in a separate forum.

[28] Practitioners in this jurisdiction will be aware that in terms of the Explanatory Note that accompanied the introduction of the Employment Relations Bill, the Authority is a body charged with making practical decisions quickly with a minimum of detail, focusing on key issues and how to resolve them.[18] It is a forum designed to bring about a resolution of employment disputes and issues in an efficient and cost-effective manner. Practitioners will also be familiar with the costs principles applied by the Authority which were reviewed by the full Court in *PBO Ltd (formerly Rush Security Ltd) v Da Cruz*.[19] The Court held that the principles included the basic tenet that costs awards in the Authority will be modest and that such awards will frequently be based on a notional daily tariff. The Court concluded its review of the Authority's approach to costs with the following observations:

> [47] Finally ... we urge representatives of parties to be conscious of the costs that are accumulating as a matter proceeds. Cases should be approached economically and in a way that is likely to leave a successful party with a satisfactory outcome. There is an overall need to ensure that costs being incurred are reasonable in the light of the amount that is likely to be recovered as remedies and costs from the Authority.

[29] At the time of the Authority investigation in the present case, the notional daily tariff was in the order of $2,000 to $2,500 per day of investigation meeting.[20] The investigation took place over a period of four days. Bearing in mind the advice

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[18] Employment Relations Bill 2000 (8-1) (explanatory note) at 9.
[19] [2005] ERNZ 808 at [44].
[20] See: *Safe Air Ltd v Walker* (unreported) CC 8A/09 at [6].

urged on practitioners by the full Court in *Da Cruz* and the Authority's well-known modest approach to costs, it is difficult to understand how any litigant at the conclusion of an Authority investigation could end up incurring legal fees in the order of those incurred by Ms Walker in the present case.

[30] In the circumstances, it is not difficult to understand and appreciate Mr Harrison's submission that Ms Walker's legal fees constituted an obstacle to settlement. Even had Ms Walker been prepared to accept the amount awarded by the Authority of approximately $14,100 and been able to recover costs in respect of the four-day investigation at the maximum daily tariff of $2,500, she was still going to be out of pocket to a considerable extent. Had she accepted the first Calderbank offer of $45,000, there would have been nothing in it for her because at that stage her legal costs amounted to approximately $70,000. The same applies to the second Calderbank offer of $60,000. Settlement in that amount would still have left her with a shortfall in meeting her own legal costs. She really was in a no-win situation.

[31] I would add that I find it extremely unlikely that Ms Walker set out deliberately to engage an expensive 'gold-plated' barrister. I say that because of the affidavit evidence before the Court regarding the significant financial assistance Ms Walker was required to obtain from her sister, beginning at an early stage of the case, in order to meet her litigation costs. That in turn raises the issue of Ms Walker's current financial situation. Her present counsel submitted that, "payment of costs would cause extreme hardship to not only Ms Walker but also her sister".

Ms Walker's financial situation

[32] It is a well-established principle in this jurisdiction that the ability of an unsuccessful party to pay an award of costs is a matter which can properly be taken into account if such payment would cause the party undue hardship. At the same time, any claim of undue hardship must be supported by acceptable evidence relevant to the ability of the unsuccessful party to pay. The information required includes details of the party's assets and liabilities and income and expenditure. In the present case affidavits have been filed with full particulars of Ms Walker's overall financial position. They make rather sorry reading.

[33] Ms Walker deposed that "the past five years plus of litigation has cost me $81,247." A breakdown was provided of that sum. She states that since the litigation she has been unsuccessful in finding employment as an employee. Ms Walker notes that most organisations require an application form to be completed which seeks disclosure details of dismissal from any previous employment and, as she puts it, "Incompatibility does not go down well - regardless of technical abilities". To her credit, however, Ms Walker has been able to obtain temporary contract work from three sources and she now describes herself as an "Accounts Contractor". Her income is reasonably high but she also has significant outgoings.

[34] A breakdown of Ms Walker's income and expenditure has been provided. The breakdown shows a monthly surplus of $133 but Ms Walker points out that she does not get paid for sick leave, annual leave or statutory holidays and her contract work will cease for two weeks over the Christmas/New Year period which means, in her words, "I have no way to recover from this and will need to rely on family to cover my basic needs for a minimum of three weeks". Her latest contract, which commenced on 1 September 2012 and is for 16 hours per week, is due to end in March 2013. Her financial position could deteriorate significantly if she is unable to replace any of her temporary contracts. Her major items of expenditure are loan repayments secured over her home at Huia.

[35] Ms Walker estimated the current value of her home at $365,000 although a written appraisal report dated 20 July 2012 from Harcourts Real Estate provided to the Court gave a likely "buyer interest" range of between $245,000 - $300,000. Ms Walker stated that: "Due to lack of money, my house is in a serious state of disrepair." She deposed that as at 24 October 2012 she had home loans with the National Bank secured over her property amounting to $344,794, a significant part of which relates to her litigation costs. She also explained that there is a caveat registered over her property in the name of her sister, Ms Sally Walker, securing an amount of $120,000. Her remaining liabilities consist of a car loan from MARAC Finance of $10,500 and a small credit card debit balance.

[36] In an affidavit dated 15 August 2012, Ms Walker's sister, Sally Walker, deposed that between September 2010 and 14 August 2012 she had made regular payments totalling $25,185.38 to Vicki for living costs, usually in the sum of $100

but there was one payment of $10,000 for tax arrears and another payment of $4,785.38 to the Employment Court. Sally Walker went on to explain the background to the caveat:

> 7. In late 2005 I topped up my mortgage by $60,000. I gave this money to Vicki to assist her to complete renovations on her home at (address provided). At this time I considered Vicki to be in stable employment with ProCare Health Ltd. Vicki agreed that this gave me vested interest in her property. Vicki changed her will accordingly.
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> 8. Vicki was dismissed from ProCare Health Ltd on the grounds of incompatibility in December 2007.
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> 9. In late 2007 I began to cash in my superannuation plan with Sovereign. In total I cashed in $48,000. I withdrew $38,000 of the $48,000 solely to assist Vicki with her litigation costs with ProCare Health. I have attached a summary of the transfers from my account to Vicki's account to this affidavit.
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> 10. Vicki and I had an agreement that when and if Vicki received compensation and costs following her Employment Court hearing that Vicki would return as much of the money that I had provided to her as she could. Vicki and I also agreed that should her Employment Court hearing go against her, we would legally register my interest in Vicki's property via a caveat based on the $60,000 for the renovations, $38,000 for the litigation and $25,000 for living costs.
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> 11. My caveat on Vicki's property for $120,000 was registered in early July 2012.
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> 12. I no longer have any funds for my retirement and have exhausted all of my funds through assisting Vicki.

[37] In response to Ms Walker's evidence about re-mortgaging her house and borrowing money from her sister in order to pay her considerable legal fees, Mr Harrison submitted:

> 37. ... While it has been acknowledged by the defendant that the plaintiff's legal costs for the Authority procedure were high and placed financial strain on her, however the defendant cannot be held responsible for this state of affairs and it is noted that the plaintiff was nevertheless in a position to meet these legal fees and continue with her challenge to the Court.
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> 38. The plaintiff's earnings have been put in evidence by her during the Court hearing. This discloses that since her dismissal from ProCare she is not impecunious and has continued to be well remunerated in her accounting roles, either as an employee or consultant. It is evident both as to the plaintiff's ability to meet her previous legal costs and ongoing remuneration and indicates that the plaintiff is able to make a contribution to the defendant's costs who, in the circumstances, would

> accept arrangements that accommodate the plaintiff's other commitments and did not cause her financial embarrassment.

Ms Walker's health

[38] One of the relevant considerations in the exercise of the Court's discretion as to costs is its equity and good conscience jurisdiction under s 189(1) of the Act. That provision enables the Court to take into account not only the unsuccessful party's ability to pay costs but also other relevant matters which can properly be said to raise issues of equity and good conscience. I touched on one of those factors when I referred to the issue of costs in my substantive judgment. Relevantly, I stated:

> [110] As the successful party, ProCare would normally be entitled to an award of costs but the Court has a discretion in relation to costs and in the exercise of that discretion the overriding principle must always be the interests of justice. In his final submissions, Mr Harrison noted that the plaintiff's case had focused on stress within the Finance Team in having to meet financial deadlines and he confirmed that in their evidence Messrs Hooton, McLean and Smith, quite responsibly, did not disagree that there was pressure on the organisation brought about by its rapid growth. I have noted that Ms Walker did not at any stage raise a disadvantage grievance in relation to the stress she complained of and, in my view, she did not help herself by rejecting ProCare's reasonable proposal to undergo a comprehensive professional medical assessment. Ms Walker preferred to be guided by he own medical adviser. No medical evidence was called before me but I can indicate now that, if the Court is required to make an award of costs, it may be appropriate to call for the production of any relevant medical evidence that may be available.

[39] There was no criticism by the ProCare witnesses at the substantive hearing of Ms Walker's work performance. The evidence indicated that she was a very competent Financial Controller who showed intense loyalty to other employees in the Finance section. The difficulty, however, was that during the time she was employed by the company, ProCare was going through a period of rapid growth and expansion which in turn brought significant pressure on all aspects of its administration, in particular, Finance. People can react in different ways to stressful situations. Ms Walker's response, as Mr Harrison submitted in his closing submissions at the substantive hearing, "was to build a fortress around herself and members of the Finance team". Those outside the Finance team were seen as "the enemy". In essence, it was that approach which ultimately led to her dismissal on the grounds of incompatibility but there can be no question that Ms Walker's significant emotional and stress reactions which I detail in my substantive judgment

were all work-related. To that extent, when it comes to the issue of costs, they are relevant considerations for the Court to take into account under its equity and good conscience jurisdiction.

[40] A helpful affidavit dated 19 July 2012 has been produced from Dr Jodie O'Sullivan, a very experienced Auckland General Medical Practitioner who has been Ms Walker's doctor for 13 years. Dr O'Sullivan is also a ProCare shareholder. I do not intend to detail the contents of the affidavit. Suffice it to say that Dr O'Sullivan was able to confirm the impact of Ms Walker's health on the stress in her workplace and she supplied the Court with details of the treatment she provided.

[41] In addition, the Court has evidence from Sally Walker in her affidavit, about the stress her sister has had to endure. Sally Walker described the stress level as "immense". She went on to state:

> 18. I have lived and breathed Vicki's life for the last five years. I have watched her struggle to earn a living and to hold her head up. I personally have had an emotional battle to keep on financially supporting Vicki and have done so at a great cost to myself and my future retirement prospects.
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> 19. I understand the situation with ProCare, I am concerned that my sister is not going to be able to cope with the stress of owing such a large amount, or any amount. I ask his honour to please take into consideration her financial standing, which sadly, is now my financial standing. My sister continues to lead a frugal life, it saddens me to see her struggle every day.

Discussion

[42] It is not an easy task for the Court to have to balance the competing equities in a case like the present. As I pointed out in my substantive judgment, Ms Walker's decision to challenge the determination of the Authority which found in her favour, was a "high risk step to take". She can also be criticised in strong terms, as Mr Harrison submitted, for not accepting one or other of the two timely Calderbank offers. Against that it must be conceded that, given the 'no-win' situation she found herself in because of the high legal fees she had herself incurred, her decision to proceed with her challenge was at least understandable.

[43] At the same time, I am satisfied that Ms Walker's overall financial situation is precarious and any significant award of costs is likely to result in serious undue hardship. There is also the sad reality that Ms Walker's emotional and depressive reaction which ultimately resulted in her dismissal for incompatibility was a direct result of the stress she had been subjected to in the workplace.

[44] Looking at the situation overall, I am particularly persuaded by Mr Harrison's submission in [37] above that ProCare cannot be held responsible for the high legal costs Ms Walker had incurred in connection with the Authority investigation. At the same time, in terms of the Court's equity and good conscience jurisdiction, I am satisfied, for the various reasons mentioned above, that justice would not be served by making any significant award of costs against Ms Walker. Taking all relevant factors into account, I consider that it is appropriate to make a moderate award of costs against Ms Walker and I fix this amount in the sum of $8,000. In the final paragraph of his submissions, Mr Harrison responsibly stated that, "in the circumstances" ProCare "would accept arrangements that accommodate the plaintiff's other commitments and do not cause her financial embarrassment". Taking up that invitation, the award of $8,000 is to be paid to ProCare within 12 months from the date of this judgment either by way of instalments or in one lump sum.

A D Ford
Judge

Judgment signed at 12.30 pm on 1 November 2012