IN THE EMPLOYMENT COURT
WELLINGTON

[2013] NZEmpC 25
WRC 37/11

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	JENNIFER GINI Plaintiff
AND	LITERACY TRAINING LIMITED Defendant

Hearing: (On the papers by submissions dated 3, 22 and 23 February 2013 and 2 March 2013)

Counsel: Patrick O'Sullivan, advocate for the plaintiff
Tim Cleary, counsel for the defendant

Judgment: 7 March 2013

COSTS JUDGMENT OF JUDGE A D FORD

Introduction and background

[1] The parties have been unable to reach agreement on costs and the plaintiff now seeks an award in terms of the order made in my substantive judgment[1] dated 22 January 2013.

[2] The plaintiff succeeded in her claim before the Employment Relations Authority (the Authority) which found that she had been unjustifiably dismissed from her employment with the defendant. In a determination[2] dated 3 November 2011, the Authority awarded Ms Gini remedies of $10,140 for economic loss (three months' ordinary time remuneration calculated out as 13 weeks

[1] [2013] NZEmpC 1.
[2] [2011] NZERA Wellington 169.

x $780 per week) and $5,000 on account of her non-economic loss. Costs were reserved.

[3] Ms Gini had also named Ms Linda Sturgess, the managing director of the defendant company, as a party to the investigation before the Authority and had sought a penalty against her. The Authority dismissed the claim against Ms Sturgess on the grounds that it was out of time. Subsequently, the Authority made a costs award against Ms Gini of $4,500 in respect of her unsuccessful claim against Ms Sturgess.

[4] On 30 November 2011, the defendant, Literacy Training Limited, filed a challenge to the Authority's determination and on 9 December 2011, Ms Gini filed a statement of defence and a cross-challenge seeking an increase in the quantum of the Authority's awards for both her economic and non-economic loss.

[5] The next significant development came on 3 May 2012 when Literacy Training discontinued its challenge. The matter then proceeded on the basis that Ms Gini's cross-challenge was treated as a de novo challenge to the remedies awarded by the Authority. Ms Gini's claim for an increase in the respective amounts awarded to her by the Authority was strongly opposed by Literacy Training.

[6] The case was eventually heard on 11 and 12 July 2012. In my judgment, I upheld the Authority's economic loss award of three months' lost remuneration but I increased the compensation award for non-economic loss under s 123(1)(c)(i) of the Employment Relations Act 2000 (the Act) from $5,000 to $12,000. I also ordered that the remedies awarded were to be reduced by five per cent on account of Ms Gini's contributory conduct.

[7] On the issue of costs, I invited the parties to endeavour to reach agreement. I also made the observation that while Ms Gini was entitled to costs assessed on the usual basis up until the date Literacy Training discontinued its challenge on 3 May 2012, given the mixed results recorded in my substantive judgment, I was inclined to the view that any award for subsequent costs should be "relatively modest".

[8] There was another development in the narrative which needs to be recorded. On 7 May 2012, Ms Gini made application to have the Court determine her entitlement to costs in respect of the Authority investigation and on 11 May 2012 she filed an application for joinder of Ms Sturgess as a party in the present proceeding "for the purpose of costs". Both those interlocutory matters were dealt with on the papers. In an interlocutory judgment[3] dated 15 June 2012, I declined the application for joinder of Ms Sturgess as a party to the proceeding and I ruled that the application for Authority costs was to be adjourned until the substantive hearing in July. I reserved the issue of costs but as the defendant successfully defended the second application and did not lose the first, it is entitled to a modest award. Mr Cleary, counsel for the defendant, seeks an amount of $750 in relation to that interlocutory matter which I consider to be appropriate and reasonable.

[9] Although it has no direct bearing on the issue of costs in this case, for completeness I should record that Ms Gini also successfully challenged the award of $4,500 costs made against her in respect of her unsuccessful claim against Ms Sturgess.[4] I make reference to that proceeding because it was given the Court file number WRC 13/12 and, as will become apparent, that file number has relevance to the costs exercise in the present case. In a judgment[5] dated 4 February 2013, I reduced the Authority's award from $4,500 to $3,000.

Costs principles

[10] This Court has a broad discretion in relation to the issue of costs. The starting point is cl 19(1) of sch 3 of 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.

[11] The principles relating to costs awards made pursuant to that provision are well established. They are based on the Court of Appeal judgments in *Victoria University of Wellington v Alton-Lee*;[6] *Binnie v Pacific Health Ltd*[7] and *Health*

[3] [2012] NZEmpC 94.
[4] At [3] above.
[5] [2013] NZEmpC 9.
[6] [2001] ERNZ 305 (CA).

Waikato Ltd v Elmsly.[8] 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 may then be adjusted upward or downward, if necessary, depending upon relevant considerations.

[12] In this case, there is also the issue of Ms Gini's entitlement to costs in respect of the Authority's investigation. As noted above, in its determination the Authority reserved the issue of costs. The principles applicable when this Court is called upon to fix costs in relation to proceedings before the Authority are also well established. They were confirmed by the full Court in *PBO Ltd (Formerly Rush Security Ltd) v Da Cruz*.[9] The principles were considered and applied recently by Judge Couch in *Pathways Health Ltd v Moxon*.[10] I will not repeat them except to note that almost invariably costs in the Authority are judged against a notional daily rate which currently stands at approximately $3,500. On this particular issue, I noted in my interlocutory judgment of 15 June 2012 that Mr Cleary considered it to be more appropriate for the question of costs in the Authority to be referred back to the Authority, I stated:

> [12] ... However, I would need to hear argument on that proposition. Unless there are special factors warranting an award of costs in excess of the standard award in the Authority, then I would have thought it would be more appropriate for this Court to fix costs rather than have the matter referred back to the Authority for determination. ...

[13] Then there is the matter of discontinuance. A little over five months after commencing its challenge, Literacy Training discontinued by filing a notice of withdrawal of proceedings. As was confirmed by Judge Inglis in *Kelleher v Wiri Pacific Ltd*[11] there are no special principles applicable to the assessment of costs on a discontinuance. The general rule that a discontinuing party is liable for costs on discontinuance may be displaced if there are just and equitable circumstances not to

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[7] [2002] 1 ERNZ 438 (CA).
[8] [2004] 1 ERNZ 172 (CA).
[9] [2005] ERNZ 808.
[10] [2013] NZEmpC 18.
[11] [2012] NZEmpC 98.

apply it. While the Court will not speculate on the merits of a case that has not been heard, the reasonableness of the stance of both parties needs to be considered. There are no circumstances in the present case, however, which would warrant a departure from the application of the general rule referred to above.

[14] Another issue arising in the present case involves the law relating to without prejudice offers, more commonly referred to as Calderbank offers. Mr Cleary relies on two Calderbank offers and I will need to determine their significance. Regulation 68(1) of the Employment Court Regulations 2000 provides that:

> **68 Discretion as to costs**
>
> (1) In exercising the Court's discretion the Court 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.

Regulation (2)(a) then provides:

> (2) Under subclause (1), the Court–
>
> (a) may have regard to an offer despite that offer being expressed to be without prejudice except as to costs.

[15] The principles applicable to Calderbank offers and the relevant authorities have recently been considered by this Court in *Te One A Mara Ltd v Olsen*;[12] *Pathways Health Ltd v Moxon*[13] and *Greenbaum v Waikato District Health Board*.[14] One of the leading authorities on the subject is the decision in *Health Waikato Ltd v Elmsly*.[15] In that case the Court of Appeal stated: [16]

> ... we think that a more sensible approach by defendants 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.
>
> (emphasis added)

[16] The call for a "steely" approach was restated by the Court of Appeal more recently in *Bluestar Print Group (NZ) Ltd v Mitchell*.[17] In *Bluestar*, the Court of

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[12] [2012] NZEmpC 176.
[13] [2013] NZEmpC 18.
[14] [2013] NZEmpC 12.
[15] [2004] 1 ERNZ 172.
[16] At [53].
[17] [2010] NZCA 385 at [20].

Appeal also recognised that in the employment context, cost assessments were not confined solely to economic considerations. It stated:

> [17] We accept that there may be cases where vindication through seeking a statement of principle in the employment context may be relevant to the exercise of the Court's discretion. Thus the relevance of reputational factors means that cost assessments are not confined solely to economic considerations. But equally, an offer to pay compensation at a level that is reasonable might well be regarded as conveying a distinct element of vindication to the plaintiff.

After reaffirming that a "steely" approach is required, the Court of Appeal went on to state:

> [20] ... Where defendants have acted reasonably in such circumstances, they should not be further penalised by an award of costs in favour of the plaintiff in the absence of compelling countervailing factors.

Costs up to the discontinuance

[17] For the first costs period I have identified, namely from the filing of the challenge by Literacy Training on 30 November 2011 until its discontinuance of the challenge on 3 May 2012, Mr O'Sullivan has advised that Ms Gini's actual costs amounted to $11,200. A supporting invoice (Invoice 1) was produced dated 10 May 2012. In his submissions in response, Mr Cleary helpfully identified the various matters and attendances Mr O'Sullivan appeared to have carried out on Ms Gini's behalf during the period in question. He referred to the preparation and filing of a statement of defence and cross-challenge; preparation and attendances in connection with a teleconference with Chief Judge Colgan on 13 February 2012 and the filing of a memorandum (51 paragraphs) "on preliminary issues" on 2 April 2012. Mr Cleary submitted that, excluding mediation costs, reasonable costs for that work would "ordinarily be in the region of $1,000-1,500."

[18] On the face of it, the actual costs claimed in respect of the period up to the filing of the discontinuance appear to be excessive. I observe, however, that the heading to the first invoice refers to both this proceeding and WRC 13/12.[18] There was no breakdown showing the division of attendances between each proceeding. Likewise, there were five subsequent invoices produced for the balance of the costs

[18] At [9] above.

after the discontinuance which all made reference in the heading to proceeding WRC 13/12 as well as WRC 37/11 (this proceeding) but costs incurred in proceeding WRC 13/12 are not relevant to the costs award in this proceeding.

[19] Invoice 1, dated 10 May 2012, also appears to include costs incurred in preparation of the hearing in July 2012 which is somewhat unusual in itself given that the hearing date was not confirmed until 27 April 2012. The narration to the invoice, for example, shows a fee of $2,000 for, "Preparation of Brief of evidence and instructions thereto including medical evidence 10 hours @ 200". In explanation, Mr O'Sullivan said in his supporting submissions that the defendant "did not withdraw its challenge until May 2012 by which time I had done most of the preparation for the trial." In another passage the advocate stated:

> 19. I make the point that the preparation was all done prior to withdrawal by the defendant and at a time when the case material being prepared was to operate defensively as well as offensively.

[20] While Mr O'Sullivan's actions in preparing the hearing at such an early stage could hardly be described as "the norm" in this jurisdiction, the narrations referred to in [19] do not appear to be duplicated in subsequent invoices. There was an obvious risk, however, with such an approach in that had the case not proceeded past the discontinuance point then it is unlikely that Mr O'Sullivan could have recovered any of the costs incurred in preparation for the hearing. Nevertheless, I accept that a significant amount of preparation work was carried out during the early stages. I note from the Court file that Mr O'Sullivan was involved in two other directions conferences apart from the one mentioned by Mr Cleary and he appeared to have had additional written exchanges with the Registrar. In addition, he was required to give advice and take instructions in connection with the first Calderbank offer. Taking all these matters into account, in particular the apparent work carried out in preparation for the hearing, I consider that reasonable costs for the period in question would be $8,000. I see no reason to depart from the 66 per cent starting point referred to in [11] above and I therefore fix the award of costs for the period prior to the discontinuance at $5,280.

Costs after the discontinuance

[21] Turning to the issue of the remaining costs for the period up to and including the hearing in this Court, both parties now seek an award in their favour. Mr Cleary's claim on behalf of Literacy Training is based on two Calderbank offers which were made to Ms Gini but not accepted. The defendant's first Calderbank offer was made on 18 April 2012, just prior to its discontinuance on 3 May 2012. The second without prejudice offer was made on 8 June 2012, approximately one month before the hearing. In reference to the Calderbank offers, Mr Cleary submitted:

> 31. Rather than seek indemnity costs as forewarned in the *Calderbank* offers the plaintiff seeks two thirds of those costs ie $12,000. ...

It is assumed that the reference to "plaintiff" is a typographical error and that it is the defendant, Literacy Training, seeking costs in the sum of $12,000.

[22] For his part, Mr O'Sullivan has filed four invoices marked Invoice 2, 3, 4, 5 and 6 respectively for amounts totalling $11,620 which are said to be the actual costs incurred by Ms Gini for the period in question. However, in para 67(c) of Mr O'Sullivan's supporting submissions he appears to claim only in respect of "invoices 3-5", omitting any reference to Invoice 2 which is for a total of $3,000. The omission could be deliberate because the narration on Invoice 2 includes a reference to "Submission on Joinder" which was the unsuccessful interlocutory application pursued by Ms Gini. In addition, as noted in [18] above the heading to each invoice includes a reference to proceeding WRC 13/12. It is also noted that the bulk of costs in Invoice 3 which totals $1,640 relate to "Submissions on Cost in the Authority" which is not relevant to the present exercise. It is up to an applicant seeking costs to clarify and justify the amount claimed - the Court should not be left to speculate. I, nevertheless, accept that the hearing itself, which occupied one and a half days, involved a number of complicated issues and that Ms Gini was well represented. Taking all those considerations into account, I consider reasonable costs for the period after the filing of the discontinuance to be $6,620. I turn now to consider the status of the Calderbank offers.

[23] There is strong disagreement between the parties over the issue of whether Ms Gini, in her successful challenge, using the terminology in *Elmsly*,[19] actually "beat" the Calderbank offer. That requires an analysis of the actual remedies Ms Gini was awarded by the Court. It is clear from the correspondence included with the submissions on costs, that after judgment was delivered, there was an initial dispute between the parties as to the correct weekly wage figure for calculating the economic loss. Mr Cleary claimed that the correct figure was $660.88 whereas Mr O'Sullivan contended that the appropriate figure was $725, which was the amount determined by the Authority and confirmed by the Court. In his submissions, Mr Cleary now accepts the $725 figure.

[24] The more significant issue between the parties, which is ongoing, relates to taxation. Mr Cleary submitted that the award of three months' ordinary time remuneration pursuant to s 128(2) of the Act was required to be assessed on a net basis after allowing for PAYE. Both Mr Cleary and Mr O'Sullivan made submissions on the issue and they attached to their submissions accounting documentation tending to support their respective arguments. Mr O'Sullivan claimed that Mr Cleary was anxious to use a net figure to support his client's case that the Calderbank offers exceeded the relief Ms Gini was awarded by the Court. However, the views expressed in submissions and in the attached documentation on this issue were not evidence.

[25] The position is that it is not for this Court to become involved in taxation issues in fixing awards for lost remuneration. This was confirmed in *Gilbert v the Attorney-General in respect of the Chief Executive of the Department of Corrections*[20] where Chief Judge Colgan stated:[21]

> ... Not only must awards of compensation for lost remuneration be of the gross sums lost, but it is not for the Court to inquire into questions of tax on these sums as it would have to in the grossing up/netting down exercise. ...

[26] The position in this regard was recently reaffirmed in *Rooney Earthmoving Ltd v McTague anors*[22] where, Judge Travis after citing the two leading Court of Appeal cases in the employment area, *North Island Wholesale Groceries Ltd v*

[19] At [14] above.
[20] (2009) 6 NZELR 441.
[21] At [40].
[22] [2012] NZEmpC 63 at [111].

Hewin[23] and *Horsburgh v New Zealand Meat Processors Industrial Union of Workers*,[24] accepted that taxation is not a consideration.

[27] On the foregoing basis, the relief Ms Gini recovered in this Court can be itemised as follows:

Section 123(1)(c)(i)	$12,000
Lost wages - 13 weeks @ $725 per week (gross)	$9,425.00
	$21,425.00
Less Sadler's earnings	$2,505.00
	$18,920.00
Less 5% contributory conduct	$946.00
	$17,974.00

In addition, Ms Gini was awarded the costs to be assessed in this judgment.

[28] The first Calderbank offer was made on 18 April 2012. It consisted of a payment of $15,140 (which sum was then held in trust) plus a contribution towards costs of $3,000. The offer would also have meant an additional saving in costs to Ms Gini of $2,250, which was the ultimate costs payable by her in respect of the failed penalty claim (WRC 13/12).

[29] The second Calderbank offer made on 8 June 2012 was for a figure described by Mr Cleary as an "approximate total of $18,000" together with a $3,000 contribution towards costs and the saving of $2,250 in WRC 13/12.

[30] Although the two Calderbank offers were realistic and timely, it cannot be said, even allowing for the observation I make in the second sentence in [20] above, that they beat the relief Ms Gini obtained through the Court. There is another aspect of the Calderbank offers which needs to be addressed. They were both expressed to be made "without admission of liability" and they also included, as a condition, the requirement that the Authority's determination be set aside. That gives rise to the

[23] [1982] 2 NZLR 176 (CA).
[24] [1988] 1 NZLR 698 (CA).

vindication element referred to by the Court of Appeal in the passage cited in [16] above from *Bluestar*.

[31] When Mr O'Sullivan wrote to Mr Cleary on 24 April 2012 rejecting the first Calderbank offer, the first point he made related to the vindication issue:

> 1. Jennifer will not agree to setting aside the determination of the Authority in any circumstances. That is a public record which is critical to the sense of vindication she needs in the resolution of this case.

[32] I have no doubt that Mr O'Sullivan was not overstating the position. In my substantive judgment of 22 January 2013, I dealt at length with Ms Gini's claim under s 123(1)(c)(i) of the Act for humiliation, loss of dignity and injury to feelings. My conclusion was that she had suffered considerable hurt and humiliation in the process leading up to her unjustifiable dismissal by Literacy Training and her win in the Authority meant an enormous amount to her. The situation was not unlike that described by Judge Couch in *Pathways Health Ltd*:[25]

> ... Employment disputes are frequently very emotive issues in which pride and reputation are important. Many employees who feel they have been unjustly treated by their employer want a public statement that they were not at fault and seek a determination of the Authority or a judgment of the Court for that reason.

[33] For these reasons, I am satisfied that this is one of those cases where the relevance of reputational factors exceeded purely economic considerations. I do not consider that the defendant acted reasonably in this particular case by including in its Calderbank offers a condition requiring the determination of the Authority to be set aside. In other words, even if it could have been said that the Calderbank offers beat the relief Ms Gini received in Court, I would still have concluded that Ms Gini had not acted unreasonably in rejecting them.

[34] I have assessed[26] Ms Gini's reasonable costs for the period leading up to and covering the hearing. In my earlier judgment, I referred to a modest award for that particular period given the "mixed results". In that regard I was making reference to the fact that although Ms Gini had succeeded in obtaining a significant increase in her non-economic loss compensation award, she had not obtained any increase in her

[25] At [25].
[26] At [23] above.

claim for loss of earnings. Having now had the opportunity of reviewing again every aspect of the case in the course of this costing exercise, I consider that only a small variation in the accepted 66 per cent starting point is necessary and appropriate in order to do justice between the parties. The percentage I fix in this regard is 60 per cent. In other words, the award I make in Ms Gini's favour for costs in respect of this second time period is for 60 per cent of the $6,620 figure referred to in [22] above, namely $3,972.

Disbursements and other costs

[35] The plaintiff also seeks disbursements totalling $1,121.22. Mr Cleary objects to the claims for airfares and incidental travel and accommodation expenses, "because they are not ordinarily awarded by the Court." I uphold that objection. Mr O'Sullivan resides in Southland. There is no reason why Ms Gini, who resides in Tawa, Wellington, could not have instructed a Wellington counsel or advocate to act for her. I do, however, allow the claim for filing fee, $204.44, hearing fees, $250.44 and I allow $15 as a contribution towards the postage charge in connection with the agreed bundle of documents.

[36] There is then the matter of Ms Gini's entitlement to costs in respect of the Authority investigation. The plaintiff seeks indemnity costs of $12,360 and disbursements of $438.21. In response, Mr Cleary suggested that the Court might refer the issue back to the Authority for determination given some of the allegations such as "suppressing evidence" which was strenuously denied by his client. Mr Cleary submitted that there were no special reasons to award any increase over the tariff costs of $3,000.

[37] I agree with Mr Cleary on this issue. There is nothing in the Authority's determination to indicate that the defendant's conduct in relation to the Authority's investigation was in any way out of the ordinary. Mr O'Sullivan filed an extensive (83 paragraphs) submission on the issue of Authority costs, which I have considered, but I have not been persuaded that there are any special factors warranting an award in excess of the standard tariff which, I accept, was approximately $3,000 at the time. I do not, therefore, propose to refer the matter back. Instead I fix the plaintiff's entitlement to costs in the Authority in the amount of $3,000. The sum of

$438.21 is claimed for disbursements in the Authority but I am prepared to allow only the filing fee which amounted to $71.56.

[38] Finally, Mr O'Sullivan claims an amount of $1,740 for costs in relation to the present application. I accept that he has made out a claim for an award of some costs in this regard in connection with the preparation of his recent extensive submissions on costs and other attendances relating to the calculation of the plaintiff's economic loss claim. I award the sum of $750 on this count.

Summary

[39] In summary, I make the following costs award in Ms Gini's favour:

1.	Costs in this Court [21] and [34] above	$9,252.00
2.	Disbursements [35] above	$469.88
3.	Costs in the Authority [37] above	$3,000.00
4.	Disbursements in the Authority [37] above	$71.56
5.	Costs on this application [38] above	$750.00
		$13,543.44
	Less costs on interlocutory hearing [8] above	$750.00
		$12,793.44

[40] The Registrar is hereby authorised to uplift the funds that have been paid into Court by Literacy Training, together with the interest thereon, and make payment of the same to Ms Gini's advocate on account of the awards that have now been made in Ms Gini's favour. The Registrar is to provide Mr Cleary with details of the payment out of Court.

A D Ford
Judge

Judgment signed at 3.30 pm on 7 March 2013