IN THE EMPLOYMENT COURT
AUCKLAND

AC 38/08
ARC 65/04

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
AND IN THE MATTER OF	an application for costs
BETWEEN	ROSS MCKEAN Plaintiff
AND	THE BOARD OF TRUSTEES OF WAKAARANGA SCHOOL Defendant

Hearing: by memoranda of submissions filed on 23 February, 28 March and 29 August 2007 and 16 April 2008

Judgment: 24 September 2008

COSTS JUDGMENT OF CHIEF JUDGE GL COLGAN

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[1] Following a finding that Mr McKean had been dismissed justifiably, Wakaaranga School Board of Trustees has applied for a direction that Mr McKean pays a contribution towards its legal costs.

[2] Although at trial Mr McKean was represented by counsel, that is no longer the position and he has made his own submissions on costs.

[3] The long delay in determining the Board's application for costs has been very regrettable but necessary in view of the unique circumstances of which the parties are aware and upon which I will not elaborate in this judgment. It is sufficient to say that for reasons in part connected with the conduct of this case by counsel for Mr McKean, his lawyer does not now practise as a barrister or solicitor.

[4] The Board succeeded in the proceedings brought against it by Mr McKean alleging that he had been dismissed constructively and unjustifiably. If not the commencement of these proceedings, then at least their maintenance and complication was attributable to Mr McKean's counsel so that, in the ordinary course of events, the Board may have been entitled to an award of costs reflecting this conduct of the litigation.

[5] The Board has been given the opportunity to seek leave to join as a party, for the purposes of costs, Mr McKean's solicitors and counsel but has elected not to do so in view of the very unfortunate repercussions from the case for Mr McKean's counsel.

[6] As Ms Chilwell, counsel for the defendant, has pointed out, the principles for the exercise of the broad statutory discretion include the ascertainment of costs reasonably incurred and the setting of a reasonable contribution to those reasonable costs. In many cases, two-thirds of actual reasonable costs is a convenient starting point but discretionary factors may increase or decrease that level: *Binnie v Pacific Health Ltd* [2002] 1 ERNZ 438 and *Health Waikato v Elmsly* [2004] 1 ERNZ 172.

[7] In this case the defendant made a Calderbank offer of settlement before the hearing began. As the judgment of the Court of Appeal in *Elmsly* confirms, the Court should usually make a *"steely response"* where the offeree does not better the Calderbank offer.

[8] The defendant's legal costs since September 2004, when the challenge was filed, amount to $139,174.90 including GST. Disbursements amount to a little less than $8,000. These amounts have been particularised in the defendant's submissions as the Court now expects. The claim for legal costs includes a contribution to the defendant's application to the Legal Services Agency seeking a contribution to Mr McKean's costs in the Employment Relations Authority. This is said to amount to a little more than $2,000 (including GST) of the total claim and accepts that there should be a reduction for costs claimed in this Court to $137,138.65. Unlike in the Authority, Mr McKean was not legally aided in this Court.

[9] I accept that this was an appropriate case for second counsel to represent the defendant, at least in the preparations for the hearing, and that the respective hourly charges of the defendant's two counsel were reasonable in all the circumstances.

[10] It is correct, also, that one of the main issues in the case was the application of the collective agreement's competency provisions, apparently the first time the Court has been called upon to interpret and apply these.

[11] The hearing of evidence occupied nine days separated by about two months because of the initial significant under-estimate of time, with a further day for submissions. It is correct that the defendant's estimate of time at hearing management was, although short, more accurate than the plaintiff's.

[12] As the defendant notes also, new causes of action were developed by the plaintiff as the hearing proceeded. It is correct, also, that new documentary exhibits were added by the plaintiff in the course of the trial. I have to say, however, that although the plaintiff must ultimately be responsible for the conduct of his case vis-à-vis the defendant, I was left with the abiding impression that many of the causes of these delays and substantial additional hearing time were attributable to Mr McKean's counsel's undiscriminating, albeit thorough, conduct of the case.

[13] The defendant made its first Calderbank offer six days before the hearing, renewing an earlier offer to pay the plaintiff $20,000 for distress compensation under s123(1)(c)(i) of the Act and to withdraw its application to the Legal Services Agency for a contribution in respect of the Employment Relations Authority's investigation. This offer was left open for acceptance by Mr McKean for approximately two days. Although that was a short period, Mr McKean's counsel responded immediately with a counter-offer (not expressed to be without prejudice except as to costs) which was not accepted. The defendant renewed its offer on 18 May, leaving it open for acceptance until 10 am on Friday 20 May. Again, this was not accepted. The defendant submits that the offer of settlement it made was reasonable and should have been accepted. With the benefit of hindsight, that is clearly so but, in my assessment, it ought also to have been so in light of the Employment Relations Authority's determination and the state of play in the litigation at the time the offer was made. The defendant estimates that its costs and disbursements incurred after 21 May 2005 (including GST) amount to $89,800.

[14] I accept also the defendant's submission that although, during the adjournment of the hearing, Mr McKean proposed mediation or a judicial settlement conference, it was

then reasonable for the defendant to have declined these proposals. The parties had already been to mediation, unsuccessfully, three times. The defendant had incurred significant expenditure in preparing its case. Without in any way denigrating dispute resolution mechanisms other than litigation, these stand a much better chance of success before the start of a hearing. I conclude, given Mr McKean's counsel's increasingly unrealistic assessments of his client's position, that settlement of the case would have been very unlikely in this way and at that time.

[15] In these circumstances the defendant seeks 80 percent of its fees ($109,710.92) and disbursements.

[16] Mr McKean has made his own submissions in opposition to costs. They were made at a point when he had, entirely appropriately, ceased to instruct his counsel and, indeed with significant justification, blames his counsel for some of the predicament in which he finds himself. There was, at that time, at least the possibility that Mr McKean's counsel might be joined in the proceeding for the purposes of liability in costs although the plaintiff has elected, responsibly in my view, not to do so in all the circumstances. I can say, however, that had Mr McKean's counsel been joined, he would have very likely faced a substantial order made against him personally. On the other hand, whether much, if anything, might have been recovered from him, is questionable in the circumstances.

[17] Mr McKean opposes costs for the following reasons. He says his counsel misrepresented many important elements of the litigation during its course that encouraged him to pursue and prosecute it. I accept this was so. For example, during the adjournment of the hearing Mr McKean's counsel told him he had settled the case for a extraordinarily substantial amount of money in Mr McKean's favour. That was not only inherently implausible, at least to others involved in the case, but simply wrong. I accept, also, that Mr McKean's counsel misled him about legal aid and did not make application for it as he intimated he would, but charged Mr McKean fees directly.

[18] Mr McKean discloses that he owes the Legal Services Agency $4,500, I assume in relation to the Authority investigation and determination.

[19] The plaintiff submits that he should not be required to contribute to the costs of second counsel, having been represented by one lawyer himself in Court. Responsibly, he does not suggest that he should make no contribution to the defendant's costs but, rather, that this should be equivalent to 25 percent of reasonable costs, that is $12,325 plus disbursements of $2,527.84.

[20] This has been both an unusual and an unfortunate case for all concerned. It is without precedent to my knowledge and determining the competing claims to, and defences of, costs has proved to be a difficult balancing exercise.

[21] I am conscious also of Mr McKean's circumstances. Having turned to teaching as a second and even late career choice, Mr McKean has learnt the hard way that it is not a vocation to which he is well suited, at least in State primary education. There were ramifications of his dismissal for performance reasons that may have affected his registration as a teacher and will almost certainly have made it very difficult for him to obtain other employment in this field. The Court will not make a costs award against a litigant in Mr McKean's position that would have a punitive effect.

[22] Irrespective of what I categorise as the responsible offer to pay something towards costs and disbursements made by Mr McKean himself, I had intended to make a similarly modest award against him.

[23] I direct that Ross McKean contribute the sum of $15,000 towards the Board's costs and the sum of $2,527.84 towards its disbursements.

GL Colgan
Chief Judge

Judgment signed at 10.45 am on Wednesday 24 September 2008