IN THE EMPLOYMENT COURT
CHRISTCHURCH

[2015] NZEmpC 150
CRC 8/13

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	GARY BURROWES Plaintiff
AND	THE COMMISSIONER OF POLICE Defendant

Hearing: (on the papers dated 2 and 30 June and 15 July 2015)

Counsel: A Shaw and J Behrnes, counsel for the plaintiff
S Turner and S Clark, counsel for the defendant

Judgment: 1 September 2015

COSTS JUDGMENT OF JUDGE B A CORKILL

Introduction

[1] In my substantive judgment of 7 May 2015[1] I considered a challenge to a determination of the Employment Relations Authority (the Authority) where a claim alleging three grievances was dismissed in its entirety.[2]

[2] Only two of those grievance findings were challenged in this Court. The first related to the question of whether New Zealand Police (Police) were justified in imposing a written warning with regard to the manner in which Mr Burrowes had conducted himself at meetings held on 28 April 2010. The challenge in relation to that incident was dismissed, because I concluded that the decision made by Police was substantively and procedurally justified.

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1 *Q v The Commissioner of Police* [2015] NZEmpC 57.
2 *Q v The Commissioner of Police* [2013] NZERA Christchurch 12.

[3] The second challenge asserted that Police were not justified in dismissing Mr Burrowes because he had breached Code of Conduct provisions by using excessive and unnecessary force against a member of the public at the Boogie Nights Nightclub on 9 May 2010. I concluded that the decision to dismiss was not a conclusion which a fair and reasonable employer could have reached in all the circumstances of the case at the time when the dismissal occurred, as assessed on an objective basis. In considering remedies, I ordered Police to pay Mr Burrowes lost wages for a period of 12 months from the date of dismissal, reduced by 40 per cent for his contributory conduct. He was also to be paid his employer superannuation entitlements for the same period, again reduced by 40 per cent. Interest was payable on both sums from 14 October 2012 to the date of payment at the rate prescribed under the Judicature Act 1908. I also directed Police to pay compensation under s 123(1)(c)(i) of the Employment Relations Act 2000 (the Act) in the sum of $10,500. I dismissed Mr Burrowes' application for reinstatement.

[4] I invited the parties to attempt to resolve any issues as to costs, and reserved leave for the making of a costs application if need be. The Court has been informed that the parties could not resolve this issue, and Mr Burrowes now requests the Court to make cost orders in two respects.

[5] The first relates to costs in the Authority. In its costs determination the Authority ordered Mr Burrowes to pay to Police $17,500 for costs, and $1,500 including GST for disbursements.[3] Because I have allowed a challenge in respect of one of the three grievances dismissed by the Authority, Mr Burrowes invites the Court to reconsider that issue. He seeks costs based on the Authority's notional daily rate for a five-day hearing, so that he is paid "at least" $7,500 and a disbursement of $1,226.64.

[6] The second application relates to costs in the Court. Mr Burrowes says through counsel that such costs should be fixed at a figure which is between $135,161.55 (being two-thirds of his actual costs for the challenge) and $174,930 (assessed according to the costs provisions of the High Court Rules), as well as disbursements of $8,743.05.

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[3] *Q v The Commissioner of Police* [2013] NZERA Christchurch 66.

[7] These applications are made in a context where the total costs of representation (including those incurred prior to the dismissal) were $296,518.51 including GST and disbursements.[4] As I shall explain later, a preliminary calculation of the monetary value of the Court's remedies provides an estimate of $62,210.42 before tax.

[8] The Commissioner opposes both of Mr Burrowes' applications. The Commissioner's primary position is that having regard to the fact that both parties had mixed success in both the Authority and the Court, no order as to costs is appropriate in either instance; alternatively there should be a significant reduction applied to any award to which Mr Burrowes would otherwise be entitled, so that a minimal contribution is payable.

[9] I shall refer to the detail of the submissions advanced by each party where relevant.

Legal principles

[10] The key legal principles relating to consideration of costs are well settled and are not controversial as between the parties.

[11] The starting point is cl 19 of sch 3 of the Act, which confers wide discretionary powers on the Court in these terms:[5]

> **19 Power to award costs**
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> (1) The Court in any proceedings may order any party to pay any other party such costs and expenses (including expenses of witnesses) as the court thinks reasonable.
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> (2) The Court may apportion any such costs and expenses between the parties or any of them as it thinks fit, and may at any time vary or alter any such order in such manner as it thinks reasonable.

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4 This includes $13,605 including GST and disbursements incurred during Mr Burrowes' employment, and $69,380.22 including GST and a disbursement for the Authority's investigation meeting.

5 See also reg 68(1) of the Employment Court Regulations 2000.

[12] The discretion is to be exercised judicially and according to principle. As was confirmed by the full Court on *PBO Limited (formerly Rush Security Limited) v Da Cruz,*[6] cl 19 refers to proceedings in both the Authority and the Court.

[13] That decision also approved the basic tenets which are appropriate for the Authority to apply when considering an application for costs in the Authority. These include:[7]

- There is a discretion as to whether costs be awarded and in what amount.
- The discretion is to be exercised in accordance with principle and not arbitrarily.
- The statutory jurisdiction to award costs is consistent with the equity and good conscience jurisdiction of the Authority.
- Equity and good conscience is to be considered on a case by case basis.
- Costs are not to be used as a punishment or as an expression of disapproval of the unsuccessful party's conduct although conduct which increases costs unnecessarily can be taken into account in inflating or reducing an award.
- It is open to the Authority to consider whether all or any of the parties' costs were unnecessarily or unreasonable.
- Costs generally follow the event.
- Without prejudice offers can be taken into account.
- Awards will be modest.
- Frequently costs are judged against notional daily rates.

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6 *PBO Ltd (formerly Rush Security Ltd) v Da Cruz* [2005] ERNZ 808 (EmpC).
7 At [44].

- The nature of the case can also influence costs and this has resulted in the Authority ordering that costs lie where they fall in certain circumstances.

[14] A full Court recently confirmed that these principles remain appropriate: *Fagotti v Acme & Co Limited*.[8]

[15] As was acknowledged by Judge Inglis in *Booth v Big Kahuna Holdings Limited*, "the level of legal costs in preparing for and attending an investigation meeting should be modest."[9] Parties who choose to incur costs in excess of the current notional daily rate of $3,500 are entitled to do so, but cannot confidently expect to recoup additional sums.[10]

[16] The position in the Court is different. That is because, as was explained in *Da Cruz*:[11]

> … In deciding costs, the Court has regard to costs reasonably incurred for the purposes of the Court hearing which is entirely adversarial in nature and, subject to judicial control, is conducted by and in a manner dictated by the parties. On the other hand, given its unique role in controlling its own investigations, the Authority must judge the reasonableness of the parties' costs in the light of whichever procedure has been adopted. It is apparent that the Authority's procedure may range from the formal to the informal and from at least part adversarial to inquisitorial and therefore the nature of the particular investigation meeting must be a relevant consideration to the exercise of the discretion to award costs.

[17] It is well established from Court of Appeal decisions that the Employment Court is required first to determine whether costs incurred by a successful party were reasonably incurred, and then after an appraisal of all relevant factors, decide at which level it is reasonable for the unsuccessful party to contribute to the successful party's costs. Sixty-six per cent is generally regarded as a starting point, although the Court has a discretion to consider whether there are factors justifying an increase or a decrease, given the discretionary nature of the assessment.[12]

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8 *Faggoti v Acme & Co Ltd* [2015] NZEmpC 135, at [114].
9 *Booth v Big Kahuna Holdings Ltd* [2015] NZEmpC 4 at [15].
10 At [17].
11 *Da Cruz*, above n 6, at [40].
12 *Victoria University of Wellington v Alton-Lee* [2001] ERNZ 305 (CA), *Binnie v Pacific Health Ltd* [2002] 1 ERNZ 438 (CA); *Health Waikato Ltd v Elmsly* [2004] 1 ERNZ 172; (2004) 17 PRNZ 16 (CA) and *Belsham v Ports of Auckland Ltd* [2014] NZCA 206 (CA).

[18] Of particular importance in the present case is the question of how the costs assessment is to be undertaken where both parties have a measure of success. In *Elmsly*, the Court of Appeal stated:[13]

> [39] It is not usual in New Zealand for costs to be assessed on an issue by issue basis, albeit that it is common enough, where both parties had a measure of success at trial, for no order as to costs to be made. The reluctance to assess costs on an issue by issue basis probably stems from the reality that in most cases of partial success it is not practical to separate out from the total costs incurred by the parties what was incurred in relation to the individual issues before the Court.
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> [40] The result of the present case was that Dr Elmsly was awarded relief and it would appear (given that there was no Calderbank letter) that he had to go to Court to receive that relief. Conventional practice (probably influenced by the way in which the old payment in rules used to operate) has been to regard a plaintiff in this situation as having an entitlement to costs. While this is no doubt a simplistic and not entirely logical approach, it is reasonably straightforward to apply. Further, it is not unjust to defendants, providing Judges are prepared to react appropriately where there has been a Calderbank offer. In any event, whatever the merits of the current costs practice, there is nothing out of the ordinary in the conclusion of the Judge that Dr Elmsly was entitled to costs.

[19] Subsequently the same Court stated in *White v Auckland District Health Board:*[14]

> [46] It has been recognised by this Court however that where the parties have achieved mixed success, it is not necessarily easy to determine who won the case so as to be entitled presumptively to costs. In such cases, where both parties have achieved a measure of success at trial it may be appropriate for no order for costs to be made: *Health Waikato Ltd v Elmsly* … at paras [39] and [40].

[20] As was submitted by counsel for the defendant in the present case, there are numerous instances where both parties have had a measure of success and the Court has directed that costs should lie where they fall.[15] The Authority has also adopted

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13 *Elmsly*, above n 12, at [39] and [40].

14 *White v Auckland District Health Board* [2008] NZCA 451, [2008] ERNZ 635. See also *Smith v Life to the Max Horowhenua Trust* [2011] NZEmpC 7 at [15].

15 *Bourne v Real Journeys Ltd* [2012] NZEmpC 2; *Smith v Life to the Max Horowhenua Trust* above n 11, at [16] and [18]; *Panovski v Marine Trimmers and All Awnings (2004) Ltd*, AC24A/08, 16 December 2008 (EmpC) at [29], and *Lwin v A Honest International Company Ltd*, AC64/04, 3 November 2004 (EmpC) at [7].

the same approach.[16] Whether such an approach is appropriate in this case is an issue I shall consider in light of each counsel's submission.

[21] As neither party raised any issues as to GST, I adopt the approach which I described as GST neutral in *Wills v Goodman Fielder*; such is the usual practice of the High Court.[17]

Costs in the Authority

[22] Since Mr Burrowes' challenge has succeeded in part, the Court must now consider the implications of that success in respect of costs in relation to the investigation meeting.

[23] I begin with a brief summary of the Authority's costs determination. The Authority Member started her analysis with the proposition that the Commissioner was entitled to a contribution to costs as the successful party. The investigation meeting took five days; the Authority Member held that the starting point under *Da Cruz* principles was accordingly $17,500. Police had submitted that the notional daily rate should be increased having regard to the fact that investigation meetings had to be adjourned for various reasons as described in the determination. The Authority declined to do so. Mr Burrowes, representing himself at that stage, submitted that the matter had "cost him over $250,000", although he provided no details. He went on to assert he had no funds to pay any costs. The Authority held there was no information to support this assertion. In the event the Authority was not persuaded that the notional daily rate should be decreased. A Police disbursement, which related to travel and accommodation for one counsel totalling $1,500 including GST, was allowed.

[24] In the submissions made for Mr Burrowes now, the Court is advised that the professional fees for his representation in the Authority were $69,380.22, including GST. That said, counsel accepted that costs should be based on the notional daily

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16 *Lewis v Welding Engineers (NZ) Ltd*, AA4/06, 12 January 2006 at [3]-[4]; *Osborne v Te Runanga o Kiriora Trust Inc*, AA64/06, 7 March 2006 at 7; and *Phillips v Bay of Plenty Polytechnic*, AA7A/05 at [14].

17 *Wills v Goodman Fielder New Zealand Ltd* [2015] NZEmpC 30 at [23]-[34]; *Burrows v Rental Space Ltd* (2001) 15 PRNZ 298 (HC). This approach has also been confirmed in the Court of Appeal: *Thoroughbred & Classic Car Owners' Club (Inc) v Coleman*, unreported, CA 203/93, 25 November 1993 (CA).

tariff; and that Mr Burrowes should be awarded costs of at least $17,500. It was submitted there should be an additional order in respect of a disbursement, being a hearing fee paid to the Authority in the sum of $1,226.46 inclusive of GST.

[25] For Police it was emphasised that ultimately Mr Burrowes had succeeded on only one of three alleged grievances; and that he had not obtained all the remedies which he sought. In effect, Police submitted that Mr Burrowes' success was modest and that the fair approach in those circumstances would be to order that costs lie where they fall. I shall return to this submission shortly.

[26] Counsel for Police also dealt with particular submissions which were made for Mr Burrowes. It had been contended that in the Authority the investigation meeting involved many witnesses and extensive documentation. In response counsel submitted that eight witnesses were called by the plaintiff, whereas only six witnesses were called by Police. Because no further analysis has been provided that would allow a realistic assessment to be made as to what evidence was called for the purposes of particular issues, the costs assessment cannot proceed on that basis.

[27] Next, it had been asserted for Mr Burrowes that there were "complex legal issues supported by significant legal submissions". Counsel for Police asserted in reply that there were no complex legal issues raised by the case. The Authority's determination shows that there was no need for the Member to discuss legal issues at all. Based on my review of the determination, I do not accept that the matter involved complex legal issues. Rather, the Authority summarised a detailed chronology and then analysed it carefully. But this factor does not require an uplift.

[28] For Police it was submitted that "the plaintiff's two unsuccessful personal grievances took up considerable time at the investigation meeting, reflected in the fact that over 45 per cent of the Authority's determination related solely to these two grievances". I do not consider that an assessment of costs with regard to each of the three grievances can sensibly be made on the basis of the quantum of paragraphs contained in a determination. The division of information into paragraphs is somewhat of a subjective matter for an individual decision-maker.

[29] In my view, the starting point must be the dicta of the Court of Appeal in *Elmsly,* that costs are not usually awarded on an issue by issue basis; it being

common for no order for costs to be made where there is mixed success.[18] As that Court confirmed, such an outcome likely arises from the reality that in most cases of partial success it is not practical to separate out costs on particular issues.

[30] However, in this instance, there was a clear delineation between the circumstances, giving rise to the unjustified action grievances on the one hand, and the dismissal grievance on the other. Given the Court's detailed knowledge of the circumstances it is practical and possible to distinguish between those claims which did not succeed in the Authority, and the one which did. I find that the dismissal grievance was of particular significance to Mr Burrowes; this conclusion is supported by the fact that he sought reinstatement and significant financial remedies.

[31] My conclusion is that although two of Mr Burrowes' grievance claims were dismissed, he ultimately succeeded on his most significant claim. Accordingly he should receive a costs award in the Authority to recognise the bringing of the dismissal claim which was ultimately upheld. He has had sufficient success to justify an award in his favour of 50 per cent of the costs which he would have received if he had been completely successful and if the notional daily rate had been applied, that is $8,750.

[32] I am not persuaded that there should be any increase of this amount, which is based on the notional daily rate routinely adopted by the Authority. Whilst it is the case that Mr Burrowes' actual costs in the Authority were very significant, I have been provided with no evidence or explanations on that topic which would justify an increase above the normal rate.

[33] Turning to the claim for reimbursement of the hearing fee disbursement, I allow 50 per cent which is $613.32.

[34] Accordingly, the assessment as to costs made by the Authority is set aside and Police are to pay Mr Burrowes costs in the sum of $8,750 and a contribution to the disbursement of $613.62.

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[18] *Health Waikato Ltd v Elmsly,* above n 12, at [39].

Costs in the Court

[35] The first issue requiring discussion relates to the quantum of Mr Burrowes' costs. His lawyer's timesheets and invoices with regard to the challenge have been placed before the Court, and these confirm he was invoiced $178,067, plus GST. This sum includes $623.46 plus GST for courier charges and photocopying of the five-volume bundle of documents prepared for the hearing.

[36] Before commenting on these charges, I record that the invoices rendered to the defendant have also been placed before the Court; total charges to Police were $257,606 plus GST. The provision of these invoices assists in my analysis of the costs rendered to Mr Burrowes.

[37] First, I consider the hourly rates which were charged to Mr Burrowes. The challenge was filed in February 2013; attendances ran from then until the conclusion of the hearing in February 2015. Senior counsel charged $450 to $475 plus GST per hour; two junior counsel were involved, and they charged $300 to $350 plus GST per hour. Law clerks charged at varying rates from $100 to $175 plus GST per hour. It is useful to compare the hourly rates charged by those representing Police; these were $400 per hour for senior counsel, between $235 and $270 per hour for junior counsel, and $100 per hour for law clerks.

[38] In *Penney v Fonterra Cooperative Group Limited*,[19] Judge Couch considered the issue of hourly rates. He said:

> [9] … It must also be said that, in the context of this litigation, an hourly rate of $590 plus GST per hour was unreasonable per se. The maximum rate provided for in the High Court Rules equates to an hourly rate of about $450 plus GST. Under those rules, this proceeding could not be regarded as any more than category 2, that is proceedings of average complexity requiring counsel of skill and experience considered average in the Court. The rate provided for such proceedings equates to about $350 plus GST per hour.
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> [10] What can be calculated in this case is that the average rate the defendant was charged for all of the work apparently done on its behalf was just under $350 plus GST per hour.
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> [11] There must always be a trade off between the hourly rate charged for legal work and the time taken to do the work. Thus, a practitioner who professes to have skill and experience justifying an hourly rate at the top of

[19] *Penney v Fonterra Cooperative Group Ltd* [2012] NZEmpC 67 (footnotes omitted).

> the range of what is reasonable can be expected to complete the work in less time than a practitioner with less skill and experience who charges less.

[39] It is my assessment that although senior counsel's hourly rates were high, it is evident from the narrative contained in the invoices rendered to Mr Burrowes that there was an appropriate division of work between senior and junior counsel, with some assistance from law clerks from time to time. The invoices suggest that a roughly equivalent sum was charged for each of senior and junior counsel. The average hourly rate for the two lawyers, taken together, ranged from $375 to $412 per hour. Although the hourly rates of the plaintiff's lawyers were higher than those of the defendant's lawyers, a considerably greater quantity of time was expended in preparation of the defendant's case; in the end the total sum charged in bringing Mr Burrowes' case was less than the total sum charged in defending it. I conclude that having regard to the appropriate use of senior and junior counsel, the hourly rates which Mr Burrowes was charged were fair and reasonable, albeit at the top end of the range.

[40] Next, I consider the extent of preparatory work. A substantial proportion of the legal charges for both parties relate to preparation. In the case of Mr Burrowes, the total charges which proceeded the hearing were $151,943 plus GST; and in the case of Police $211,074 plus GST.

[41] The defendant submits that the amount devoted to preparation was excessive having regard to the fact that a great deal of preliminary work was performed in the course of the proceedings before the Authority. It is submitted that since substantially the same issues were raised before the Court, the plaintiff's significant costs could not be considered reasonable. In response it is submitted that the nature of the case taken in the Authority was different, that no formal bundle of documents was required in the Authority, nor a chronology or agreed statement of facts, that the witness statements in the Authority were not comprehensive and required significant rewriting by the witnesses, and that additional witnesses had to be called. I find that there is force in the concern as to the extent of preparation, given the fees incurred

for the purposes of the investigation meeting were very significant: they exceeded $69,000.[20]

[42] However, the same could be said of the extent of preparation undertaken to represent Police. The defendant incurred significant costs in the Authority for the purposes of the investigation meeting, and then incurred higher costs of preparation for the challenge than the plaintiff.

[43] I turn now to aspects of the preparatory work. A significant volume of documentation was prepared and placed before the Court. It was all of assistance. Whilst some individual documents were less helpful, on the whole, as I indicated to counsel during the hearing, the preparation of the bundle was undertaken thoroughly and competently. In a case that involved a long chronology, I was assisted by the provision of a bundle which had been carefully prepared. It is also evident that – on both sides – careful attention was devoted to the preparation of briefs of evidence, cross-examination and closing submissions. Preparation for all of this was no doubt time-consuming. However, the case was very important to both parties, which is no doubt why the costs of preparation were high on both sides. In those circumstances it could not be said that such costs were excessive.

[44] I observe that the invoice rendered to Mr Burrowes for work undertaken in December also reflected a write-off of some $4,000; and the work in that month was undertaken by junior counsel only. These factors suggest that a fair and reasonable approach has been adopted to the rendering of invoices to the plaintiff.

[45] The invoice for December 2014 also includes a fee for attending mediation. Mediation was directed by the Court under s 188(2) of the Act. In those circumstances I consider it appropriate that the mediation costs in this instance should be regarded as having been necessarily incurred in the proceedings, and subject to the same considerations for recovery as other costs.[21] As to quantum, $2,100 was charged which I consider in the circumstances to be fair and reasonable. I note that it was not contended for the defendant that these costs should be excluded.

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[20] Counsel who represented Mr Burrowes with regard to the challenge did not represent him for the purposes of the Authority proceeding.

[21] *Jinkinson v Oceania Gold (NZ) Ltd* [2011] NZEmpC 2 at [15]-[16].

[46] Mr Burrowes was charged $26,125 plus GST for the hearing and for one counsel only. Police were charged $46,532 plus GST for the hearing and for two counsel. I consider the charges rendered to Mr Burrowes in respect of the hearing to be fair and reasonable for cost purposes.

[47] Each counsel argued in their submissions that the other side had unnecessarily escalated costs by taking an unreasonable stance on such factors as the preparation of the index for the bundle of documents, the chronology, and whether interlocutories and an official information request were necessary. On this topic I must focus on the plaintiff's costs for these attendances; I do not regard the charges for these attendances being so significant as to require an adjustment.

[48] Standing back, I consider that the factors considered to this point support a conclusion that the invoiced sum of $178,067 exclusive of GST, is a fair and reasonable starting point for the purposes of the costs application.

Assessment under the High Court Rules

[49] A more significant issue relates to the reliance which both parties placed on schs 2 and 3 of the High Court Rules. This Court is not bound to apply these schedules, although from time to time it can be useful to consider the amounts which the High Court might award in similar litigation.[22] In this case, I regard recourse to the Rules as being of assistance for the purposes of a cross-check.

[50] It is submitted by counsel for Mr Burrowes that under sch 2 of the High Court Rules, Category 3 is the appropriate daily rate, which at the time of this litigation was $2,940.[23] Counsel also argues that Band C of sch 3 is appropriate given the extent of time devoted to particular steps. Applying Category 3 and Band C, counsel has produced a calculation totalling $174,932.[24]

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22 *Smith v Air New Zealand* EMPC Auckland AC17/01, 19 March 2001 at [17], *Cliff v Air New Zealand Ltd* EMPC Auckland AC47A/06, 17 November 2006 at [17]-[19] and *Allright v Cannon New Zealand Ltd* EMPC Auckland AC1/09, 5 February 2009 at [11].

23 The daily rates were increased with effect from 1 July 2015: High Court Amendment Rules 2015; the pre-amendment rates are appropriately adopted in this case.

24 The calculation is based on items 1, 20, 21, 22, 30, 31, 33, 34, 35 and 40. Item 35 applies where the Court allows for second and subsequent counsel, an item for which there was no charge to Mr Burrowes.

[51] By contrast, counsel for Police submits that the appropriate calculation is under Category 2 where the daily rate is $1,990. Applying a combination of Band B and Band C time allocations,[25] the amount so calculated by counsel totals $57,710.

[52] In my opinion, these were proceedings of average complexity requiring counsel of skill and experience which could be considered average in the Employment Court; Category 2 is accordingly appropriate. However, as is evidenced by both sides' invoices, those representing each party devoted a very significant amount of time to preparation; I have concluded this was not unreasonable. I consider that Band C is accordingly appropriate. Allowing for all of the items referred to by Mr Burrowes' counsel except for second and subsequent counsel since no actual charge was made in that regard, the total is 54 days which at a daily rate of $1,990 produces a total of $107,460. The High Court scale is predicated on the basis that "an appropriate daily recovery rate should normally be two-thirds of the daily rate considered reasonable in relation to the proceeding."[26] A grossed up figure is accordingly $161,190.

[53] The analysis under the High Court Rules does provide a helpful cross-check of my assessment of reasonable costs. It produces a figure which is less than that actually incurred by the plaintiff, but not significantly less.

Other factors

[54] Counsel for Police submits that there are a number of other factors which justify a reduction of any starting point figure. Before dealing with the most significant of those, which is that the parties had mixed success, there are a number of other less significant points which it is convenient to deal with now. In my view they should be assessed globally. They are as follows:

a) It is submitted the plaintiff withdrew his personal grievance relating to the defendant's decision not to return him to normal duties following his warning, so that the Authority's findings on this grievance were undisturbed on challenge to the Court. Also, unnecessary costs were

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[25] Items 1, 30, 31, 33 and 34.
[26] High Court Rules, r 14.2(d).

incurred in having to apply to have claims relating to the plaintiff's stand-down and restricted duties struck out on the basis they were out of time. I agree that a modest allowance should be made for these factors.

b) The second issue relates to admissibility of evidence issues. At the commencement of the hearing the Court was required to consider submissions from both parties as to the admissibility of certain statements in four briefs of evidence filed for Mr Burrowes. That application was partially successful in that I ruled some paragraphs of those briefs contained evidence that was not admissible. In response, it is submitted for the plaintiff that there were passages in the defendant's briefs which could also have been the subject of objection, but the view was taken that it was preferable to allow the Court to exercise its discretion and apply weight as might be appropriate. I observe, however, that no relevant application was made by the plaintiff so that there was no consequence in costs. I find the defendant did make a partially successful application and is accordingly entitled to some allowance for this factor.

c) For the defendant it is submitted that a direct consequence of the warning grievance, which related to the unit for whom Mr Burrowes had worked, was that the plaintiff had to apply for *in camera* and non-publication orders. However, the application was unopposed. That said, some allowance is appropriate for this application.

d) The defendant submits allowance should also be made for the unsuccessful application made to the Court following the hearing for permanent non-publication orders.[27] I agree.

e) Finally, the defendant submits that the duration of the hearing was unduly prolonged because the plaintiff required "pedantic scrutiny of the defendant's processes". Counsel submits that I recognised this in my judgment when I referred to Dr Webb's evidence as to

[27] *Burrowes v Commissioner of Police* [2015] NZEmpC 91.

Mr Burrowes' "very intellectual, pedantic and technical analysis of every aspect of … events [reflecting] his obsessional personality and need for justice and just process".[28] Counsel goes on to submit that these traits were reflected in the way in which the hearing was conducted, and that it resulted in minor issues being traversed in great detail, which had little or no ultimate significance. The example is given of the time spent on cross-examination of Mr Mikaera and the ultimate conclusion of the Court that the asserted "plethora of flaws" was misconceived.[29] Counsel also referred to the close analysis of Mr Kynaston's investigation and report, where the Court found that he had been entitled to reach the conclusions which he did. I find that Mr Burrowes' case did require an unduly close scrutiny of the chronology relating to both grievances. Counsel has made no submission as to the financial consequences of this problem, but I take it into account in my assessment.

f) Counsel for Police advises that the costs incurred by the defendant in dealing with these factors, save for the last, totalled $30,311.18. I have perused each of the defendant's invoices, and observe that some include reference also to other attendances. Standing back, it is my assessment that a downward adjustment of the plaintiff's starting figure of $20,000 for these factors is appropriate.

[55] In summary to this point, I consider that having regard to the total of the plaintiff's invoices, considered in the context of the amount charged by the defendant's lawyers and the figure produced by reference to the Schedules to the High Court Rules, the figure of $178,067 should be reduced by $20,000 to $158,067. This sum represents the adjusted starting point before considering any apportionment in light of my assessment of success, and the issues flowing from a Calderbank offer.

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28 *Q v The Commissioner of Police*, above n 1, at [333].

29 As discussed in *Q v The Commissioner of Police*, above n 1, at [227], [234] and [236].

Mixed measure of success

[56] The defendant submits that there should be a substantial adjustment to reflect the issues on which the plaintiff failed. Thus:

a) Counsel estimates that "around 40 per cent" of hearing time was devoted to issues relating to the unsuccessful challenge. To support this assessment, reference is made to the evidence given by witnesses, with percentages based on the numbers of paragraphs or pages devoted to the issue, the fact that only 61 of the 253 documents related to the challenge which succeeded; and that 129 paragraphs of the Court's judgment addressed the warning whilst 160 paragraphs addressed the dismissal, being 32 per cent of paragraphs in the judgment. Counsel realistically accepts that this is not an exact science; moreover, it focuses only on features of the hearing itself.

b) Counsel further submits that the claim for reinstatement failed, and that Mr Burrowes received monetary remedies which were significantly less than those sought. I observe that the time devoted to remedies was relatively modest.

c) As an aspect of the submission that the plaintiff had limited success, reference was made to the contribution finding. I put that fact to one side. The Court of Appeal made it clear in *White* that it is not appropriate to take into account contributory conduct both in relation to remedies and costs.[30]

[57] The primary submission of counsel for the defendant is that the guidance of the Court of Appeal in *Elmsly* should be followed. As I said earlier, the Court in that instance recorded that in some instances of mixed success it is appropriate for no order as to costs to be made. As the Court pointed out, in such cases of partial success it is not practical to separate out costs incurred with regard to individual issues.

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[30] *White v Auckland District Health Board*, above n 14, at [38]-[40] and [43].

[58] In the exercise of my discretion I do not consider that such an approach is fair and reasonable in the present case. The reality is that Mr Burrowes had to bring a challenge in order to establish his dismissal grievance. In my view he had sufficient success at trial as to warrant an award of costs. Further, in a case where there were two discreet causes of action, one of which failed and the other of which succeeded, the Court is well able to make a realistic apportionment.

[59] I have already found that of the two grievances, the more important one was the dismissal grievance, since it was the circumstances which gave rise to that grievance which had particularly significant consequences for Mr Burrowes. That said, an equal split of the assessed fair and reasonable costs is not the correct approach; rather, I consider that the fair and reasonable costs for the purposes of the successful cause of action should be determined by adopting the approach of the Court of Appeal in *Elmsly* where, in a situation where the reasonable costs were $72,000, the Court fixed $30,000 as the proportion of costs reasonably incurred in relation to the issues on which the appellant succeeded; it then allowed for two-thirds recovery of that figure, which produced a costs award of $20,000.[31]

[60] I consider that methodology to be appropriate in this instance. For present purposes I have found that reasonable costs were $158,067. I then found that $100,000 is the proportion of costs reasonably incurred by the plaintiff with regard to the cause of action on which he succeeded. I allow for two-thirds recovery of that figure, producing a costs award of $66,666.

Disbursements

[61] The quantum of disbursements must be assessed to enable a proper consideration of the Calderbank offer made shortly before the hearing. I therefore address that issue next. I do so on the basis that, as Judge Inglis put it, to qualify as a reasonable disbursement, "a payment must be both necessary to the conduct of the proceeding and reasonable."[32]

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31 *Elmsly*, above n 12, at [48].

32 *Baker v St John Central Regional Trust Board* [2013] NZEmpC 109, at [43].

[62] The plaintiff seeks an order in respect of four disbursements on the basis they were reasonably incurred. It is convenient to consider the first two together. The first is the sum invoiced for the preparation of a report and the giving of opinion evidence by Dr Webb, a Clinical Psychologist. Her fee was $3,146.40 including GST. The second invoice relates to the costs of Mrs Beekhuis, who described her attendances on Mr Burrowes at the request of a Police Welfare Officer in mid-2010. Her fee was $1,125 including GST.

[63] For the defendant, it is submitted that the evidence of these witnesses was of little or no value and that it was unnecessary to call two experts to traverse the same topics; it was also pointed out that successful applications were made to have aspects of the evidence of both those witnesses struck out.

[64] Dr Webb's evidence focused on the issue of whether Mr Burrowes had a recognised mental health condition at material times. She concluded that he did not, although she did explain the view that he had an "obsessional personality" and a "need for justice and just process". This evidence was of some assistance to the Court when considering the possibility of reinstatement. Mrs Beekhuis' evidence was led primarily for the purposes of the warning grievance, which was not upheld. I did however find her evidence relevant when considering the issue of reinstatement.

[65] I allow all of the costs relating to Dr Webb and 50 per cent of the costs relating to Mrs Beekhuis' evidence; that is, a total of $3,708.90.

[66] Next, airfares were sought in respect of Mr Banff, namely $214 including GST. His evidence related to his participation in, and observation of, the incident at the Boogie Nights Club, which was relevant to the reports prepared by Mr Mikaera and Mr Kynaston. The claims made with regard to the processes and conclusions reached in each of those reports were not upheld. Nor was the Court materially assisted by Mr Braniff's evidence. I disallow this disbursement.

[67] Finally, the plaintiff seeks recovery of the disbursement paid to the Ministry of Justice for a hearing fee for 17 half days totalling $4,257.65 including GST. Given mixed success, I allow 50 per cent of this disbursement, being $2,128.82.

[68] Accordingly, the total amount payable for disbursements is $5,837.72 including GST.

Calderbank offer

[69] For the defendant it is submitted that Police are entitled to the benefit of a Calderbank offer which was made on 14 January 2015, some 14 days before the hearing commenced. The terms of the offer were that:

a) the written warning would be removed from the plaintiff's file;

b) it would be agreed that the plaintiff could advise that his employment had ended by way of resignation (effective on the date of his dismissal);

c) a certificate of service would be provided;

d) a payment of $11,000 would be made under s 123(1)(c)(i) of the Act;

e) payment of the $19,000 costs award made against Mr Burrowes by the Authority would not be pursued; and

f) costs would otherwise lie where they fell.

[70] The defendant submits that had this offer been accepted, Mr Burrowes would have been in the same, if not a better, position than is the case now. It was argued that a preliminary calculation of the payment owed to the plaintiff for lost wages and the employer's superannuation based on his salary at the date of his dismissal produces a figure of $51,710.42 gross; and that along with the $10,500 awarded by the Court under s 123(1)(c)(i) of the Act, the total monetary value of the Court's judgment to the plaintiff is estimated at $62,210.42 before tax. It is contended that in assessing the financial component of the Calderbank offer there has to be given consideration to the costs incurred by the plaintiff following his declinature of the offer.

[71] It is also submitted that Mr Burrowes would have had the benefit of the written warning being removed from his file, whereas the Court has now found that the warning was justified. Mr Burrowes would have been able to advise that his employment ended by way of resignation and he would have had a certificate of

service to support that statement; this would have had the same practical benefit as the Court's unjustified dismissal finding. Accepting the Calderbank offer would also have achieved Mr Burrowes' desire to have his identity and that of his family remain anonymous.

[72] Thus, it is submitted that Mr Burrowes' rejection of the Calderbank offer was unreasonable and supports the Police's submission that costs should lie where they fall, or alternatively that costs that would otherwise be payable should be significantly reduced.

[73] In response for Mr Burrowes, it is submitted that by the time the offer was made, almost all of the preparation had been undertaken for the hearing, including the filing of all evidence, preparation and filing of the agreed bundle of documents, and the finalising of an agreed statement of facts. The offer did not reflect the significant costs incurred by Mr Burrowes up to that time.

[74] Counsel for the plaintiff also submitted that the offer did not adequately address Mr Burrowes' reputation concerns nor his ability to explain his circumstances to third parties. The offer to reclassify his dismissal as "a resignation" would have been of little benefit to Mr Burrowes, since he had been out of his role for some four and a half years. To tell others that he had resigned was not plausible. It was submitted it was of considerably greater value to his reputation for him to be able to say that he was unjustifiably dismissed, which he is now able to do.

[75] The relevant principles as to offers of this kind are well known, and conveniently summarised by the Court of Appeal in *Blue Star Print Group (NZ) v Mitchell*:[33]

> [19] 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 costs 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.

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[33] *Blue Star Print Group (NZ) Ltd v Mitchell* [2010] NZCA 385, [2010] ERNZ 446, (footnotes omitted).

> [20] We consider that the potential for vindication to be a relevant factor does not mean that the developed prudence under the High Court Rules costs regime should be ignored. We reject Mr Churchman's submission that the principles applicable to Calderbank offers should be adjusted or ignored in employment cases merely because of the nature of the employment relationship and because employees may in certain cases be motivated in part by the desire for vindication. As this Court has previously said a "steely" approach is required. It has been repeatedly emphasised that the scarce resources of the Courts should not be burdened by litigants who choose to reject reasonable settlement offers, proceed with litigation and then fail to achieve any more than was previously offered. 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. The importance of Calderbank offers is emphasised by reg 68(1). It is the only factor relevant to the conduct of the parties specifically identified as having relevance to the issue of costs.

[76] In comparing a Calderbank offer with the value of a judgment sum, it is necessary to assess the quantum of the judgment together with any likely order as to costs up to the date of the settlement offer. I respectfully agree with the recent analysis of Judge Ford in *Rodkiss v Carter Holt Harvey Limited* to this effect.[34] Since the offer which was made in this case included an allowance for costs in the Authority, I consider it is appropriate to utilise the actual amount of costs and disbursements in the Authority which I have found to be appropriate in this judgment.

[77] Had Mr Burrowes accepted the Calderbank offer, its financial value would have been $30,000 ($11,000 under s 123(1)(c)(i), and waiver of the obligation to pay costs ordered by the Authority in the sum of $19,000). That sum is to be contrasted with the amounts awarded by the Court. These are the remedies assessed on a provisional basis totalling $62,210.42 before tax; $8,750 for costs in the Authority, and a disbursement of $612.62. I assess costs and disbursements in the Court to the date of the offer as being $50,000. The total of the comparator sum is accordingly a little over $120,000. Having regard to the foregoing I do not accept the submission that Mr Burrowes would, by accepting the offer, have been placed in a superior financial position than that in which he finds himself now. Nor did the terms of the

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[34] *Rodkiss v Carter Holt Harvey* [2015] NZEmpC 147, at [35]-[36] adopting the dicta of Whata J in *Gauld v Waimakariri District Council* [2014] NZHC 956 at [20].

financial offer made provide sufficient compensation as to convey a "distinct element of vindication".[35]

[78] Turning to the offer to remove the written warning from Mr Burrowes' file, and to place him in a position where he could say he had resigned with a certificate of service to that effect, I accept the submission made for Mr Burrowes that this would have been of modest benefit. Four and a half years has passed since the relationship problem was brought first to the Authority and then to the Court. Mr Burrowes, for the reasons he gave in evidence, had been fully focused on the litigation for this period. Were an application for work to be made thereafter, any potential employer would wish to know why Mr Burrowes had not applied for employment during that period, if he had apparently resigned. This outcome could well have created more problems that it would have solved.

[79] In addition to the hypothetical outcome, the actual result must also be considered. Mr Burrowes did not succeed in his application for reinstatement, but he did establish that he was unjustifiably dismissed; that finding may perhaps go some way towards vindicating his reputational concerns.

[80] Finally, I deal with the submission made for Mr Burrowes that as at the date of the offer substantial costs had been incurred. That is not a particularly strong point because the challenge had long since had any reasonable prospect of being economic. Given the advanced state of preparation and Mr Burrowes' significant financial commitment to his claims along with a late Calderbank offer, it was not unreasonable for him to decide at that point to proceed to a hearing.

[81] In summary, I do not consider that the contribution which Police should otherwise make to Mr Burrowes' costs should be reduced on account of its Calderbank offer.

[82] Although I am very concerned to find that Mr Burrowes has expended a huge sum on costs and disbursements, and has recovered only a fraction of it, that fact does not justify increased costs awards in the Authority or Court. As I observed earlier, the discretion as to costs must be exercised judicially and in accordance with

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[35] *Blue Star*, above n 33, at [19].

established principles. There is no evidence before me as to the advice given to Mr Burrowes regarding his potential liabilities at each stage of the proceeding, and I make no criticism of counsel in that regard since they were, I assume, acting on Mr Burrowes' instructions. However, on the face of it, the claim was far from cost effective. The end result demonstrates the importance of ensuring that clients are fully and properly advised as to the prospects of recovery of actual costs.

Conclusion

[83] I order payment to the plaintiff by the defendant of:

a) Costs in the Authority in the sum of $8,750, and a contribution to a disbursement of $613.32;

b) Costs in the Court of $66,666 and a contribution to disbursements of $5,837.32.

[84] On 12 January 2015, Mr Burrowes paid the sum of $19,000 into Court, so as to obtain a stay execution of the Authority's costs order. I direct the Registrar to pay this sum and accrued interest thereon to Mr Burrowes' lawyers.

B A Corkill
Judge

Judgment signed at 4.40 pm on 1 September 2015