IN THE EMPLOYMENT COURT
AUCKLAND

[2014] NZEmpC 100
ARC 91/10

IN THE MATTER OF	proceedings removed by special leave
AND IN THE MATTER	of costs
BETWEEN	LAURA JANE GEORGE Plaintiff
AND	AUCKLAND COUNCIL Defendant

ARC 124/10

IN THE MATTER OF	proceedings removed
AND IN THE MATTER	of costs
BETWEEN	AUCKLAND COUNCIL Plaintiff
AND	LAURA JANE GEORGE Defendant

Hearing:	By submissions filed on 3 February, 4 and 6 March, and 13 June 2014
Appearances:	A R Drake, counsel for Ms George T L Clarke and E J Coats, counsel for Auckland Council
Judgment:	18 June 2014

COSTS JUDGMENT OF JUDGE CHRISTINA INGLIS

Introduction

[1] These proceedings involve an unsuccessful claim of unjustified dismissal and disadvantage by Ms George against her former employer, the Auckland Council (the

Council),[1] and an unsuccessful claim for breach of contract by the Council against Ms George. Both proceedings were heard together. The parties were encouraged to seek agreement as to costs but have been unable to do so. Both parties now claim costs against each other and have filed extensive submissions and material in support of their respective positions.

[2] The background to these proceedings is fully set out in my substantive judgment.[2] The hearing in this Court was at first instance, Ms George having successfully applied for special leave to remove her claim to the Court. The Council's claim against Ms George followed suit soon after.

[3] Clause 19(1) of Sch 3 to the Employment Relations Act 2000 (the Act) confers a broad discretion as to costs. It provides that:

> The court in any proceedings may order any party to pay to any other party such costs and expenses ... as the court thinks reasonable.

[4] The discretion to award costs, while broad, is to be exercised in accordance with principle. The primary principle is that costs follow the event. The usual starting point in ordinary cases is 66 per cent of actual and reasonable costs. From that starting point factors that justify either an increase or decrease are assessed.

[5] While these principles provide a useful framework for an analysis of costs in relation to Ms George's unsuccessful claim against the Council (in ARC 91/10), the position differs in relation to the Council's unsuccessful claim against Ms George (in ARC 124/10). That is because Ms George's employment agreement contained an indemnification clause. Ms George submits that she is entitled to be fully indemnified for her costs in ARC 124/10.

[6] Given the differing costs frameworks it is convenient to deal with each proceeding in turn.

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[1] An application for leave to appeal having been dismissed by the Court of Appeal on 30 May 2014, *George v Auckland Council* [2014] NZCA 209.
[2] *George v Auckland Council* [2013] NZEmpC 179 [Substantive judgment].

The Council's unsuccessful claim against Ms George (ARC 124/10)

[7] Mr Drake, counsel for Ms George, submits that a preliminary issue arises as to whether Ms George is to be indemnified for her actual legal costs and expenses having regard to cl 6 of her employment agreement. The submission appears to have been spurred by correspondence on behalf of the Council taking issue with Mr Drake's contention that the global costs calculation advanced on behalf of the Council in the context of discussions aimed at resolving costs, spanning both proceedings, could not include the costs associated with ARC 124/10 as the Council had had no lawful right to commence the action against Ms George having regard to cl 6.

[8] Clause 6 of Ms George's employment agreement provided that:

> The [Council] shall indemnify the employee from and against all actions, claims, proceedings, costs and damages incurred or awarded in respect of or arising out of any act or omission or statement by the employee in the course of employment, provided that the indemnity shall not be available for wilful loss, or damage caused by the employee or where the loss or damage is the result of misconduct or an unlawful activity.

[9] The Council accepts that Ms George is entitled to a contribution to her costs in ARC 124/10 but does not accept that she is entitled to a contribution on a full indemnity basis. It submits that there was no finding that the indemnity provision precluded the Council from commencing a proceeding against Ms George unless there had been wilful loss or damage resulting from misconduct or unlawful activity. Rather it is said that the question of whether the Council was able to prove that the loss or damage it suffered was the result of wilful misconduct or unlawful damage is a separate issue from whether Ms George is entitled to a full indemnity for all costs and expenses that she has incurred in respect of the claim. In the alternative, it is submitted that if the effect of the Court's substantive judgment is that the Council was precluded from bringing a claim against Ms George unless it could prove wilful loss or damage it does not follow that Ms George is entitled to a full indemnity for the total costs and expenses that she incurred. It is further submitted that the Court is entitled to reduce the amount of costs from a full indemnity basis on public policy grounds or as part of an assessment as to whether the total amount of costs was reasonable.

[10] The position can be simply stated. If the Council had proved wilful misconduct or unlawful damage by Ms George the indemnity clause would not have applied. The Council did not prove such misconduct or damage and accordingly the clause does apply. If a claim had been brought against Ms George by a third party, the position would have been the same.

Approach – indemnity costs

[11] Mr Clarke submits that the approach to indemnity costs under a contract provided for in the High Court Rules is to be applied in the present case. I accept that, even if the Court is not bound by these Rules in the circumstances, the principles embodied in them, and the jurisprudence which has been developed around them, provide useful guidance.

[12] The claim by the Council arose out of alleged acts and omissions by Ms George during the course of her employment. It was not established at trial that Ms George had wilfully caused any loss or damage or that the alleged loss or damage was the result of any misconduct or unlawful activity. On the face of it, cl 6 provides that, in such circumstances, the Council shall indemnify Ms George for any costs incurred by her in defending the claim pursued against her.

[13] Mr Drake submits that Ms George is entitled to full indemnity costs pursuant to the Council's obligations under cl 6. A more nuanced approach is required. While it is well accepted that a party can contractually bind itself to pay the other party's full solicitor-client costs, it is equally apparent that the inquiry does not start and stop with an assessment of actual costs.[3] As the Court of Appeal observed in *Watson & Son Ltd v Active Manuka Honey Assoc*:[4]

> It is clear in principle and on authority that once it is established that the indemnity is applicable in the circumstances and that, properly construed, it includes solicitor-client costs, no discretion remains available other than on public policy grounds or as part of an assessment by the court as to whether the amount of the solicitor-client costs is objectively reasonable.

[3] *Gibson v ANZ Banking Group (NZ) Ltd* [1986] 1 NZLR 556 (CA).
[4] *Watson & Son Ltd v Active Manuka Honey Assoc* [2009] NZCA 595 at [35].

[14] A number of steps are accordingly required. First, an assessment must be made of the scope of the contractual provision and what costs fall within and outside of it. Second, consideration must be given to whether there are any public policy reasons preventing reliance on the contractual indemnity. If not, the Court must turn to consider whether the costs claimed under the indemnity clause are objectively reasonable.[5]

[15] I consider the claim for full indemnity costs against the foregoing framework.

What tasks attract indemnity costs under the contract?

[16] Clause 6 is broadly worded. It does not distinguish between steps in litigation or seek to impose any parameters around what costs will and will not be indemnified, other than (for the purposes of this claim) that the costs must have been incurred in respect of, or arising out of, any act or omission by the employee in the course of employment. Legal defence of the claim falls within the scope of the clause.

Public policy considerations

[17] There are no public policy reasons why the indemnity should not apply. Rather, there are clear public policy reasons why it should apply in the present context.[6]

Whether the steps undertaken were reasonably necessary in pursuance of those tasks

[18] The Council commenced its claim against Ms George on 21 September 2010, when it filed a statement of problem in the Authority. A statement in reply followed and the proceeding was removed to the Court on the Council's (unopposed) application. The substantive hearing was completed on 5 July 2013. Mr Drake accordingly submits that Ms George was obliged to incur expenses in defending the Council's proceeding between 21 September 2010 and 5 July 2013. I agree. I return to the issue of whether all of the steps taken were necessary below.

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[5] *Black v ASB Bank Ltd* [2012] NZCA 384.
[6] Traversed in the substantive judgment.

[19] Assessing the costs incurred in relation to ARC 124/10, as opposed to ARC 91/10, has proved problematic for the parties and presents similar difficulties for the Court. That is because the costs relating to the two proceedings bled into one another, have not been recorded against a particular matter and are not now able to be allocated with any degree of certainty. The problem is compounded by the assessment made by opposing counsel as to which percentage of costs related to each proceeding. Mr Drake considers that 65 per cent of the total costs incurred are attributable to ARC 124/10. Mr Clarke estimates that 50 per cent of the costs over the lifecycle of the two proceedings falls within ARC 124/10.

[20] Twelve witnesses gave evidence at the substantive hearing. Five witnesses gave evidence focussed solely on ARC 124/10. The remaining witnesses gave evidence directed predominantly, although not exclusively, on ARC 91/10. While not necessarily an accurate guide, the closing submissions for Ms George in ARC 124/10 ran to 21 pages whereas the closing submissions in ARC 91/10 ran to 29 pages. The latter proceeding involved more factual and legal issues than the former. Each proceeding generated a comparable (and relatively substantial) number of documents. The time occupied by submissions at hearing appears to have been similar for each proceeding.

[21] On balance I consider that a 50/50 split between the proceedings more accurately reflects the reality of where the legal costs lie. Based on the information before the Court, it appears that total legal costs for Ms George in relation to both proceedings, excluding the expert witness fees and other claimed expenses, amounts to $230,364.67. Half of that amount equates to $115,182.33.

[22] The Council submits that much of the cost associated with the proceeding was unnecessary. Particular reference is made to the costs associated with ancillary arguments, including the submission that there was an implied term in Ms George's contract that the Council would not pursue her for breach of contract for unintentional loss or damage caused by her in the course of her duties. It was this defence that much of the evidence, and legal argument, was directed at.[7] This aspect

[7] Substantive judgment, above n 2, at [145]-[161].

of the defence was not made out. In the final analysis the Council's claim failed on the facts.[8]

[23] It is fair to say that Ms George adopted something of a belt and braces approach to the defence of the claim against her, and mounted a number of arguments against liability. The fact that these arguments did not succeed does not, in itself, mean that she ought not to be entitled to the costs associated with them. They could not reasonably be characterised as spurious or otherwise devoid of merit. Ms George was entitled to treat the claim against her very seriously. The Council filed its claim for breach of contract after it had dismissed her from her employment. She was left without work, as a solo mother with the care of two young children. Her professional reputation was squarely at stake. The Council's allegations that she had caused significant loss and damage to it in breaching her employment obligations called into question her professional abilities. These allegations were in the public domain and impugned her competence as a professional chartered accountant.

[24] The Council submits that a number of interlocutory applications were unreasonably advanced on Ms George's behalf in this proceeding. Ms George applied for an order that the Council file a more explicit statement of claim, that it provide further and better disclosure, and applied for non-party discovery. These applications were dealt with in one judgment of the Court.[9] Ms George only enjoyed success on part of one of these applications. She also unsuccessfully opposed an application by a non-party to set aside a witness summons.[10] The summons was found to be an abuse of process and was set aside. I make an adjustment downwards for the unnecessary costs associated with opposing the application in the circumstances. The fact that Ms George was otherwise the unsuccessful party on a number of interlocutory matters does not, of itself, mean that the costs associated with pursuit of the applications ought to be excluded. Having carefully considered the circumstances, including the matters discussed in each of the interlocutory judgments, I do not consider that a deduction in costs is warranted. Each of these

[8] At [162]-[186].
[9] *George v Auckland Council (No 2)* [2012] NZEmpC 143.
[10] *Auckland Council v George* [2013] NZEmpC 79.

matters directly related to a defence of the claim and, while unsuccessful, were not unreasonably pursued in the circumstances.

[25] Process server costs of $245.00 are sought. These costs appear to relate to a witness summons served on Mr Eaton. As I have said, the summons was found to be an abuse of process and was set aside.[11] I disallow this aspect of the claim.

[26] The Council submits that the Calderbank offers it made to Ms George are relevant to the claim of costs in this proceeding, and warrant a decrease from the amount that would otherwise be awarded in her favour. I do not accept this submission, for the reasons set out later in this judgment.

[27] I accept that the rates at which the steps were charged were reasonable, namely $300.00 per hour plus GST from 21 September 2010, $325.00 per hour from 31 March 2011, and $350.00 per hour from 1 March 2013. These rates represented a substantial reduction in the usual charge out rate of $450.00 per hour plus GST. In addition, a further $25,475.00 of work in progress was written off.

[28] It is submitted that Ms George was obliged to engage expert accountancy witnesses as part of her defence to the proceeding (the fees for which amounted to $41,181.50). The Council takes a different view, contending that the evidence given on Ms George's behalf was of little or no value and that it was unnecessary to call two expert witnesses to traverse the same area. There were other issues as to the extent of their expertise and the relevance of some of their evidence. I agree with the Council that it was unnecessary to engage two experts and that these additional costs were unreasonably incurred. In the circumstances I discount 50 per cent of these costs.

[29] Finally, it is submitted that Ms George was obliged to take out two loans in order to pay her legal expenses and that interest on those loans, amounting to $2,488.18, ought to be ordered. Mr Clarke submits that there is no basis for this aspect of the claim, suggesting that it would enable any litigant to use loan finance (which may be at an exorbitant interest rate) to fund litigation rather than financing

[11] At [19].

litigation from their own savings. Exorbitant interest rates do not appear to be a feature of the claim that Ms George is making. Nor does the Council's submission address the circumstances of this case, where it is apparent that Ms George was without work following her dismissal and was confronting legal costs in defending a claim brought against her by her ex-employer. There does not appear to be any authority on this part of the claim, as Mr Clarke observes. In the event I do not need to decide the point.

[30] It is well established that a person seeking a contribution to their costs must provide adequate support for their claim. Ms George has not provided any evidence in relation to the loan, the size of it, or what the applicable rate of interest was. I disallow this aspect of her claim on that basis.

[31] I conclude that Ms George is entitled to the sum of $134,000 in relation to ARC 124/10.

Costs in ARC 91/10

[32] The Council seeks an award of costs against Ms George in relation to her unsuccessful claim against it (in ARC 91/10). I approach the issue of costs in these proceedings on the usual basis (as set out at [4] above).

[33] I am satisfied, based on the material before the Court, that the Council incurred actual costs over both proceedings of $426,467.73 (excl GST). I have already concluded that a 50/50 split between the proceedings is appropriate in terms of an allocation of time spent.

[34] The costs incurred by the Council include the costs associated with Ms George's application to the Authority on 5 March 2010 and the costs associated with attending two mediations. The Council accepts that the costs incurred in relation to the first mediation ought to be excluded, but submits that the costs associated with the second should not.[12]

[12] Citing *Jinkinson v Oceania Gold (NZ) Ltd* [2011] NZEmpC 2 at [16]; and *Baker v St John Regional Trust Board* [2013] NZEmpC 109 at [22] in support.

[35] That leads to a figure of $211,598.68 for ARC 91/10. The Council submits that costs of $211,598.68 were reasonable in the circumstances and represent a discount from the actual time-cost incurred. Mr Drake disagrees. He submits that the costs incurred by the Council are unreasonable in a number of respects.

[36] I deal with the interlocutory history of the proceeding first as it is apparent, from a perusal of the judgments relating to each interlocutory application, that in some instances costs have already been dealt with and accordingly ought to be excluded from the starting point.

Interlocutory history

[37] The first application was advanced by Ms George, seeking special leave to remove the matter to the Court.[13] This application was granted. Costs were reserved.[14] While the Council did not actively oppose the application, I am satisfied that costs ought to follow the event. Accordingly Ms George is entitled to a contribution to costs on the application. I deal with this issue separately below. In the circumstances, the costs incurred by the Council on the application ought to be excluded from an assessment of its actual and reasonable costs.

[38] Applications were later pursued by Ms George for further and better disclosure and for verification orders. Those applications were dismissed.[15] It is however evident from the interlocutory judgment of Judge Travis that he considered that better communication between counsel for both parties may have obviated the issues giving rise to the applications.[16] Relevantly, while it is apparent that the Council sought costs against Ms George on both applications, Judge Travis declined to adopt this course. Rather, he considered it appropriate that costs lie where they fell, and made orders accordingly.[17] In these circumstances an adjustment ought to be made to exclude the costs incurred by the Council in defending these applications from its actual and reasonable costs.

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[13] *George v Auckland Regional Council* [2010] NZEmpC 138, [2010] ERNZ 350.
[14] At [30].
[15] *George*, above n 9.
[16] At [58].
[17] At [59].

[39] The Council applied for the two proceedings to be tried at the same time. This was opposed by Ms George. Judge Travis granted the Council's application.[18] Costs were squarely before the Court and were dealt with, Judge Travis noting that the Council was not seeking costs on its application. He made no order for costs on this basis.[19] Accordingly, the costs associated with the pursuit of this application should also be excluded from the costs calculus.

[40] The Council later filed an application to strike out references to privileged communications. The communications related to matters referred to during the course of mediation. The application was granted by Chief Judge Colgan, following consideration on the papers.[20] However, costs were neither dealt with in the interlocutory judgment nor reserved. As the High Court observed in *Exportrade Corp v Irie Blue New Zealand Ltd* the failure to reserve a question of costs in a judgment on an interlocutory application should not deprive the Court of the ability to make an award of costs post-judgment.[21] Costs should follow the event on this application and an adjustment made to the starting point to reflect that.

[41] The only other interlocutory application relating to ARC 91/10 also related to ARC 124/10. Ms George sought directions concerning a possible conflict of interest. The application was dismissed by Judge Travis, who ordered costs in favour of the Council, the quantum of which was reserved.[22] I accept that the Council's costs of responding to this application (in so far as they relate to this proceeding) ought to be taken into account in assessing actual and reasonable costs.

Costs of two counsel

[42] The Council was represented by two counsel. I do not accept that this was reasonable in the context of what was ultimately a factually orientated personal grievance claim. While the Council's claim against Ms George may in combination with Ms George's claim against it have justified two counsel, it is not appropriate to have regard to that factor in assessing reasonable costs in ARC 91/10. There is some

[18] *George v Auckland Regional Council* [2011] NZEmpC 25, [2011] ERNZ 89 at [16].
[19] At [18].
[20] *George v Auckland Council* [2013] NZEmpC 76.
[21] *Exportrade Corp v Irie Blue New Zealand Ltd* [2013] NZHC 427 at [14].
[22] *George v Auckland Council* [2012] NZEmpC 83, (2012) 9 NZELR 577 at [38].

strength in Mr Drake's submission that such an approach would effectively reward the Council for having complicated the litigation by commencing and pursuing a second proceeding, which inflated the timeframes involved and the overall complexity of the matters before the Court.

[43] While the hearing involved a number of witnesses and traversed a range of legal points I do not consider that it necessitated the attendance of two counsel. It is, of course, the prerogative of each party to decide the level of representation it considers appropriate. However those choices cannot automatically be visited on the unsuccessful party. As Mr Drake points out, the Council chose to be represented by two counsel at a combined hourly charge out rate of around $700.00. I do not accept the appearance of two counsel during the course of trial, or a combined charge-out rate of this ilk, is reasonable for the purposes of determining an appropriate costs contribution on ARC 91/10. Mr Clarke submitted that the rate effectively represented a "blended rate", which was a lower hourly rate than the costs of senior counsel. That may be so but I do not consider that the case reasonably required the application of services at such a high hourly rate. I make a downwards adjustment accordingly.

Mediation costs

[44] The Council's total legal costs include the costs associated with mediation. Ms George takes issue with this, on the basis that mediation costs are generally excluded.

[45] It is apparent that the parties attended two mediations, the first in 2010 and the second almost three years later. The Council submits that while the costs associated with the first mediation ought not to be included, the costs of the second ought to be. No reasons are cited for this submission, other than a footnoted reference to two judgments of this Court, *Jinkinson v Oceania Gold (NZ) Ltd* and *Baker v St John Regional Trust Board.* [23]

[23] *Jinkinson,* above n 12; *Baker,* above n 12.

[46] In *Baker* it was said that:[24]

> The defendant also seeks costs in relation to its attendance at a second mediation. The costs associated with attendance at mediation are not generally recoverable. In *Jinkinson v Oceania Gold (NZ) Ltd* the Court stated:
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> > … It is reasonable to regard that first attendance at mediation as discharging the obligation referred to in the *Trotter* case. That having been done, it seems to me that costs incurred in further mediation directed by a Judge pursuant to a statutory requirement should be regarded as costs necessarily incurred in the proceedings before the Court and subject to the same considerations for recovery as other costs. I therefore do not accept Mrs Brook's submission that costs incurred by the plaintiff in relation to further mediation ought to be excluded from consideration.

[47] Mediation costs were not allowed in *Baker.* No information had been put before the Court in relation to the basis on which it took place.[25] There is an absence of information in the present case also. In these circumstances, while I accept that mediation costs may be available in some cases, I am not prepared to accept that the claimed costs relating to the 2013 mediation ought to be allowed. These costs are apparently set out in an invoice dated 31 January 2013. Although no copy of the invoice is before the Court, reference to it is made in the schedule of invoices appended to counsels' submissions. According to the schedule, the 31 January 2013 invoice was for $10,500. That figure is accordingly deducted from the costs reasonably incurred.

[48] The hearing of both matters consumed ten and a half days, half of which (as I have said) can be attributed to ARC 91/10. I do not consider a starting point of costs of over $200,000 is reasonable having regard to the nature and scope of the hearing, including the steps that were required to be taken in relation to it and the hearing time involved. By way of cross check, costs according to the High Court scale would likely result in a figure substantially less, although I accept that there are difficulties with attempting to directly translate scale costs to the costs associated with litigation in this Court.

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[24] At [22] (footnotes omitted).
[25] At [23].

[49] It is appropriate that a degree of proportionality be brought to bear in the assessment process. Ms George's claim was largely factually orientated, although it did raise a number of legal issues, some of which were novel. The claim called into question the integrity of a number of other employees of the Council, which it was entitled to treat seriously. This was reinforced by the range and quantum of remedies sought on Ms George's behalf. Having said that, this was not the sort of case that reasonably required a gold plated response. And ultimately it was decided on the facts.

[50] Standing back and having regard to the particular features of this proceeding, what was reasonably required to respond to it, excluding the interlocutory steps identified above and having regard to the range of costs that generally applies in a case such as this, I consider that a starting point of around $60,000 would be appropriate.

Factors warranting a discount

[51] Mr Drake submits that Ms George's financial position ought to be taken into account as a discounting factor. There is authority for the proposition that, in this jurisdiction, a party's ability to pay is a relevant factor in determining costs if payment of the sum which would otherwise be appropriate would cause undue hardship. However, any such claim must be supported by sufficient evidence.[26] Evidence was led at trial in relation to Ms George's financial position (which included evidence that Ms George had found alternative employment). Ms George has also filed an updating affidavit setting out in detail her income and expenditure. While reference is made to her liabilities, including two mortgages, no information has been provided in respect of her assets, other than a reference to a house that she owns. Nothing is said about the value of the property or the equity held in it. As Judge Couch pointed out in *Metallic Sweeping (1998) Ltd v Ford*, such information is relevant to an assessment of financial position in the context of an application for costs.[27] I decline to make an adjustment based on the information before the Court in the present case.

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[26] *Merchant v Chief Executive of the Department of Corrections* [2009] ERNZ 108 (EmpC) at [32].
[27] *Metallic Sweeping (1998) Ltd v Ford* [2010] NZEmpC 129, [2010] ERNZ 433 at [53].

[52] It was further submitted that a large award of costs in a case such as this would likely have a chilling effect on employees in bringing personal grievance claims. While parties are entitled to representation of their choosing, it is important to avoid a disproportionate result being brought to bear in terms of cost. Many 'garden variety' personal grievance claims are pursued and defended in this Court at relatively modest legal cost. A party to such a claim cannot expect that if they choose to engage senior, or multiple, counsel the Court will necessarily be drawn to a submission that their associated costs are reasonable, and ought to be incurred by the unsuccessful party. This sort of concern can, however, be adequately addressed in terms of the second stage of the Court's enquiry, namely whether actual costs were reasonably incurred, including by way of reference to the nature and scope of the proceeding and what is at stake. I have already dealt with this issue above.

Factors warranting an uplift

[53] The Council submits that there are a number of factors that ought to be taken into account to uplift the quantum of costs that would otherwise be awarded in its favour in ARC 91/10.

[54] It is submitted that Ms George pursued a number of interlocutory applications which were either unsuccessful, ought not to have been pursued, or which ultimately did not necessitate an order from the Court. Having already traversed the interlocutory history of this proceeding, it should be apparent that I do not accept the submission that an uplift is justified.

[55] The Council further submits that the proceedings were conducted in a way that unnecessarily prolonged the hearing and increased its costs, and that this ought to reflect in an uplift. In particular it is said that Ms George failed to make reasonable concessions which added to the length of the trial and which obliged the Council to address all heads of relief (totalling some $700,000); that the way in which her claim was pursued gave rise to difficulties in relation to the documentation for the bundle; that she put the Council to proof in relation to her duties; and that she pursued concerns relating to a possible conflict of interest. I accept that such matters would have added to the length of the hearing but have already taken this into

account in assessing actual and reasonable costs. I am not otherwise satisfied that an uplift is warranted.

Calderbank offers

[56] The parties exchanged a number of Calderbank offers prior to the hearing.

[57] On 8 August 2011, Ms George made a written offer to settle both proceedings, on the basis that the Council provide a letter from the Chief Executive recording that her dismissal was unjustified and acknowledging that she had no liability to the Council, together with a payment of $100,000 ($10,000 of which was to represent lost remuneration and the remaining $90,000 a global figure comprising compensation for hurt and humiliation and a contribution towards Ms George's costs for the proceedings to date). The offer was expressed to remain open until 5 pm on 18 August 2011.

[58] The 8 August offer was rejected on 26 August 2011. The Council extended an offer to settle on the basis that both parties would agree to discontinue their own proceedings without any issue of costs, that neither party would disparage the other, and that there would be no admission of liability. The terms of settlement would remain confidential. The 26 August offer lapsed at 5 pm on 2 September 2011.

[59] A further offer was advanced by the Council on 20 February 2013. It offered to settle both proceedings on the basis of a global payment to Ms George of $200,000 (inclusive of costs) together with a letter seeking to address potential damage to Ms George's reputation. The offer reiterated the non-disparagement, no admission of liability, and confidential terms of settlement components of the earlier offer. The offer was to lapse at 5 pm on 8 March 2013.

[60] Mr Drake responded on behalf of his client on 8 March 2013. He advised that Ms George did not consider the Council's offer to be reasonable, including because there needed to be a clear statement about the allegations that the Council had made against Ms George, to enable her to show it to any prospective employer or recruitment agent. Mr Drake also advised that the amount offered did not attempt

to estimate Ms George's legal costs to date and that those costs, together with the level of remedies that might be awarded to her at trial, meant that the amount offered was unreasonable. The Council's offer was accordingly rejected. Mr Drake made a further offer to settle both proceedings on Ms George's behalf. The offer included draft terms of a letter from the Chief Executive, expressly acknowledging that the Council withdrew its allegations against Ms George in its proceeding and regretted having made them and the impact of them on her career and reputation. The offer was to lapse on 20 March 2013.

[61] The Council's 20 February 2013 offer was repeated in a subsequent letter to counsel for Ms George dated 14 March 2013, with some variation to reflect aspects of the proposal contained in Ms George's offer of 8 March 2013. It identified concerns about the possible tax implications of the global approach in Mr Drake's letter and on which it had sought further advice. It advised that it was uncomfortable with the wording of the draft letter, but indicated that it was willing to consider any alternative suggested wording. It offered to settle again for $200,000, incorporating a contribution of up to $130,000 towards Ms George's legal fees upon receipt of a tax invoice. Ms George was advised that if the offer was not accepted by 5 pm on 20 March 2013 it would lapse and the Council reserved the right to refer to its letter on any issue as to costs in the event that her personal grievance claim was unsuccessful.

[62] The Council's offer was not accepted and Ms George's personal grievance claim failed in its entirety.

[63] It is well accepted that a Calderbank offer should be taken into account as a factor in favour of the defendant if it makes an offer that would have been more beneficial to the plaintiff than the judgment subsequently obtained.[28] A steely approach is required where reasonable settlement proposals have been rejected, for public policy reasons.[29] The reasonableness or otherwise of refusing an offer to settle is to be assessed at the time the offer was made, not simply against the final result.[30] Ultimately, Calderbank offers are a discretionary factor for the Court in

[28] *Fifita v Dunedin Casinos Ltd* [2013] NZEmpC 171 at [27].
[29] *Bluestar Print Group (NZ) Ltd v Mitchell* [2010] NZCA 385, [2010] ERNZ 446 at [20]; applied in *Mayne v Polychem Marketing Ltd* [2013] NZEmpC 127 at [16].
[30] *Baker*, above n 12, at [30].

determining an appropriate costs award and the making of such an offer does not in itself automatically result in a more favourable award of costs. An offeror has the burden of persuading the Court to exercise its costs discretion in their favour.[31]

[64] The Council characterises the 26 August 2011 offer as a "drop hands" offer, adopting terminology used in the judgment of the English High Court in *Fulham Leisure Holdings Ltd v Nicholson Graham & Jones,*[32] although it does not appear to have been adopted more generally, either overseas or in this jurisdiction.

[65] The offer contained in the Council's letter reduced to a proposal that neither party would pursue their claim in the Employment Court and that all matters would be at an end. I prefer to approach the offer having regard to the way in which "walk away" offers have been dealt with in New Zealand to date, the features of which were discussed in *O'Hagan v Waitomo Adventures Ltd*.[33]

[66] In *Hira Bhana & Co Ltd v PGG Wrightson Ltd* the Court of Appeal rejected the contention that a "walk away" offer was consistent with the overall purpose of a Calderbank offer.[34] It held that:[35]

> ...where the nature of the offer made is simply a "walk away" proposition, made early in the proceedings, it cannot be the case that the mere fact that the party which rejected the offer subsequently loses means that party is required to pay indemnity costs or increased costs. If that were so, it would mean that the costs regime set out in rr 46-48G would be effectively bypassed in almost all cases where the defendant succeeds, because defendants would routinely make "walk away" offers of the kind made in this case, and then claim indemnity costs if they subsequently succeed at trial.

[67] The underlying policy was more recently considered by the High Court in *Easton Agriculture Ltd v Manawatu-Wanganui Regional Council.*[36] There Kós J observed that:[37]

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[31] *Foai v Air New Zealand Ltd* [2013] NZEmpC 50 at [17].
[32] *Fulham Leisure Holdings Ltd v Nicholson Graham & Jones* [2006] EWHC 2428 (Ch).
[33] *O'Hagan v Waitomo Adventures Ltd* [2013] NZEmpC 58 at [24]-[26].
[34] *Hira Bhana & Co Ltd v PGG Wrightson Ltd* [2007] NZCA 342.
[35] At [26].
[36] *Easton Agriculture Ltd v Manawatu-Wanganui Regional Council* HC Palmerston North CIV-2008-454-31, 22 December 2011.
[37] At [13].

> ... the reason the Courts take a conservative approach to imposing increased costs in the context of walk-away offers is that they effectively value the opponent's claim, the opponent's prospects of success, and their own litigation risk all at nil. As the plaintiffs put it in their submissions, it ranked the plaintiffs' chances of success "at zero percent". It will be a rare case where it is unreasonable for a plaintiff to take a more optimistic view of their own prospects than "zero percent".

[68] The Council's offer of 26 August 2011 clearly assessed Ms George's prospects of success in her claim as zero, although it rated its own chances on the breach of contract claim more highly. It was not unreasonable for Ms George to place a higher value on her prospects than zero. Nor was it unreasonable for her to reject the offer in any event. While I accept Mr Clarke's submission that by 26 August 2011 Ms George ought to have appreciated the risks associated with her personal grievance claim, it was evident that she was extremely concerned about reputational issues, as reflected in the offer subsequently advanced on her behalf. Whatever terminology is used to described the offer in this case, it is evident that Ms George's reputational concerns were not addressed in the Council's offer and nor (insofar as the proceeding in ARC 124/10 is concerned) did it include a financial component for costs. I accordingly put the 26 August 2011 letter to one side.

[69] I agree with the submission that the Council's offers of 20 February and 14 March 2013 were generous from a financial perspective. The offers sought to resolve all claims before the Court and included a draft agreed statement directed at addressing the reputational issues identified on Ms George's behalf, by noting that there was "some uncertainty" about the grounds for dismissal and that it regretted the termination of her employment and the impact of the termination on her career and reputation.

[70] The Council's offer was rejected on a number of grounds, including that it did not provide sufficient scope for Ms George to offer an explanation (if necessary) about the very serious allegations which the Council had levelled against her (in its claim of breach of contract), to prospective employers and recruitment agents so as to satisfy any questions or concerns they may have in considering her for employment. Nor did the letter attempt to estimate Ms George's legal costs to date, over the preceding three years. The draft letter was focussed on Ms George's termination and not the basis for the Council's claim against her for breach of

contract, other than noting obliquely that "the [unspecified] proceedings have been discontinued". I do not accept the Council's submission that this oblique reference was sufficient to address Ms George's concerns about damage to her professional reputation and her ability to explain the situation to third parties. The terms of settlement did not offer her the public vindication she reasonably sought and which she could, and later did, obtain through a Court judgment.

[71] In *Bluestar Print Group (NZ) Ltd v Mitchell*, the Court of Appeal noted that monetary compensation may, in and of itself, provide adequate vindication:[38]

> 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.
>
> We consider that the potential for vindication to be a relevant factor does not mean that the developed jurisprudence under the High Court Rules costs regime should be ignored…

[72] In *Bluestar,* the plaintiff rejected a settlement offer of $13,000 yet was ultimately only awarded $10,000 compensation by the Court. This is, however, to be viewed in the context of a finding by the Court of Appeal that the respondent was principally motivated by monetary concerns.[39] That is not the case here. While Ms George sought a significant amount by way of relief, it was clear, including during the course of the hearing, that she was primarily motivated by concerns about her reputation and her ability to secure alternative employment. She was not simply seeking personal vindication. What she also wished to address, and what the offer did not adequately deal with from her perspective, were the reputational issues associated with both proceedings (not just the claim relating to her dismissal), including to provide a platform for finding alternative employment.

[73] Having carefully considered the terms of the offer in the context of the particular circumstances of the case, including the interests at stake, I am not

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[38] *Bluestar,* above n 29, at [19]-[20].
[39] At [14].

persuaded that it was unreasonable of Ms George to reject it and I decline to exercise my discretion to take it into account as an uplifting factor.

[74] Mr Drake submits that Ms George's Calderbank offer of 8 August 2011 was unreasonably declined by the Council and that this ought to entitle her to costs from that date in relation to ARC 91/10. The Calderbank offer was based on the Council making an all-up payment of $100,000 and was premised on an admission by it that the termination of Ms George's employment was unjustifiable, wrong and ought not to have occurred. Accepting the Calderbank offer would also have necessitated the Council making a substantial payment to Ms George by way of lost remuneration, compensation for hurt feelings, humiliation and loss of dignity for the alleged unjustified disadvantage and unjustified dismissal, together with special damages in relation to the disciplinary process. While the offer covered both proceedings, and the Council has been ordered to pay Ms George over $100,000 by way of costs in ARC 124/10, I do not consider that it was unreasonable for the Council to decline it in the circumstances prevailing at the time and having regard to its prospects of success in defending the claim against it.

Conclusion

[75] Standing back and considering all matters before me I consider that a costs contribution of $40,000 is appropriate.

Costs on Authority's determination declining leave to remove matter to Employment Court

[76] Ms George seeks a contribution to costs in relation to the Authority's earlier determination declining leave.[40] Costs were reserved on that matter.[41] The Authority Member has since retired from the Authority. I do not understand the Council to take issue with Mr Drake's submission that the Court is able to revisit any earlier costs

[40] *George v Auckland Regional Council* ERA Auckland AA331/10, 22 July 2010.
[41] At [24].

award made in the Authority on a de novo challenge,[42] and ought to do so in this case.

[77] Mr Drake submits that the Authority investigation consumed approximately two and a half hours and that Ms George incurred costs of $4,140 (GST inclusive). A contribution of $2,000 is sought.

[78] Costs in the Authority are generally fixed by way of reference to a notional daily rate. At the relevant time it was $3,000. I see no reason to depart from the usual approach in the present case. The investigation meeting appears to have consumed just under half a day. In these circumstances I consider that a contribution to costs of $1,500 is appropriate.

[79] Accordingly, the Council must pay Ms George the sum of $1,500 in relation to the application for removal in the Authority.

Costs on Ms George's application for special leave

[80] Ms George pursued an application for special leave to remove her personal grievance claim to the Court. The application was granted by Judge Travis.[43] Costs were reserved and have not yet been fixed.

[81] Mr Drake has set out the attendances required, which included the preparation of affidavits, extensive written submissions and an appearance on 14 September 2010 (which occupied half a day). Actual legal costs of $6,037.50 (GST incl) were incurred by Ms George which, I accept, represented a significant write-off in terms of time spent and counsel's usual charge out rate. A contribution to costs of $4,000 is sought by Ms George in relation to the successful application for special leave. I consider that appropriate in the circumstances. The Council is accordingly ordered to pay Ms George the sum of $4,000 on this application.

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[42] *Taylor v Milburn Lime Ltd* [2012] NZEmpC 27 at [23].
[43] *George*, above n 13.

Result

[82] The Council must pay Ms George the sum of:

- $134,000 on ARC 124/10.

- $1,500 in relation to the application to remove to the Authority.

- $4,000 in relation to the application for special leave.

[83] Ms George must pay the Council the sum of:

- $40,000 on ARC 91/10.

Christina Inglis
Judge

Judgment signed at 3.30 pm on 18 June 2014