IN THE EMPLOYMENT COURT
WELLINGTON

[2014] NZEmpC 180
WRC 17/04
WRC 19/05
WRC 8/09

IN THE MATTER OF	proceedings removed from the Employment Relations Authority
BETWEEN	LYNNE FRANCES SNOWDON Plaintiff
AND	RADIO NEW ZEALAND LIMITED Defendant

Hearing:	(on the papers by submissions filed on 1 May, 30 May and 19 June 2014)
Appearances:	C R Carruthers QC, R L Fletcher, counsel for the plaintiff M Quigg, counsel for the defendant
Judgment:	26 September 2014

COSTS JUDGMENT OF JUDGE A D FORD

Introduction

[1] In my judgment of 1 April 2014, I found in favour of the defendant Radio New Zealand Limited (RNZ) and I held that it was entitled to an award of costs in respect of all three substantive proceedings which I had identified as:[1]

1. The "disadvantage grievances claim" – WRC 17/04

2. The "unjustified dismissal claim" – WRC 19/05

3. The "fraud proceedings" – WRC 8/09

[1] *Snowdon v Radio New Zealand Ltd* [2014] NZEmpC 45 [Substantive judgment].

[2] I invited the parties to endeavour to reach an agreement upon costs but failing that I made a timetable for the filing of submissions on the issue. I am satisfied, and grateful, that the parties appear to have made a genuine attempt to try and reach an agreement. The plaintiff, Ms Lynne Snowdon, instructed Mr Greenwood, a solicitor who had not been involved in the litigation before me, to have discussions with counsel for the defendant, Mr Quigg, and I have been informed of the nature of the negotiations that then ensued. Unfortunately, but perhaps not surprisingly, the parties were unable to reach agreement.

[3] Subsequently, detailed submissions were filed on behalf of each party (the defendant's principal submissions and attachments totalled approximately 265 pages). The Court also has before it two affidavits from Ms Snowdon. The first in time, deposed on 28 April 2014, was attached to the defendant's submissions in reply. The other, sworn on 30 May 2014, was filed along with her counsel's submissions of the same date. It is apparent that the parties were a long way apart on the costs issue. RNZ seeks a costs award totalling $1,104,611.50. Ms Snowdon's counsel submitted that the appropriate award should be $106,500.

Legal principles

[4] In an article entitled "Affordable costs in civil litigation" Dr Andrew J Cannon states:[2]

> A great challenge for courts in the common law world is to make civil processes affordable, but not so cheap and easy as to encourage excessive use of litigation. At the moment, in most jurisdictions, the problem is that processes are too expensive rather than there being an excessive use of litigation. A major cause of the high expense of litigation has been the award to successful parties of compensation for their costs calculated on the basis of the activity done to establish their rights, rather than a fixed or proportionate price for the value of the rights in controversy. This results in inefficiency and can reward exploitation of court processes to achieve strategic advantage rather than focusing on achieving a cost-effective and accurate result in accordance with established legal rights.

[5] Without intending any criticism of either party in this litigation, I simply make the general observation that there is a good deal of substance in that commentary on current costs awards.

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[2] Dr Andrew J Cannon "Affordable costs in civil litigation" (2014) 23 JJA 171 at 171.

[6] There is no dispute as to the applicable legal principles relating to costs awards but I will restate them briefly. Clause 19(1) of sch 3 to the Employment Relations Act 2000 (the Act) confers on the Court a broad discretionary power to order costs. It provides that the Court "may order any party to pay to any other party such costs and expenses (including expenses of witnesses) as the Court thinks reasonable."

[7] Regulation 68(1) of the Employment Court Regulations 2000 then provides:

> **68 Discretion as to costs**
>
> (1) In exercising the court's discretion under the Act to make orders as to costs, the court may have regard to any conduct of the parties tending to increase or contain costs, including any offer made by either party to the other, a reasonable time before the hearing, to settle all or some of the matters at issue between the parties.

[8] The approach that has invariably been applied by this Court in relation to costs awards in recent years is based on the Court of Appeal decisions in *Victoria University of Wellington v Alton-Lee*,[3] *Binnie v Pacific Health Ltd*,[4] and *Health Waikato Ltd v Elmsly*.[5] The Court first determines whether the actual costs incurred by the successful party were reasonably incurred. If the Court is unable to reach that conclusion then it must make its own assessment of what, in all the circumstances, would have been reasonable legal costs in order to conduct the case for the successful party.

[9] Either way, once an assessment has been made of what the reasonable legal costs would have amounted to, the Court must decide, after an appraisal of all relevant factors, at what level it is reasonable for the unsuccessful party to contribute towards those costs. The figure of 66 per cent of the reasonably incurred costs is generally regarded as an appropriate starting point and that figure may then need to be adjusted upward or downward, if necessary, depending upon all the relevant considerations.

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[3] *Victoria University of Wellington v Alton-Lee* [2001] ERNZ 305 (CA).
[4] *Binnie v Pacific Health Ltd* [2002] 1 ERNZ 438 (CA).
[5] *Health Waikato Ltd v Elmsly* [2004] 1 ERNZ 172 (CA).

[10] In *Shirley v Wairarapa District Health Board*, the Supreme Court confirmed the longstanding principle that unless there are exceptional reasons, costs should follow the result.[6] The Court emphasised that although the costs jurisdiction is discretionary, it is not unprincipled or else it would be "unacceptably arbitrary".[7] In that same context, the Court cited the following passage from the judgment of Lord Halsbury LC in *Sharp v Wakefield*:[8]

> … when it is said that something is to be done within the discretion of the authorities … that something is to be done according to the rules of reason and justice, not according to private opinion … according to law, and not humour. It is to be, not arbitrary, vague, and fanciful, but legal and regular.

RNZ's claim

[11] In my judgment of 1 April 2014, I recorded that the proceedings spanned a period of more than a decade and involved 23 interlocutory hearings, six applications for leave to appeal to the Court of Appeal and 70 formal minutes, orders and rulings leading up to the commencement of the substantive hearing of the three actions on 30 September 2013. The hearing itself then occupied 47 sitting days.[9]

[12] RNZ seeks costs in respect of a number of interlocutory hearings, in which the question of costs had been adjourned, together with costs in relation to "the discovery process" and costs on the substantive hearing in respect of the three distinct causes of action. Its claim is summarised in Mr Quigg's submissions. The first figure shows the costs actually incurred. The figures in bold show the contribution sought by RNZ from Ms Snowdon.

Interlocutory matters

(i)	Judgment of Judge Shaw dated 13 October 2004:	$11,533.00	**$7,611.78**
(ii)	Determination of the Employment Relations Authority dated 25 May 2005:	$2,000.00	**$2,000.00**

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6 *Shirley v Wairarapa District Health Board* [2006] NZSC 63, [2006] 3 NZLR 523 at [19].
7 At [16].
8 At [16], citing *Sharp v Wakefield* [1891] AC 173 (HL) at 179.
9 Substantive judgment, above n 1, at [1]-[2].

(iii) Judgment of Judge Shaw dated 4 August 2005:

$65,002.00 **$42,901.32**

(iv) Judgment of Judge Travis dated 24 February 2010:

$69,067.29 **$58,707.20**

(v) Minute of Judge Travis dated 21 December 2012:

$33,984.00 **$22,429.44**

(vi) Judgment of Judge Ford dated 5 September 2013:

$1,900.00 **$1,615.00**

(vii) Judgment of Judge Ford dated 26 September 2013:

$1,985.00 **$1,985.00**

(viii) Judgment of Judge Ford dated 1 October 2013:

$2,215.00 **$1,461.90**

(ix) Discovery (7 September 2004, 7 December 2006):

$168,812.00 **$143,490.20**

Substantive hearing

(x) The personal grievances claims (WRC 17/04 and WRC 19/05):

$552,736.30 **$469,825.85**

(xi) The fraud proceedings (WRC 8/09):

$345,291.47 **$345,291.47**

Submissions

(xii) Preparation of costs submissions:

$11,049.00 **$7,292.34**

TOTAL CONTRIBUTION SOUGHT: **$1,104,611.50**

[13] A complete breakdown with full details and particulars has been provided in respect of each head of claim. Mr Quigg confirmed that time records have not been

produced in relation to historical matters in which costs are either not being claimed or have already been awarded.

[14] In their submissions, counsel for the plaintiff do not take issue with the general costs principles set out above or with a number of the specific claims made by the defendant but they do challenge the application of certain costs principles to the circumstances of this case. I will need to deal with those issues.

[15] With reference to the general scheme of the costs principles set out above, the defendant's breakdown records the actual costs incurred under the respective headings in [12] above and in each case counsel has then gone on to record in percentage terms the contribution which RNZ seeks from the plaintiff. For example, the documentation produced to the Court shows that the total costs incurred in respect of claim (i) relating to the judgment of Judge Shaw dated 13 October 2004 amounted to $11,533. The plaintiff seeks to recover 66 per cent of those costs, namely, $7,611.78. In general, where that approach has been followed in relation to the interlocutory matters listed and the plaintiff seeks to recover no more than the standard percentage figure of 66 per cent of those costs then the plaintiff does not contest the claim. That approach is understandable given the historic nature of many of the issues involved. The Court still needs to satisfy itself, however, that the actual costs incurred were reasonable. It will be necessary for me to come back to this aspect of the exercise.

[16] The 66 per cent reduction approach has been applied in respect of claims (i), (ii), (iii), (v), (viii) and (xii) and, as indicated, counsel for the plaintiff have made no specific submissions in relation to those particular claims. The plaintiff does take strong exception, however, to contributions that exceed the standard 66 per cent figure. That is the case in respect of claims (iv), (vi), (ix) and (x) where the contribution sought amounts to 85 per cent of the actual costs incurred and claims (vii) and (xi) where full indemnity costs are sought. Before turning to consider the claims falling into these latter categories I need to deal with some other general propositions that were advanced by counsel for the respective parties.

Calderbank offer

[17] On 5 August 2003, RNZ made a without prejudice except as to costs offer, more commonly referred to as a Calderbank offer, in an attempt to settle the differences between the parties. The offer included the following terms:

> 1 That your client cease employment with our client as at Friday 8 August 2003 and on that day receive payment of any outstanding salary and holiday pay.
>
> 2 That on Friday 8 August 2003 our client will pay to your client three months' salary as an agreed cessation payment.
>
> 3 On Friday 8 August 2003, our client will pay to your client $20,000 as a contribution towards the medical and other professional fees that she has incurred in relation to the matters referred to in the Employment Court's decision and earlier proceedings.

[18] Mr Quigg submitted that: "This offer represented a reasonable offer to settle matters between the parties". Mr Quigg referred to the principles relating to Calderbank offers recently considered by this Court in *Gini v Literacy Training Ltd.*[10]

[19] Counsel also referred to the call for a steely response by the Courts where plaintiffs do not beat Calderbank offers which was emphasised by the Court of Appeal in *Health Waikato Ltd v Elmsly*[11] and *Bluestar Print Group (NZ) Ltd v Mitchell.*[12]

[20] Mr Quigg emphasised that it was unreasonable of Ms Snowdon to reject an offer "to end her employment which included provision of payments to her" when the evidence was that she did not wish to return to employment at RNZ. In counsel's words:

> When all of the above is taken into account it is submitted that a "steely" approach should be taken with regards to this Calderbank offer and it should be given significant weight in terms of the uplift of the contribution to costs, not just in the interests of this case but to discourage litigants from pursuing cases of this nature.

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[10] *Gini v Literacy Training Ltd* [2013] NZEmpC 25 at [14]-[16].
[11] *Elmsly*, above n 5, at [53].
[12] *Bluestar Print Group (NZ) Ltd v Mitchell* [2010] NZCA 385, [2010] ERNZ 446 at [20].

[21] One of the points noted in the submissions made in response by counsel for the plaintiff was that the offer required Ms Snowdon to withdraw the claim that she had made under the Protected Disclosures Act. In *Bluestar*, the Court of Appeal recognised that in the employment context, costs assessments were not confined solely to economic considerations. It stated:[13]

> 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.

[22] There was an interesting exchange during the cross-examination of Mr Peter Cavanagh at the substantive hearing. Mr Cavanagh took over as Chief Executive of RNZ in December 2003 following the retirement of Ms Sharon Crosbie. I found him to be an impressive witness. I formed the view that he was prepared to approach the dispute involving Ms Snowdon with both an open mind and a resolve to try and reach an amicable settlement.[14] He confirmed that in the early days of his time at RNZ he would have considered the option of settling the case by payment of a "modest amount" to Ms Snowdon "if it could be done on terms that were reasonable and acceptable". He was asked in cross-examination what he meant by a "modest amount" and in response he indicated a figure of between $50,000 and $100,000 (Ms Snowdon's annual salary at the time of her appointment as Managing Director was $93,940). However, such a proposal was never put to Ms Snowdon in open correspondence.

[23] Against that background, I do not consider that it can be said that Ms Snowdon acted unreasonably in declining to accept the Calderbank offer. Although she was not being invited to capitulate altogether, the offer in my view, in all the circumstances at the time, could hardly be described as a realistic compromise. The proposal to pay three-months' salary was effectively the minimum she would have been entitled to receive under the Act had she been able to make out

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[13] At [19].
[14] Substantive judgment, above n 1, at [86].

a personal grievance and subject to any reduction for contributory behaviour or failure to mitigate.

[24] Perhaps more significantly, however, the offer did not include any compensation under s 123(1)(c)(i) of the Act for humiliation, loss of dignity, and injury to the plaintiff's feelings. No other Calderbank offer was made during the extensive course of the litigation. For these reasons, and notwithstanding the ultimate outcome, I do not consider that the justice of the case requires me to give, in defence counsel's words, "significant weight in terms of the uplift of a contribution to costs" on account of the August 2003 letter.

Other settlement proposals

[25] One of the submissions made by Ms Snowdon's counsel was that the Court should be mindful of RNZ's approach towards settlement. This was also a matter addressed at length by Ms Snowdon in her affidavit of 30 May 2014. In essence, she deposed that in 2011, 2012 and 2013 her solicitors/counsel sought to try and settle the litigation but RNZ, and Mr Quigg in particular, did not exhibit any intention to do so.

[26] In his submissions on this matter, Mr Quigg queried the correctness of some of the statements made by Ms Snowdon in her affidavit and referred to two of the proposals she put forward to RNZ in March 2012 to settle the case as "ultimatum(s)" to the directors to settle failing which they would become parties to criminal offending. Mr Quigg also noted that the suggested settlement figure set out in an attachment to a letter from Ms Snowdon to the Board of RNZ dated 23 March 2012 was $9,411,530. In her affidavit of 30 May 2014, Ms Snowdon described the suggested settlement figure in these terms:

> [60] It was simply an opening position whereby the parties could sit around the table and reach a suitable compromise. No response was received.

[27] Mr Quigg submitted:

> 3.3.8 It is scarcely surprising that no response was received considering, Ms Snowdon had had her employment terminated for irreconcilable breakdown after remaining on the payroll on paid sick leave for over

> two years and then almost immediately secured alternative employment at Transpower for the next 18 months.

[28] No authorities were cited on this issue but in *Bradbury v Westpac Banking Corp,* the Court of Appeal accepted the principle that an imprudent refusal of an offer of compromise may justify increased, but not indemnity, costs.[15] Conversely, however, I do not find, if this is the contention intended to be advanced by Ms Snowdon and her counsel, that any aspect of RNZ's response or failure to respond to the settlement proposals initiated by or on behalf of Ms Snowdon was so imprudent or unreasonable that it needs to be reflected in some way through a reduction in RNZ's costs award.

Indemnity costs

[29] RNZ seeks full indemnity costs in respect of one of the interlocutory matters – claim (vii), and the substantive hearing of the fraud proceedings – claim (xi). Although they are not binding on the Employment Court, traditionally this Court has taken considerable guidance from the indemnity costs principles recognised in the High Court Rules. Rule 14.6(4) provides that the court may award indemnity costs if:

> (a) the party has acted vexatiously, frivolously, improperly or unnecessarily in commencing, continuing, or defending a proceeding or a step in a proceeding; or
>
> …
>
> (f) some other reason exists which justifies the court making an order for indemnity costs despite the principal that the determination of costs should be predictable and expeditious.

[30] In the recent case of *Ben Nevis Forestry Ventures Ltd v Commissioner of Inland Revenue*, the Court of Appeal confirmed that the leading case in New Zealand on indemnity costs is *Bradbury v Westpac Banking Corp*.[16] The Court noted that in *Bradbury* it was observed that there is an important question as to how readily or reluctantly a court should depart from the usual scale of costs, and observed that

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[15] *Bradbury v Westpac Banking Corp* [2009] NZCA 234, [2009] 3 NZLR 400 at [30].

[16] *Ben Nevis Forestry Ventures Ltd v Commissioner of Inland Revenue* [2014] NZCA 348, (2014) 26 NZTC 21-084 at [12].

access to justice is a fundamental right.[17] It also recorded that *Bradbury* listed the following, non-exhaustive categories in which indemnity costs have been ordered:[18]

> (a) the making of allegations of fraud knowing them to be false and the making of irrelevant allegations of fraud;
>
> (b) particular misconduct that causes loss of time to the Court and to other parties;
>
> (c) commencing or continuing proceedings for some ulterior motive;
>
> (d) doing so in wilful disregard of known facts or clearly established law;
>
> (e) making allegations which ought never to have been made or unduly prolonging a case by making groundless contentions, summarised in French J's "hopeless case" test.

[31] O'Regan P, delivering the judgment of the Court of Appeal in *Ben Nevis*, went on to state:[19]

> [17] The reference to French J's "hopeless case" test is to an observation made by French J (now Chief Justice of Australia) in *J Corp Pty Ltd v Australia Builders Labourers Federation Union of Workers (WA Branch) (No 2)* that indemnity costs may be awarded where "a party persists in what should on proper consideration be seen as a hopeless case". French J relied on an earlier decision in which Woodward J said that it was appropriate to consider awarding indemnity costs "whenever it appears that an action has been commenced or continued in circumstances where the applicant, properly advised, should have known that he had no chance of success". Woodward J added that such a case must be presumed to have been commenced or continued for an ulterior motive or because of some wilful disregard of the known facts or the clearly established law. In that case the presumed ulterior motive was to pressure the respondents to settle. The other possibility was that the proceeding was pursued for no good purpose at all, due to inertia and carelessness.

[32] In a section of the judgment particularly relevant to the fraud proceedings in the present case, O'Regan P went on to state:

> [27] The appellants argue that, even if the case was hopeless, that is not sufficient to justify indemnity costs. They argue it is also necessary that there be flagrant misconduct. We disagree. As Woodward J makes plain, if the case is truly hopeless the action must be presumed to have been commenced for some ulterior motive. It is clear from this Court's decision in *Bradbury v Westpac Banking Corp* that the commencement and continuation of a hopeless case is, potentially, sufficient in itself to justify an award of

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17 At [13].
18 At [16], citing *Bradbury*, above n 15, at [28].
19 *Ben Nevis*, above n 16.

> indemnity costs. The dictum of French J says so unequivocally, and that dictum was adopted by this Court in *Bradbury v Westpac Banking Corp*.
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> …
>
> [33] … The Commissioner's case stands or falls on whether the claim was hopeless. It did ultimately fail and the Supreme Court's decision is decisive in identifying its shortcomings. But in the end we see this case as simply a case where a claim has failed after due consideration, rather than one which was so hopeless that it should never have been brought in the first place. In the absence of a finding of flagrant misconduct, we do not think it is appropriate to award indemnity costs simply because the claim failed and was, after due consideration, shown to have been unsubstantiated. That runs the risk of opening up losing litigants to a risk of indemnity costs in circumstances where that would not be consistent with access to justice, a matter which was clearly identified as a concern in *Bradbury v Westpac Banking Corp*.

[33] I will need to return to these principles and their application to the facts of the case before me.

The interlocutory claims

[34] I turn now to consider each of the interlocutory heads of claim referred to at [12] above in terms of the reasonableness of both the basic amount claimed and the contribution sought.

Interlocutory claims

(i) *Judgment of Judge Shaw dated 13 October 2004*[20]

In this interlocutory claim Dr R Moodie, who was then acting as counsel for Ms Snowdon, challenged the authority of RNZ to direct Ms Snowdon to attend a disciplinary meeting in the light of ongoing personal grievances which were then before the Court. An issue of jurisdiction was also raised. RNZ succeeded on both issues and costs were reserved. RNZ was represented by Mr Quigg and Mr Bates. While that was its prerogative, I do not consider that the interlocutory hearing required two counsel although I acknowledge that Mr Bates' charge out rate was significantly less than Mr Quigg's. I consider a

[20] *Snowdon v Radio New Zealand Ltd* [2004] 2 ERNZ 238 (EmpC).

reasonable amount for costs in respect of this item to be $9,000 and at the 66 per cent figure (rounded off) I allow $6,000.

(ii) *Determination of the Employment Relations Authority dated 25 May 2005*[21]

No objection was taken to the amount claimed of $2000 and I allow it in full.

(iii) *Judgment of Judge Shaw dated 4 August 2005*[22]

This claim related to an application made on behalf of Ms Snowdon by Dr Moodie for interim reinstatement. It also involved an application by RNZ for security for costs. Ms Snowdon was unsuccessful in obtaining interim reinstatement and the security for costs application was withdrawn. The hearing took place on 1 August 2005 but attendances included in the invoice covered the period 26 April 2005 to 1 August 2005. The total costs incurred are recorded as $21,985 in respect of Quigg Partners (a contribution is sought of $14,510) and $43,017 as a disbursement being the costs of PricewaterhouseCoopers – Chartered Accountants (PwC). The interlocutory hearing appeared to be relatively straightforward and it resulted in a seven page judgment. I accept that the outcome would have been significant to RNZ. I consider that the contribution in respect of this particular claim could reasonably be fixed at $14,000. RNZ also seeks a contribution of $28,391.22 on account of disbursements, namely PwC's costs. Although it is unusual for financial considerations to play a significant role in an interim reinstatement case, I am satisfied that it was appropriate for accountants to be involved in connection with this particular reinstatement application. I consider that $15,000 is a reasonable amount to allow as a contribution towards the PwC costs.

[21] *Snowdon v Radio New Zealand Ltd* ERA Wellington WA86/05, 25 May 2005.
[22] *Snowdon v Radio New Zealand Ltd* EMC Wellington WC15/05, 4 August 2005.

(iv) *Judgment of Judge Travis dated 24 February 2010*[23]

(a) The 24 February 2010 judgment of Judge Travis related to disclosure of documents and was a development which followed on from the commencement of the fraud proceedings by Ms Snowdon on 17 March 2009. Judge Travis recorded that Judge Shaw had issued, what he described as "discovery judgments", on 16 December 2005, 27 March 2006 and 7 December 2006 and the cumulative effect of the discovery judgments was that RNZ had complied with all of its disclosure obligations.[24] In the fraud proceedings, Ms Snowdon had alleged that the discovery judgments had been obtained or procured by fraud. Dr Moodie therefore sought to set the discovery judgments aside. Judge Travis rejected the application and held that until the outcome of the fraud proceedings was determined at trial, the discovery judgments of Judge Shaw remained the final disposition of the disclosure issues between the parties.[25] I accept that the matter was complicated and, apart from the hearing, it involved several telephone directions conferences. Five sets of submissions were filed by each party but it was an interlocutory matter and the hearing did not involve the taking of evidence.

(b) The actual costs were recorded as being incurred by Quigg Partners in the sum of $62,262.50 and disbursements in relation to Wayne Findley in the sum of $6,804.79. The latter amount appears to relate to the costs and expenses incurred by Mr Findley in providing an affidavit. Mr Findley charged for his attendances over a period of 6.25 days at a rate of $1,000 per day. The charge includes Mr Findley's accommodation and travel expenses in travelling from Christchurch to Wellington. Judge Travis declined to take into account the defendant's affidavits (including

[23] *Snowdon v Radio New Zealand Ltd* [2010] ERNZ 33 (EmpC).
[24] At [2]-[4].
[25] At [52].

Mr Findley's),[26] and I do not allow his claim. There appears to be some duplication between this particular claim and the defendant's subsequent claim for costs on discovery.

There is also, perhaps inevitably, considerable duplication through the involvement of more than one counsel and there are some instances of items being listed which are not recoverable. For example, there are four entries recorded on 1 October 2009 relating to "preparation for and attendance at" a particular meeting with a Wellington QC where RNZ was represented by both Mr Quigg and Mr Bates – two of the entries relate to Mr Quigg's preparation for and attendance at the meeting ($700), and the other two entries relate to Mr Bates' preparation for and attendance at the same meeting ($580). There is no indication of what the meeting was about or how it related to these proceedings. I suspect, because of the QC's particular area of expertise, that the meeting may have related to separate defamation proceedings in the High Court but I cannot be sure about that. As noted above, I accept that RNZ was perfectly entitled to have more than one counsel involved in such attendances but I am required to determine what is reasonable in all the circumstances.

(c) I am prepared to fix reasonable costs in connection with this item of claim at $25,000. I am also prepared to grant an uplift in the contribution from the standard 66 per cent figure to 75 per cent. I do this in recognition of the fact that the application lacked merit. As Judge Travis observed, "to allow disclosure of the very documents which are at the heart of these fraud proceedings at this stage would be oppressive and an abuse of process."[27] The amount I award, therefore, in respect of this particular matter is $18,750.

[26] At [17].
[27] At [52].

(v) *Minute of Judge Travis dated 21 December 2012*

The minute issued by Judge Travis on 21 December 2012 followed on from a telephone directions conference that same day. Judge Travis recorded that the conference had been convened to deal with applications for interlocutory orders made by both parties. The matters were summarised as issues, including challenges; expert witnesses; the agreed bundle of documents; security for costs; amended pleadings and timetabling leading up to the hearing.

The total costs incurred in respect of attendances relating to matters covered in the minute was said to be $33,984. The breakdown shows that the attendances were incurred by Quigg Partners between 10 September 2012 and 20 January 2013. I am not satisfied that all of the attendances claimed can properly be categorised as reasonable in terms of the criteria for costs awards. I am prepared to fix reasonable costs under this head at $10,000 and I fix the award at 66 per cent of that figure, namely $6,600.

(vi) *Interlocutory judgment dated 5 September 2013*[28]

This judgment related to an urgent application made on behalf of Ms Snowdon for an order directing a conference of experts. It was decided on the papers based on written submissions filed by counsel. I dealt with the application urgently because the substantive hearing was set to commence on 30 September 2013. The costs incurred by Quigg Partners totalled $1,900. The amount is reasonable. RNZ seeks an uplift in the standard contribution to reflect the "futility of the application". I agree that such an uplift is appropriate. I fix the contribution at $1,615.

(vii) *Interlocutory judgment dated 26 September 2013*[29]

This judgment related to an application on behalf of the Chief Executive of the Ministry for Culture and Heritage to have a witness

[28] *Snowdon v Radio New Zealand Ltd* [2013] NZEmpC 168.
[29] *Snowdon v Radio New Zealand Ltd* [2013] NZEmpC 176.

summons which had been served on him on 25 September 2013, set aside on the grounds that it was oppressive and an abuse of process. The summons required the CEO to produce a large amount of historical documentation for the hearing which was set down to commence on 30 September 2013. Mr Quigg appeared and I granted the application setting aside the witness summons. Quigg Partners incurred costs totalling $1,985. Mr Quigg seeks indemnity costs and I consider that his claim is appropriate. The very late application was clearly an abuse of process that caused loss of time to the Court and counsel. I award the full amount claimed.

(viii) *Interlocutory judgment dated 1 October 2013*[30]

This interlocutory judgment related to an application made on behalf of the plaintiff at the commencement of the hearing on 30 September 2013 for the entry of judgment in default on the grounds that the defendant had failed to file an amended statement of defence to an amended statement of claim filed over five months earlier. I heard full argument on the matter and in my judgment I rejected the application. Quigg Partners incurred costs totalling $2,215. That figure seems reasonable given the urgent nature of the issue raised and I award 66 per cent of that sum (rounded off), namely $1,460.

(ix) *Discovery*

(a) The total costs incurred in relation to all aspects of the discovery process is claimed to have amounted to $168,812, made up of Quigg Partners costs of $132,727 and disbursements, being PwC costs of $36,085. I accept that the discovery process in this case was exceptional in every respect. I refer in my substantive judgment to many of the problems RNZ encountered in relation to the disclosure exercise. Invariably, these resulted from unmeritorious applications made on behalf of Ms Snowdon.

[30] *Snowdon v Radio New Zealand Ltd* [2013] NZEmpC 183.

The documentation involved in the case was voluminous. Mr Quigg refers in his submissions to an affidavit provided by one of Ms Snowdon's witnesses dated 2 June 2008, "that ran to 25 full Eastlight folders and required the use of a trolley to enable them to be presented in Court." Counsel also referred in his submissions to one of the early interlocutory discovery judgments of the Court, dated 16 December 2005, where it was noted by Judge Shaw that in advance of the hearing Ms Snowdon had filed what the Court described as:[31]

> … a massive amount of evidence comprising eight affidavits and 19 large volumes of documents in support.

(b) I do not intend to go into the particulars making up the claim. No specific objections were raised by Ms Snowdon's counsel in opposition but the Court still needs to be satisfied as to the reasonableness of the amount claimed. Even allowing for the exceptional circumstances referred to in the previous paragraph, I consider that the costs incurred in respect of this aspect of the case were excessive. Several counsel were involved in the process on behalf of RNZ, which inevitably involves a certain amount of duplication. Some of the entries in the time records are also questionable.

For example, the entry for 30 September 2010: "tidying Snowdon room - $300" and a similar entry for 4 October 2010 in the amount of $500, whilst no doubt attracting the sympathy of the Registrar of this Court are not, in my view, proper items of claim. Doing the best that I can, based on the information available to me, I am prepared to allow $65,000 as reasonable legal costs under this head. I agree with Mr Quigg, however, that the conduct of the plaintiff throughout the disclosure process was such that it warrants an uplift in the contribution and I therefore,

[31] *Snowdon v Radio New Zealand Ltd* [2005] ERNZ 905 (EmpC) at [22].

fix the contribution at 85 per cent of $65,000 namely $55,250. I also allow $20,000 as a disbursement (PwC).

The substantive hearing

[35] RNZ's claim for costs in respect of the substantive hearing is summarised at the end of counsel's written submissions. Under a heading "Substantive Hearing – Personal Grievances" total costs of $552,736.30 are shown and RNZ seeks to recover 85 per cent of those costs, namely $469,825.85

[36] Then under another heading, "Substantive Hearing – Fraud", the breakdown shows further costs incurred of $345,291.47. The summary states that RNZ seeks to recover that amount on an indemnity basis.

[37] The difficulty I have with the breakdown supplied is twofold. First, the amount of $345,291.47 is made up of disbursements only. They are listed as follows:

PwC	$301,683.65
Wayne Findley	$24,962.25
Robert Buchanan	$8,790.00
Delwynne Walsh	$5,647.50
Bernard Duncan	$4,208.07

[38] It would seem from this breakdown, in other words, that indemnity costs are claimed only in respect of disbursements and not in relation to legal costs but that is inconsistent with statements made in the body of counsel's submissions where Mr Quigg seeks an award of indemnity costs in respect of all costs associated with the fraud proceedings.

[39] The other confusing aspect of the breakdown of costs shown in the summary relating to the substantive hearing is that they appear to cover more attendances than simply those involved in connection with the hearing itself.

[40] The hearing took place between 30 September 2013 and 21 February 2014 but the costs claimed under the heading "Substantive Hearing – Personal Grievances" of $552,736.30 is made up of costs going back well before that period. They are recorded as:

Quigg Partners: (pre 5 November 2010 costs) – adjusted by 50 per cent	$27,535.50
Quigg Partners: (from 5 November 2010 onward) – $30,000 wasted costs	**$396,929.43**
Gresson Grayson: (Mr Jol Bates)	$126,100.00
Morrison Kent:	$1,139.65
Hot Copy: (preparation of defendant's bundle of documents)	$1,031.72

[41] From what I can make out from the invoices supplied, it would seem that of the costs figure of $396,929.43 highlighted in the previous paragraph, the proportion of costs incurred by Quigg Partners relating to the actual hearing (excluding any GST or disbursements) amounted to $270,741.15, made up as follows:

Invoice	26120		$81,372.50
Invoice	26201		$46,755.00
Invoice	26378		$42,150.00
Invoice	26505		$29,155.00
Invoice	26815		$71,309.00
		Total:	**$270,741.15**

[42] Costs incurred by Mr Bates of Gresson Grayson (as junior counsel) during the same period appear to have amounted to approximately $63,300, made up as follows:

Invoice	11/10/13		$28,500.00
Invoice	24/10/13		$19,650.00
Invoice	25/02/14		$15,150.00
		Total:	**$63,300.00**

[43] Mr Quigg's hourly rate is shown as $350 and Mr Bates' figure is said to be "$200 - $290". The hourly rates appear to be reasonable. The data provided records that other junior solicitors were involved in different aspects of RNZ's case but I do not consider it necessary or appropriate to look beyond Mr Bates' contribution.

[44] The actual number of hours of attendances represented by each invoice is not recorded in the invoice itself but separate time recording sheets have been provided which are not easy to reconcile with the individual invoices.

[45] Doing the best that I can based on the documentation before the Court, I consider that an appropriate figure of reasonable costs in respect of the substantive hearing of all three proceedings (including an allowance for junior counsel) would be (rounded off) $300,000.

[46] Of that amount, I consider it reasonable to apportion 50 per cent of the costs to the disadvantage grievance claims and unjustified dismissal claim and the other 50 per cent to the fraud proceedings.

[47] I have a major problem with the claim for disbursements, particularly those relating to PwC where, as can be seen in [37] above, $301,683.65 is claimed in relation to the substantive hearing. The actual invoices produced appear to indicate that the total amount charged by PwC came to $326,330.22 but, whatever the correct position, I consider the charge to be excessive. Likewise, but to a lesser extent, I consider that the Wayne Findley disbursement is also excessive. I do not appear to have been provided with any details regarding the Delwynne Walsh disbursement.

[48] Whilst I acknowledge and repeat that a party is fully entitled to retain any number of counsel, professional advisers and expert witnesses, they must understand

that the costs incurred through such representation will not necessarily be recoverable under a costs award.

[49] In this particular case, as the end result demonstrates, RNZ were well served by their professionals. In awarding costs, however, the Court must be guided not by the actual costs incurred but by what would be reasonable legal costs to conduct the case for the defendant in all the circumstances known to it.

[50] That exercise is somewhat artificial and it is not always an easy task, particularly in a complex case such as the present. It often involves having to dissect the gold-plated service provided and concentrating more on the nuts and bolts of the various attendances making up the substance of the claim. As Chief Judge Goddard expressed it in *Kukumoa Trust v Blackmore*:[32]

> The Court does not pass judgment upon the reasonableness of the costs charged by lawyers to their clients. It depends on the lawyer's assessment of the degree of thoroughness required and sometimes expected by an overly apprehensive client. But that does not mean that the client's opponent, if unsuccessful, can be made to contribute to the luxurious service required by the client or the meticulous attention provided by the lawyer, if the case is not complex enough to warrant it.

In my view, as this case demonstrates, that same principle has equal application to complex cases.

[51] I consider $75,000 to be a reasonable amount to allow for the disbursements claimed in relation to the substantive hearing. For preparation prior to the substantive hearing, excluding those interlocutory matters I have already separately allowed for, I am also prepared to fix reasonable costs (including costs in respect of any expert witnesses) in the sum of $125,000. These amounts, when added to the $300,000 figure allowed for in [45] above, give a total sum in respect of the substantive hearing of $500,000.

[52] Again, in respect of the additional amount of $200,000 which I allow in the previous paragraph for preparation and disbursements, I consider it appropriate to apportion 50 per cent of that figure to the fraud proceedings and the other 50 per cent to the two other sets of proceedings. I now turn to consider the extent to which

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[32] *Kukumoa Trust v Blackmore* EMC Auckland AC18/03, 19 February 2003 at [6], cited in *Mayne v Polychem Marketing Ltd* [2013] NZEmpC 127 at [10].

Ms Snowdon should be required to contribute towards the total cost figure of $500,000 which I am prepared to allow in connection with the substantive hearing.

Contribution

[53] Mr Quigg claimed that the contribution to reasonable costs in respect of what has been referred to throughout as the disadvantage grievances claim and the unjustified dismissal claim should be increased above the standard 66 per cent figure to 75 – 85 per cent. I have apportioned those costs at $250,000, i.e. 50 per cent of the total costs figure allowed of $500,000.

[54] A number of reasons are advanced in support of Mr Quigg's submission including the fact that the affirmative defence filed by RNZ should have put Ms Snowdon on notice that her grievances had not been raised within the required 90-day limitation period. Reference was also made to Ms Snowdon's refusal to accept the Calderbank offer which I have dealt with above.

[55] I have considered Mr Quigg's submissions carefully. I have not been persuaded that any increase is warranted because of the Calderbank offer or the 90-day issue but, as would have been apparent from my substantive judgment, the sheer volume of unmeritorious interlocutory applications pursued by Ms Snowdon prolonged the proceedings unnecessarily and in turn resulted in RNZ incurring additional unnecessary costs.

[56] For these reasons I am prepared to grant an uplift to 75 per cent in respect of the two grievance claims and I award RNZ 75 per cent of $250,000, namely, $187,500.

[57] Mr Quigg is on strong ground in claiming indemnity costs in respect of the fraud proceedings. Counsel stressed that Ms Snowdon had been warned repeatedly by this Court that the pursuit of allegations of fraud required cogent evidence and he noted that when awarding indemnity costs in respect of the strike out of claims

against Quigg Partners, Judge Travis in a judgment dated 25 September 2012 had reinforced the position stating:[33]

> In maintaining those serious fraud allegations in such circumstances without a shred of evidence to support them, amounted, in my view, to a flagrant misconduct which justifies the imposition of indemnity costs.

[58] In an earlier interlocutory judgment dated 2 August 2011, Judge Travis had stated:[34]

> I have to say, at this stage, that there is simply no new evidence at all which would suggest that there has been any such fraudulent conduct on the part of any present or past employee or board member of Radio New Zealand. As Mr Quigg has pointed out, if such allegations are made they must be backed by evidence otherwise any counsel that is acting for the plaintiff will be in breach of his or her ethical requirements.

[59] There was also evidence before me that earlier, a QC and a senior counsel who had been instructed to issue fraud proceedings on Ms Snowdon's behalf had both quite properly declined the instructions.

[60] Despite these warnings, Ms Snowdon continued to pursue her fraud claim which, as Mr Quigg submitted, included allegations of the most serious and damaging kind against RNZ and its senior personnel. In the event, I found in my substantive judgment that there was "not a scintilla of evidence in support of a single claim of fraud."[35]

[61] In response to the claim for indemnity costs, counsel for Ms Snowdon submitted that it was important to understand that the fraud allegations were made in "good faith" based on, inter alia, evidence from "recognised experts". Counsel also submitted that the Court should "consider the efforts made to ensure the fraud allegations were credible, reasonable and warranted".

[62] I will not repeat the rather scathing comments I made in my substantive judgment about the plaintiff's principal "expert witness" in the fraud proceedings.[36] The reality is that the warning bells were sounding at a very early stage but

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[33] *Snowdon v Radio NZ Ltd* [2012] NZEmpC 165 at [18]-[19].
[34] *Snowdon v Radio New Zealand Ltd (No 2)* [2011] NZEmpC 98 at [5].
[35] Substantive judgment, above n 1, at [133].
[36] At [122]-[124].

Ms Snowdon and her then legal advisers seemingly paid no heed to them. Nor did they take stock and discontinue the proceedings later after Judge Travis had signalled as strongly as he could that the fraud claim was totally unmeritorious.

[63] In [30] above I cite a passage from the Court of Appeal judgment in *Bradbury* listing the recognised non-exhaustive categories in which indemnity costs may be ordered. In my view, the fraud proceedings fall within both the first and last categories listed.

[64] In terms of the first category, given the warning signs I have just referred to from both the Court and senior counsel, Ms Snowdon, in my view, behaved improperly and unreasonably in continuing to pursue the fraud allegations when she must have known that they were false.

[65] In terms of the final category referred to in *Ben Nevis* of the "hopeless case" situation, in my view the fraud proceedings amounted to a "hopeless case" from the outset. It was clear from the evidence that from an early stage the ulterior motive in initiating and then persisting with such a claim, when Ms Snowdon properly advised should have known that it had no chance of success, was to pressure RNZ into a settlement. It was the leverage which towards the end of the case enabled her to open settlement negotiations at the absurd figure of $9.4 million.

[66] I agree with Mr Quigg that the fraud claim is an appropriate case for indemnity costs and I award the full amount apportioned of $250,000.

[67] I consider it appropriate to also award RNZ a reasonable sum on account of costs associated with the preparation of its submissions on costs. I award $5,000 under this head.

Summary of costs award

[68] In summary, subject to the next section of this judgment dealing with the issue of hardship. I would have been prepared to make an award of costs in RNZ's favour made up as follows:

Interlocutory matters

(i)	Judgment of Judge Shaw dated 13 October 2004	$6,000.00
(ii)	Determination of the Employment Relations Authority dated 25 May 2005	$2,000.00
(iii)	Judgment of Judge Shaw dated 4 August 2005	$29,000.00
(iv)	Judgment of Judge Travis dated 24 February 2010	$18,750.00
(v)	Minute of Judge Travis dated 21 December 2010	$6,600.00
(vi)	Judgment of Judge Ford dated 5 September 2013	$1,615.00
(vii)	Judgment of Judge Ford dated 26 September 2013	$1,985.00
(viii)	Judgment of Judge Ford dated 1 October 2013	$1,460.00
(ix)	Discovery (7 September 2004, 7 December 2006)	$75,250.00

Substantive hearing

(x)	The personal grievances claims (WRC 17/04 and WRC 19/05)	$187,500.00
(xi)	The fraud proceedings (WRC 8/09)	$250,000.00

Submissions

(xii)	Preparation of costs submissions	$5,000.00
	Total:	**$585,160.00**

Hardship

[69] Perhaps the principal submission advanced by counsel for Ms Snowdon was that "an unsuccessful party's ability to pay a costs award is a matter that can properly be taken into account if the payment would cause the party undue hardship". Reliance in this regard was placed on the Court's exclusive equity and good conscience jurisdiction under s 189 of the Act. Counsel also referred to my earlier decision in *Walker v ProCare Health Ltd* in which I affirmed the principle that the

purpose of an award of costs is not to punish an unsuccessful party but to compensate the successful party.[37]

[70] RNZ does not dispute the application of these principles in this jurisdiction. In *Walker* the successful defendant's actual costs had amounted to just under $95,000.[38] After analysing the documentation provided, I concluded that 66 per cent of the defendant's reasonable costs would have amounted to $33,000.[39] I then went on to hold that, given the serious undue hardship such an award would have imposed on the plaintiff, Ms Walker, the actual award should be reduced to $8,000.[40]

[71] The hardship claim in the present case was strongly supported by the affidavit of Ms Snowdon dated 30 May 2014. Ms Snowdon detailed her financial position and described the impact the litigation has had on her and her family. In summary, Ms Snowdon deposed that she has no assets left to pay the costs claimed by RNZ, that she is effectively destitute, and that her liabilities exceed her assets. Ms Snowdon further deposed that she has nowhere to live other than temporary accommodation, that she has no income, and that she is struggling to pay her existing costs in connection with the proceedings.

[72] In the concluding paragraphs of her affidavit Ms Snowdon stated:

> 81. Above all, these proceedings have adversely affected my health and have done so repeatedly over the past 12 years. The anticipated draconian effects of the costs order on me and my family, [and] the consequential stress and anxiety have caused me to become ill again and seek medical assistance.
>
> 82. Effectively, I have been totally destroyed. I ask the court that I be left with a little bit of dignity so that I can try and regain control of some part of my life, what is left of it, and move on.

[73] In a schedule to her affidavit, Ms Snowdon sets out particulars of her assets and liabilities which I do not intend to detail but her net position is that her liabilities exceed her assets by $2,589,005. The figures listed under the heading "Litigation costs" include debts to two private funders of her litigation costs in the amounts of

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[37] *Walker v ProCare Health Ltd* [2012] NZEmpC 186 at [20].
[38] At [1].
[39] At [19].
[40] At [44].

$130,000 and $240,000, respectively. In the body of her affidavit, Ms Snowdon refers to a notation in one of the invoices sent to RNZ by their lawyers which stated:

> Drafting bankruptcy notices for Employment Court and Court of Appeal costs awards.

Ms Snowdon's alleged that that was evidence on the part of RNZ "of an intention to totally destroy me over and above my current very distressed personal and financial circumstances".

[74] In response, Mr Quigg submitted:

> 4.1.2 Ms Snowdon is effectively asking that her advisor's latest costs be preferred over her obligation to pay Radio New Zealand's previously awarded costs. This is despite the fact that some of Radio New Zealand's costs date back many years. There is no reason whatsoever why Ms Snowdon's advisors should be effectively "preferred creditors" over Radio New Zealand …

[75] Mr Quigg submitted that little credence could be given to some of the plaintiff's information as to the costs she incurred and he alleged that the asset information provided by Ms Snowdon was unreliable. No application was made, however, to have Ms Snowdon cross-examined on the contents of her affidavit and so, for present purposes, I accept what Ms Snowdon has deposed.

[76] Mr Quigg is on much stronger ground when he submits that *Walker* and many of the other costs decisions can be distinguished on the facts from the "highly unusual features of this case". Ms Walker was not pursuing a "hopeless case". Ms Snowdon, on the other hand, incurred very substantial costs in her Don Quixote like pursuit of evidence of fraud on the part of RNZ and its senior officers when she should have recognised from the outset that such evidence simply did not exist. The fact that she claims to have relied on advice she received from her legal representatives at the time and/or her professional advisers does not immunise her from an award of indemnity costs.[41]

[77] For its part, RNZ was inevitably forced into the position of having to also incur substantial costs in responding to and defending the baseless fraud allegations.

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[41] See *Ben Nevis*, above n 16, at [30].

Whilst the Court has some sympathy with Ms Snowdon given her present financial plight, it cannot be seen to be encouraging or condoning in any way the pursuit of hopeless causes.

[78] The Court is prepared to give some recognition to the undue hardship principles but only in relation to the two grievance cases which did not fall into the hopeless case category. To this end, I am prepared to reduce the award of costs from the figure of $585,160 detailed in [68] above to a rounded off figure of $490,000.

Conclusion

[79] I have found that RNZ was entitled to recover from Ms Snowdon the sum of $585,160 as her contribution towards its costs. However, after making appropriate allowance for undue hardship, I have fixed the costs award in the sum of $490,000. Prior to the commencement of the hearing, I made an order on an application by RNZ, requiring Ms Snowdon to pay the sum of $240,000 into Court as security for costs. That amount was duly paid into Court and has been invested in an interest earning account with Westpac since 5 September 2013.

[80] I now direct the Registrar to arrange for the full amount that had been paid into Court, together with the interest thereon, to be paid out to RNZ. The Registrar is to advise counsel for Ms Snowdon of the total amount so paid. Leave is reserved for Ms Snowdon to apply within 21 days of the date of this judgment for an order allowing the balance of the costs award to be paid by instalments or within a defined timeframe.

A D Ford
Judge

Judgment signed at 11.00 am on 26 September 2014