IN THE EMPLOYMENT COURT
CHRISTCHURCH

[2015] NZEmpC 147
CRC 52/13

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	DAVID RODKISS Plaintiff
AND	CARTER HOLT HARVEY LIMITED Defendant

Hearing: (on the papers by submissions filed 21 April, 7 and 18 May 2015)

Counsel: N Ironside, counsel for the plaintiff
D Erickson, counsel for the defendant

Judgment: 27 August 2015

COSTS JUDGMENT OF JUDGE A D FORD

Introduction

[1] In my substantive judgment dated 24 March 2015, I found in favour of the plaintiff and invited the parties to endeavour to reach agreement on the issue of costs.[1] Agreement was not possible and the Court has now been called upon to make a formal award of costs in the plaintiff's favour. The statistics relating to costs make disturbing reading. In her submissions, Ms Ironside, counsel for the plaintiff, confirmed that: "Against his total recovery of $51,258.85, Mr Rodkiss has incurred legal expenses of $230,313.61."

[2] Mr Rodkiss had been employed as Engineering Manager at Carter Holt Harvey Limited's (the defendant) Eves Valley sawmill, near Nelson. His was a senior position and he was directly responsible for the management of the plant's

1 *Rodkiss v Carter Holt Harvey Ltd* [2015] NZEmpC 34.

maintenance department of approximately 30 employees. He brought proceedings in the Employment Relations Authority (the Authority) claiming that on 16 April 2013 he had been constructively dismissed by the defendant. He also claimed that during the course of his employment he had been subjected to certain disadvantage grievances.

[3] In a determination dated 28 November 2013, the Authority rejected Mr Rodkiss' constructive dismissal claim but upheld his three disadvantage grievances, awarding him compensation in the sum of $6,000.[2] In a subsequent costs determination dated 11 February 2014, the Authority ordered the defendant to pay Mr Rodkiss costs in the amount of $6,710 and disbursements of $378.22.[3]

[4] Mr Rodkiss then challenged the findings of the Authority on the constructive dismissal claim; the defendant cross-challenged in respect of the disadvantage grievance claims and the Authority's costs award. The challenges proceeded by way of a complete de novo hearing.

[5] After an eight-day hearing in Nelson, the Court upheld Mr Rodkiss' challenge and, by way of relief he was awarded the sum of $51,258.85 made up of lost wages in the sum of $15,258.85; other financial loss of $16,000 and $20,000 on account of compensation for hurt and humiliation. Counsel agreed at the hearing that the judgment would not need to deal with the defendant's challenge to the Authority's costs determination because that would depend upon the outcome of the substantive challenge. In other words, there are now two issues the Court must deal with – costs in the Authority and costs in this Court.

The Authority's determination

[6] In a commendably succinct costs determination, the Authority recorded that its investigation meeting occupied two days. It applied the well-established principles expounded by the full Court in *PBO Ltd (formerly Rush Security Limited)*

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2 *Rodkiss v Carter Holt Harvey Ltd* [2013] NZERA Christchurch 243.
3 *Rodkiss v Carter Holt Harvey Ltd* [2014] NZERA Christchurch 25.

v Da Cruz,[4] and began the exercise by adopting the notional daily tariff, which it correctly confirmed currently stood at $3,500.

[7] The Authority declined to give any weight to a Calderbank offer made by Mr Rodkiss to the defendant before it carried out its investigation because it found that the offer "was for an amount well in excess of that ultimately awarded."[5] It did, however, make a deduction of $700 per day from the daily starting point of $3,500 in recognition of the fact that Mr Rodkiss had not been completely successful and had failed in his constructive dismissal claim. After allowing for these adjustments, the Authority settled for a notional daily rate of $2,800 or $5,600 for the two days.

[8] The Authority then allowed an increase of $910 on top of that sum in recognition of the fact that Mr Rodkiss had successfully opposed an application by the defendant to have certain evidence declared inadmissible. Ms Ironside had submitted that the actual costs of opposing the application had amounted to $3,050 and she had sought a contribution of $1,750 on that count.

[9] The evidence in question was a statement made by Mr Rodkiss in his written brief of evidence in the Authority to the effect that as he was about to leave the building in which an unsuccessful mediation had been held between the parties, he informed the mediator to advise the defendant representatives about his intention to resign. Mr Erickson, counsel for the defendant, had argued that the statement had been made orally at mediation and was, therefore, inadmissible. In *Just Hotel Limited v Jesudhass*,[6] the Court of Appeal held that all communications for the purposes of mediation attract statutory confidentiality. The Authority concluded that the communication in question relating to Mr Rodkiss' future intentions had, in fact, been made after mediation was at an end and was, therefore, admissible.

[10] Finally, the Authority made a further upward adjustment of $200 for costs in respect of preparation of the costs memoranda, and it ordered a total contribution towards costs of $6,710 together with disbursements comprised of the filing fee, $71.56, and the hearing fee of $306.66.

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4 *PBO Ltd (formerly Rush Security) v Da Cruz* [2005] ERNZ 808 (EmpC).
5 *Rodkiss v Carter Holt Harvey Ltd*, above n 3, at [13].
6 *Just Hotels Ltd v Jesudhass* [2007] NZCA 582, [2007] ERNZ 817 at [31].

Submissions

[11] There was no dispute that the role of the Court on a challenge as to costs is to stand in the shoes of the Authority and to assess the evidence relating to the costs award in that forum in order to judge what is an appropriate award in light of all considerations which are relevant to the Authority.[7]

[12] Ms Ironside advised that the total costs and disbursements incurred by Mr Rodkiss in relation to the Authority's two-day investigation meeting amounted to $34,166.47 inclusive of GST. Ms Ironside subsequently sought a contribution of $25,081.57 towards those costs and disbursements made up of costs (including GST) of $23,000 and disbursements (including GST) of $2,081.57. The costs claim is based on an uplift in the notional daily tariff from $3,500 to $5,000 and the application of that daily tariff over a four-day period (two days for the investigation meeting and two days for preparation) with a claim of $3,000 for GST.

[13] Ms Ironside submitted that the higher daily rate claimed of $5,000 should be allowed, taking into account the degree of preparation time that was needed to be put into this case. Counsel noted that in *Da Cruz* the full Court had increased the tariff from $2,000 (the then notional rate) per day to $7,000 per day and by adopting that approach the Court "was clearly recognising that there is significant scope for doing justice between the parties in a given case simply by making a principled adjustment to the daily tariff."

[14] Ms Ironside also sought to rely upon *Wackrow v Fonterra Co-operative Group Limited*;[8] *Carter Holt Harvey Ltd v Eastern Bays Independent Industrial Workers Union*[9] and *Chief Executive of the Department of Corrections v Tawhiwhirangi*.[10] In those cases an uplift in the daily rate and an allowance for preparation time had been made in recognition of the complexity of the Authority's investigations but, as the full Court emphasised in *Da Cruz*, each case is to be treated on its own facts.

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7 *PBO Ltd (formerly Rush Security Ltd) v Da Cruz*, above n 4, at [19].
8 *Wackrow v Fonterra Co-operative Group Ltd* [2006] ERNZ 375 (EmpC).
9 *Carter Holt Harvey Ltd v Eastern Bays Independent Industrial Workers Union* [2011] NZEmpC 13.
10 *Chief Executive of the Department of Corrections v Tawhiwhirangi* WC 4A/08..

[15] Two additional specific reasons were advanced by Ms Ironside for a significant uplift in the daily rate in this case:

(i) the defendant's unsuccessful application to exclude the evidence referred to in [8] above; and

(ii) a Calderbank offer Mr Rodkiss had made to the defendant on 13 May 2013 to try and settle his claim.

[16] Mr Erickson submitted that the case did not give rise to any complex issues over and above those which generally apply to an application involving claims of unjustified constructive dismissal and unjustified disadvantage. Mr Erickson submitted that the plaintiff's costs claim in relation to the Authority's investigation meeting was excessive and failed to accord with the guiding principle enunciated in *Da Cruz* that costs in the Authority should be modest.

[17] In relation to the specific grounds Ms Ironside relied upon for an uplift in the daily rate, Mr Erickson submitted that the Calderbank offer was not relevant because the plaintiff required the defendant to pay a total amount of $57,704.88 which was considerably in excess of the sum the plaintiff was awarded. Mr Erickson further submitted that no allowance should be made for preparation time or costs in respect of the defendant's unsuccessful objection to the admissibility of evidence because both matters were effectively included in the notional daily tariff. Mr Erickson submitted that a sum of $7,000 was an appropriate contribution towards the plaintiff's costs in respect of the Authority's investigation meeting.

The Authority's costs

[18] Under cl 15 of sch 2 to the Employment Relations Act 2000 (the Act), the Authority has a broad general discretion to order any party to a matter before it to pay to any other party such costs and expenses (including expenses for witnesses) as the Authority thinks reasonable.

[19] In its recent judgment in *Fagotti v Acme & Co Limited*, the full Court applied and re-confirmed the principles it had expounded in what it referred to as, "the now

long and well established judgment of this Court"[11] in *Da Cruz*. In reaffirming the appropriateness of the notional daily rate approach to costs orders in the Authority, the full Court in *Fagotti* stated:[12]

> As to the question of the utility and value of a "notional daily rate" for costs, we agree that there is significant value in a commonly applied and well publicised notional daily rate for costs in the Authority. This enables parties and their representatives to assess more accurately from the outset what may be a very important element of the litigation (costs) when undertaking the regular economic analys[i]s that parties and their representatives should undertake during that process. This was put succinctly and recently in the costs judgment in *Booth v Big Kahuna Holdings Ltd* where it was said that parties who elect to incur costs that are likely to exceed the Authority's notional daily rate are "entitled to do so it cannot confidently expect to recoup any additional sums".[13]

[20] In *Fagotti* the plaintiff was awarded remedies in the Authority totalling $8,598. In a subsequent costs determination the Authority awarded Mr Fagotti the sum of $4,500 plus disbursements (filing fee) of $71.56.[14] The $4,500 was made up of the notional daily tariff of $3,500 which was taken as the starting point together with an uplift of $1,000 on account of the defendant's failure to take "a more pragmatic approach"[15] to trying to resolve the matter through settlement.

[21] The plaintiff in *Fagotti* challenged the Authority's costs award and sought to recover his actual costs in the Authority of approximately $25,000, less $3,000 which was incurred in connection with an unsuccessful mediation. The plaintiff accepted that mediation costs were not usually recoverable unless directed by the Authority. After a consideration of all the issues, the full Court dismissed the plaintiff's challenge concluding that the order made by the Authority for costs of $4,571.56 (including disbursements) was an appropriate award.[16]

[22] While the case before me did not involve any overly complex legal issues, it did involve a particularly complex factual matrix. I agree with Mr Erickson, however, that the costs figure of $34,166.47 said to have been incurred in connection

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11 *Fagotti v Acme & Co Ltd* [2015] NZEmpC 135 at [6].
12 At [108].
13 *Booth v Big Kahuna Holdings Ltd* [2015] NZEmpC 4 at [17].
14 *Fagotti v Acme & Co L*td [2015] NZERA Wellington 131.
15 At [14].
16 *Fagotti v Acme & Co Ltd*, above n 11.

with the Authority investigation is excessive. The issue regarding the Calderbank offer is more complex.

Calderbank offer

[23] On 13 May 2013 Mr Rodkiss made a formal Calderbank offer to settle his claim. The offer was made "without prejudice save as to costs". Under the settlement proposal, Mr Rodkiss indicated that he would be prepared to settle his claim on a confidential basis in the amount of $57,704.88 made up as follows:

Lost wages and benefits:	$32,704.88
Compensation for distress:	$10,000.00
Contribution towards costs:	$15,000.00

[24] The offer was to remain open for a "reasonable time". It was made well in advance of the Authority's investigation which did not commence until August 2013.

[25] An invoice was produced showing that as at 6 May 2013, Mr Rodkiss had incurred legal costs and disbursements in the sum of $16,052.85. Ms Ironside explained that the legal costs were incurred as from 27 March 2013 when Mr Rodkiss had been falsely accused of serious misconduct and was required to take urgent legal steps to try and protect his job. The defendant rejected the Calderbank offer and made no counterproposal.

[26] Ms Ironside submitted that although the Calderbank offer was given no weight by the Authority in its costs determination, it is relevant to this Court's consideration of the cost issues because the Authority's substantive determination dated 28 November 2013, has now been replaced with this Court's judgment of 24 March 2015. Under the judgment, Mr Rodkiss was awarded the sum of $51,258.85 for lost wages and benefits compared with the sum of $42,704.88 he had been prepared to settle his claim for under those respective heads. Ms Ironside submitted that Mr Rodkiss was also entitled to significant costs in respect of both the Authority investigation and his successful challenge in this Court.

[27] In response to these submissions, Mr Erickson stated:

> The Calderbank offer set out in Ironside Law Limited's letter dated 13 May 2013 required the defendant to pay a total amount of $57,704.88. This amount is in excess of what the plaintiff was ultimately awarded ($51,258.85). Therefore, it is not relevant to the setting of costs in either the Authority or this Court.

[28] Several issues arise out of these submissions. The first is whether a Calderbank offer made prior to an Authority investigation is relevant to the question of costs upon the challenge in this Court. Then there is a question as to whether the Calderbank offer in question was a successful offer in terms of the relevant rules of court. Finally, there is the issue of the effects of a successful Calderbank offer. I will deal with each matter in turn.

Relevance of Calderbank offer made in the Authority

[29] There seems to have been a divergence of legal authorities on this issue. In *Kaipara v Carter Holt Harvey Ltd*,[17] Chief Judge Colgan in his assessment of costs following an unsuccessful challenge by the plaintiff, declined to take into account Calderbank offers which had been made by the defendant prior to the Authority's investigation meeting. In that case, Mr Kaipara had rejected Calderbank offers made in the Authority and had then failed in his claim. In awarding costs against Mr Kaipara, the Authority took into account the rejected Calderbank offers. Mr Kaipara challenged the Authority's substantive determination but there was no challenge to the Authority's costs award. The issue before the Court was whether, in fixing costs on the unsuccessful challenge, account could be taken of the Calderbank offers made in the Authority. The Court, for reasons explained in the judgment, declined to take into account the Calderbank offers made in the Authority.[18]

[30] The approach taken in *Kaipara* and followed in *O'Connor v University of Auckland Students' Association Incorporated* would appear to be consistent with that taken by the Australian Courts towards Calderbank offers. The rationale in that jurisdiction is that the proceedings on appeal are, in effect, new proceedings. In

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[17] *Kaipara v Carter Holt Harvey Ltd* [2012] NZEmpC 92.

[18] At [28]. *Kaipara* was followed in *O'Connor v University of Auckland Students' Assoc Inc* [2014] NZEmpC 185 at [19(d)]. There are two judgments of the High Court to contrary effect: *Tournament Parking Ltd v The Wellington Company Ltd* [2010] NZHC 2333 and *Geary v Accident Compensation Corporation* [2014] NZHC 1037.

Re Baresic v Slingshot Holdings Pty Limited (No 2),[19] the New South Wales Court of Appeal held that the effect of a Calderbank offer made in lower court proceedings, would not extend to provide the offeror with any benefit in subsequent Court of Appeal proceedings. In *Stewart v Atco Controls Pty Limited (in Liquidation) (No 2)* where a Calderbank offer was made prior to the hearing of an appeal by the Court of Appeal, the High Court observed that at the time of the appeal, there was no extant offer by the appellants for the respondent to accept.[20] Writing extra judicially on the subject of Calderbank offers, the Hon Justice M J Beazley, President of the New South Wales Court of Appeal, stated:[21]

> Finally, a note of caution. As a general rule, an offer made before or during trial, whether made under the rules or by way of a *Calderbank* offer, does not automatically subsist for the purposes of an appeal. A fresh offer should be made on an appeal. The reason is simply that the 'ball game' has changed. A judicial officer has expressed a view on the facts and on the law. Parties should reconsider the original offer made in light of the findings made and/or the result of the first instance decision.[22]

[31] The legal situation in this jurisdiction was revisited recently in *Stevens v Hapag-Lloyd (NZ) Limited*,[23] where Judge Inglis noted that the position in New Zealand was governed by *Bluestar Print Group (NZ) Ltd v Mitchell*.[24] In that case Bluestar had made a Calderbank offer in the Authority to settle Mr Mitchell's claim for a total sum of $13,000 made up of $10,000 plus costs of $3,000. The offer was not accepted. Mr Mitchell failed in his claim before the Authority but he then challenged the Authority's determination in this Court and was partially successful, recovering $10,000 compensation, $1,000 for costs in the Authority, $3,000 Court costs and $1,510 for disbursements. In fixing costs, this Court disregarded the Calderbank offer because it did not address the personal vindication that Mr Mitchell was seeking.

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19 *Re Baresic v Slingshot Holdings Pty Ltd (No 2)* [2005] NSWCA 160.

20 *Stewart v Atco Controls Pty Ltd (in Liquidation) (No 2)* [2014] HCA 31; 252 CLR 331, (at [7]).

21 M J Beazley, President of the New South Wales Court of Appeal, "'Without Prejudice' Offers and Offers of Compromise" NSW Young Lawyers Civil Litigation Committee, Sydney, 26 September 2012 at [22].

22 See also *Brymount Pty Ltd t/a Watson Toyota (Acn 003 200 459) v Cummins (No 2)* [2005] NSWCA 69 at [22]-[30] and *Monie v The Commonwealth of Australia (No 2)* [2008] NSWCA 15 at [71].

23 *Stevens v Hapag-Lloyd (NZ) Ltd* [2015] NZEmpC 137.

24 *Bluestar Print Group (NZ) Ltd v Mitchell* [2010] NZCA 385, [2010] ERNZ 446.

[32] The appeal concerned the correctness of the decision to disregard the Calderbank offer when assessing costs. The Court of Appeal allowed the appeal holding that it was necessary to take into account the Calderbank offer because it:[25]

> [W]as more than what [Mr Mitchell] achieved in the Employment Court. This is because the $13,000 [Bluestar] offered for compensation and costs before the Employment Relation[s] Authority investigation was more than the $11,000 the Employment Court later awarded under those heads.

[33] Applying *Bluestar,* I accept that the successful Calderbank offer made prior to the Authority investigation is relevant to the issue of costs in this Court.

Was the Calderbank offer in question successful?

[34] Ms Ironside submitted that in assessing the merits of the Calderbank offer it was necessary to have regard to the fact that it included $15,000 towards Mr Rodkiss' costs. In other words, CHH could have settled the whole claim for $57,704.88 whereas under this Court's judgment of 24 March 2015, CHH is required to pay Mr Rodkiss the sum of $51,258.85 along with costs in the Authority and costs on the hearing of the substantive challenge.

[35] No authority was cited in support of this particular submission. In *Gauld v Waimakariri District Council*,[26] the High Court was concerned with the issue of whether costs awarded subsequent to a Calderbank offer should be taken into account for the purposes of assessing whether the final judgment exceeded the value or benefit of the offer. Counsel for the plaintiff argued that in comparing a Calderbank offer with the value of the judgment sum, the amount of the judgment must include any costs and disbursements up to the conclusion of the hearing. Counsel for the defendant submitted that the true assessment was the quantum of the judgment combined with any likely order as to costs as at the date of the settlement offer.

[36] The Court agreed with counsel for the defendant stating:[27]

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[25] *Bluestar Print Group (NZ) Ltd v Mitchell*, above n 24, at [24].
[26] *Gauld v Waimakariri District Council* [2014] NZHC 956.
[27] *Gauld v Waimakariri District Council*, above n 26, at [20].

> On this preliminary issue, I agree with the submissions of the defendant on the quantum of the judgment. The underlying purpose of r 14.11 (in combination with r 14.10) is to recognise the cost efficiencies gained by way of making offers to settle in advance of the hearing of the case. It would therefore be anomalous for a party to factor into costs that might be awarded subsequent to the offer for the purposes of assessing whether the final judgment obtained exceeded the value or benefit of the offer. In reality, any costs in fact incurred post the settlement offer would more than offset any judgment sum in any event. Therefore, the net position of the (in this case) plaintiff is at best neutral in terms of an award post settlement offer costs.

[37] I respectfully agree with those observations. However, even disregarding Mr Rodkiss' costs entitlement in respect of the Authority's investigation and the challenge, the position is that, having regard to the quantum of this Court's judgment and any likely order as to costs as at the date of the making of the Calderbank offer (which I deal with subsequently), the defendant would have been better off had it accepted Mr Rodkiss' Calderbank offer of 13 May 2013.

Effects of successful Calderbank offer

[38] In *Bluestar* the Court of Appeal, after noting the costs rules for this Court in the Employment Court Regulations 2000 (the regulations), went on to state:

> [6] … Regulation 68(1) states:
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> > 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.
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> [7] Regulation 6 states that where there is no relevant procedure in the regulations or the ERA, the Court must resolve the issue as nearly as is practicable, in accordance with the High Court Rules.
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> [8] Rules 14.1 – 14.23 of the High Court Rules set out the costs regime. Rule 14.10 states that a party may make a Calderbank offer at any time. Rule 14.11 governs the effect of Calderbank offers on costs:
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> **14.11 Effect on costs**
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> (1) The effect (if any) that the making of an offer under rule 14.10 has on the question of costs is at the discretion of the court.
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> (2) Subclauses (3) and (4)–
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> (a) are subject to subclause (1); and
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> (b) do not limit rule 14.6 or 14.7; and
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> (c) apply to an offer made under rule 14.10 by a party to a proceeding (**party A**) to another party to it (**party B**).

(3) Party A is entitled to costs on the steps taken in the proceedings after the offer is made, if party A–

(a) offers a sum of money to party B that exceeds the amount of a judgment obtained by a party B against party A; or

(b) makes an offer that would have been more beneficial to party B than the judgment obtained by party B against party A.

(4) The offer may be taken into account, if party A makes an offer that–

(a) does not fall within paragraph (a) or (b) of subclause (3); and

(b) is close to the value or benefit of the judgment obtained by party B.

[39] One of the factors listed in High Court Rules 14.6 and 14.7 relevant to the exercise of the Court's discretion in making an order increasing or reducing costs is the failure of a party, without reasonable justification, to accept an offer of settlement.[28]

[40] If (un)reasonableness was the appropriate test, the Court would find it difficult to conclude that the defendant did act unreasonably in rejecting Mr Rodkiss' initial Calderbank offer. With hindsight, the fact that the Authority found for the defendant on the principal issue of whether Mr Rodkiss had been constructively dismissed illustrates that point. The reality, however, as noted in my substantive judgment,[29] was that the case did involve complex factual issues and the hearing was hard-fought throughout. In the end, much depended upon the credibility of witnesses after their testimony had been tested by cross-examination. In those circumstances, it would be difficult to attempt to make a judgment call on the defendant's non-acceptance of the original Calderbank offer in terms of some standard of reasonableness.

[41] Offers of settlement in this jurisdiction, however, including Calderbank offers, are made pursuant to reg 68(1) of the regulations and that provision does not contain any criteria of reasonableness apart from the requirement for the offer to be made a reasonable time before the hearing.

[42] Once it is established that a party has made a successful Calderbank offer then the effect of the offer on costs is governed by r 14.11 of the High Court Rules

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[28] High Court Rules, r 14.6(3)(v) and 14.7(f)(v).

[29] *Rodkiss v Carter Holt Harvey* at [1].

and in addition; the requirement, reaffirmed in *Bluestar*, that in the exercise of its discretion, the Court is to have regard to the principles that: (1) the public interest in the fair and expeditious resolution of disputes would be undermined if a party were able to ignore a Calderbank offer without any consequences as to costs; and (2) a "steely approach" is required.[30]

[43] In the present case, as noted above, the defendant maintained that the Calderbank offer in question was simply not relevant because it was for an amount in excess of what the plaintiff was ultimately awarded but, upon analysis, that is not correct. The defendant would have been significantly better off had it accepted the Calderbank offer. A steely approach, therefore, is now called for. Calderbank offers can be powerful instruments and offerees ignore them at their peril.

Costs

[44] Ms Ironside seeks an uplift in the notional daily tariff adopted by the Authority, from $3,500 to $5,000, and the application of that daily tariff over a four-day period giving a total of $20,000 for costs in the Authority. In the *Eastern Bays* case referred to above, the Court made an order for costs in the Authority along the same lines. In all the circumstances, particularly having regard to Mr Rodkiss' successful Calderbank offer, I accept that Ms Ironside's submission in this regard is reasonable and I adopt her suggested approach for fixing costs in the Authority.

Goods and Services Tax (GST)

[45] Ms Ironside also seeks GST in the amount $3,000 but Mr Erickson disagreed with the assertion that GST should be paid on costs submitting: "The historical approach of this Court … has been to exclude GST from costs awards in keeping with the High Court's general approach of GST neutrality."[31]

[46] In *Sai Systems Limited v Bird*,[32] I referred to the provisions of the Goods and Services Tax Act 1985 and queried whether it was appropriate for this Court to effectively impose GST on the discretionary lump sum figure it decides upon in

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30 *Bluestar Print Group (NZ) Ltd v Mitchell* at [18] and [20].
31 See *Sai Systems Ltd v Bird* [2015] NZEmpC 13 at [11].
32 *Sai Systems Ltd v Bird*, above n 31, at [12]-[14].

fixing a costs award. I indicated a preference for the High Court GST neutral approach.

[47] In *Thoroughbred & Classic Car Owners' Club Inc v Coleman*, Cooke P stated:[33]

> The appropriateness or otherwise of adding GST in a costs order has not been argued to any extent this morning but our present view, on which the Court will act unless and until on full argument we are satisfied otherwise, is that in a party-and-party costs order it is not normally appropriate to add GST.

[48] In *Burrows v Rental Space Limited*, in reference to a case in which Hanson J had allowed GST on a costs award, Chambers J stated:[34]

> With respect, that decision is wrong. Costs between parties are GST neutral. The losing party when required to make a contribution towards the successful party's costs is not paying for a service provided to it by the successful party or its lawyers. I have discussed this matter with Rodney Hanson J and with Fisher J, chair of the Rules Committee. Both agree with the views I have just expressed and have authorised me to say that they do so agree.

[49] For the reasons stated, I make no specific award in respect of the GST element of the plaintiff's claim, either in the Authority or in this Court.

Disbursements

[50] Mr Rodkiss also claimed $2,081.57 for disbursements. Ms Ironside sought to rely on the following passage from the Court of Appeal judgment in *Victoria University of Wellington v Alton-Lee*:[35]

> It was not seriously suggested that the Chief Judge's approach to out-of-pocket expenses was wrong. It is conventional where costs are fixed for the award to include a 100-per-cent recovery in relation to disbursements reasonably incurred.

[51] Under r 14.12 of the High Court Rules ‘disbursement’ means, relevantly, “an expense paid or incurred for the purposes of the proceeding.” As Judge Inglis observed in *Baker v St John Central Regional Trust Board*, to qualify as a

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33 *Thoroughbred & Classic Car Owners' Club Inc v Coleman* unreported, CA 203/93, 25 November 1993 at 2 – 3.

34 *Burrows v Rental Space Ltd* (2001) 15 PRNZ 298 (HC) at [14].

35 *Victoria University of Wellington v Alton-Lee* [2001] ERNZ 305 (CA) at [60].

recoverable disbursement, a payment must be both necessary to the conduct of the proceeding and reasonable."[36] I am not prepared to make any order in respect of those items which appear to me to come under the category of business overheads normally allowed for in the fee charged.[37] However, I am prepared to allow as disbursements the Authority filing fee of $378.22; a photocopying charge of $392.12; binding expenses of $45 and a courier fee of $67.50. These items have been explained and I accept that they related directly to expenses necessarily incurred in respect of the Authority investigation.

[52] I am also prepared to allow a disbursement of $832 for expenses relating to a witness who was required to travel from Whangarei to Nelson to give evidence at the investigation hearing. This item was not objected to by Mr Erickson and an email was produced confirming that prior to the investigation hearing, the Authority approved the expenses in question relating to the attendance of the witness and in these circumstances, I am prepared to allow that claim.

Result

[53] In summary, therefore, in respect of costs in the Authority Mr Rodkiss is awarded a total of $21,714.84. This is made up of costs of $20,000, and disbursements, $1,714.84.

Costs in this Court

Applicable principles

[54] Under cl 19(1) of sch 3 of the Act and reg 68(1) of the regulations, the Court has a broad discretion in relation to costs but that discretion must be exercised according to principle. There was no dispute as to the relevant principles. They are well established;[38] the primary principle is that costs follow the event. The Court looks to determine what would be reasonable costs for the successful party in conducting the particular litigation in question and then decides what, in all the

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

37 *Goodfellow v Building Connexion Ltd T/A ITM Building Centre* [2010] NZEmpC 153, at [12].

38 *Victoria University of Wellington v Alton-Lee* [2001] ERNZ 305 (CA) at [48]; *Binnie v Pacific Health Ltd* [2002] 1 ERNZ 438 (CA) at [14]; Health Waikato Ltd v Elmsly [2004] 1 ERNZ 172 (CA).

circumstances, would be a reasonable contribution for the unsuccessful party to make towards those costs.

[55] Normally a 66 per cent contribution of the reasonable costs so determined is regarded as fair and reasonable but that percentage contribution may need to be adjusted upwards or downwards depending upon the circumstances. Ultimately, the award of costs is discretionary.

[56] The approach just outlined was noted and endorsed relatively recently by the Court of Appeal in its judgment in *Belsham v Ports of Auckland Limited*.[39] In dismissing an application to appeal the Employment Court's costs judgment, the Court of Appeal stated:[40]

> This Court has recognised that it is open to the Employment Court, if it chooses to do so, to adopt the High Court approach to costs but it is entitled to follow its existing practice in terms of which costs actually and reasonably incurred are the relevant starting point. This Court has also said that the primary principle is that costs follow the event and that the amount of costs is generally approached on the principal of a reasonable contribution to costs actually and reasonably incurred. Other factors specific to the case may then be applied as appropriate to increase or decrease the award. Given the discretion vested in the Employment Court, we cannot discern any point of law for which leave should be given to appeal to this Court. If change is required, it may more properly be a matter for Parliament's attention.

Indemnity costs

[57] In parts of his claim, Mr Rodkiss seeks indemnity costs. The principles applicable to whether the Court should in any given situation exercise its discretion to award full indemnity costs are also well established. Although not strictly binding on this Court, it has traditionally been accepted that the High Court Rules relating to indemnity costs provide useful guidance. Relevantly, r 14.6(4) provides that:

> …
>
> (4) The court may order a party to pay 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

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39 *Belsham v Ports of Auckland Ltd* [2014] NZCA 206.

40 At [22]. (footnotes omitted)

…

> (f) some other reason exists which justifies the court making an order for indemnity costs despite the principle that the determination of costs should be predictable and expeditious.

[58] In *Ben Nevis Forestry Ventures Limited v Commissioner of Inland Revenue*,[41] the Court of Appeal confirmed that the leading case in New Zealand on indemnity costs is *Bradbury v Westpac Banking Corporation*.[42] In reference to the judgment in *Bradbury* the Court stated:[43]

> [16] The Court listed the following, non-exhaustive categories in which indemnity costs have been ordered:
>
> (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; or
>
> (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.
>
> [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 Australian 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".[44] 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.

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41 *Ben Nevis Forestry Ventures Ltd v Commissioner of Inland Revenue* [2014] NZCA 348 at [12].

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

43 *Ben Nevis Forestry Ventures Ltd v Commissioner of Inland Revenue*, above n 41, (some footnotes omitted).

44 *J-Corp Pty Ltd v Australian Builders Labourers Federation Union of Workers (WA Branch) (No 2)* (1993) 46 IR 301 (FCA) at 303.

[59] At another point in *Ben Nevis*, O'Regan P delivering the reasons of the Court stated:[45]

> 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 a 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.*

[60] It will be necessary for me to apply these principles, as necessary, to the facts of the present case.

Second Calderbank offer

[61] On 9 January 2014, Ms Ironside presented the defendant with another Calderbank offer on behalf of Mr Rodkiss under which he would settle his claim for $48,879.88 made up of $32,704.88 for lost remuneration; $10,000 for compensation and $6,175 towards his legal costs. There could be no question that the defendant would have been significantly better off had it accepted that Calderbank offer because Mr Rodkiss went on to achieve an award in this Court of $51,258.85 plus costs.

[62] The Calderbank offer of 9 January 2014 was made in a timely way because the hearing before me did not commence until 19 August 2014. The defendant, however, did not respond to the Calderbank offer and made no counter-offer to settle. Ms Ironside seeks full indemnity costs in respect of all costs incurred after the making of the 9 January 2014 Calderbank offer.

[63] For his part, Mr Erickson accepted that an uplift in the assessment of costs from the 66 per cent figure was warranted as from the 9 January 2014 Calderbank offer but he submitted:

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[45] *Ben Nevis Forestry Ventures Ltd v Commissioner of Inland Revenue*, above n 41, at [33].

> The Court has observed that indemnity costs following refusal of a Calderbank [offer] *"are rare and are generally reserved for cases where a party's conduct has been especially egregious"*. Instead, the Court's approach in recent cases is to uplift the costs contribution from the starting point of 66% of actual and reasonable fees to 75-80%, not 90% or 100%.
>
> (footnote cases cited)

[64] In the particular circumstances of this case, I do not see that the second Calderbank offer calls for any special treatment. As noted above, under the approach in *Bluestar* the original successful Calderbank offer remained relevant throughout the entire period of this litigation and a steely approach is called for.

The claim

[65] As noted above, the Court was informed that Mr Rodkiss had incurred legal expenses totalling $230,313.61 in connection with all aspects of his case. The following invoices were produced showing how that figure was made up:

(i)	6 May 2013:	$16,052.85
(ii)	22 August 2013:	$31,250.10
(iii)	30 November 2013:	$7,814.25
(iv)	18 December 2013:	$1,638.75
(v)	23 December 2013:	$7,066.11
(vi)	19 May 2014:	$11,718.50
(vii)	19 May 2014:	$7,239.25
(viii)	23 December 2014:	$139,388.45
(ix)	10 April 2015:	$8,145.35
	TOTAL:	$230,313.61

[66] Mr Rodkiss' claim for costs and disbursements in respect of the litigation in the Employment Court was divided up in counsel's presentation into six different claims which cannot be neatly correlated to the invoices. In respect of some of those

claims Mr Rodkiss seeks full indemnity costs, in respect of others he seeks an uplift to 90 per cent over the standard 66 per cent contribution.

[67] I propose to deal with the claim under several heads which incorporate but do not necessarily follow the categories identified by Ms Ironside.

(a) Pre-proceedings costs

[68] Mr Rodkiss is seeking to recover indemnity costs in the sum of $16,052.85 in respect of attendances from the point in time when he first obtained legal representation, 27 March 2013, until he issued proceedings in the Authority on 16 April 2013; the attendances included a failed mediation.

[69] In her submissions on this aspect of the case, Ms Ironside relied on *Binnie* where the Court of Appeal allowed legal costs incurred before proceedings were commenced. The legal costs in that case covered a period of time when counsel was required to be extensively and at times intensively involved over a period that covered Dr Binnie's original suspension through to his resignation and acquisition of new employment. The Court held that such costs could have been claimed as special damages and, if so they would have been "recoverable in full as opposed to being recoverable only to the extent of a reasonable contribution".[46]

[70] In response to Ms Ironside's submissions, Mr Erickson cited the following passage from *Binnie*:[47]

> The line between special damages on this footing and party and party costs will often be blurred at the margins, but the point is valid as a general proposition. We do not wish to encourage unduly precise apportionment's in this area. Use of the special damages approach should be reserved for cases in which a proper line can be drawn, albeit only in broad terms.

[71] Mr Erickson submitted that this was a case where a "proper line" could easily have been drawn and had the pre-proceeding costs been pleaded as special damages then, "they could have been the subject of evidence, cross-examination and submission. However, they were not pleaded as such and it is submitted in these

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46 *Binnie v Pacific Health Ltd*, above n 38, at [18].
47 At [18].

circumstances the claim should not be allowed." In the alternative, Mr Erickson submitted that the level of costs incurred pre-proceeding was not reasonable noting that the invoice recorded that 49.3 hours had been spent on that aspect of the case at the rate of $280 per hour.

[72] The events which gave rise to Mr Rodkiss' pre-proceeding costs were, in fact, covered at some length at the hearing and were the subject of evidence, cross-examination and submission. Ms Ironside referred in her submissions to conduct which she claimed warranted an award of costs on an indemnity basis under this head of claim. No authority was cited, however, in support of her submission that indemnity costs can properly be awarded in respect of pre-proceedings costs.

[73] While I accept, following *Binnie*, that as an item of special damages proven pre-proceedings costs could be recoverable in full, it appears to me that under the rules and the principles referred to by the Court of Appeal in *Bradbury*, the concept of indemnity costs is preserved for conduct relating to the proceedings or litigation itself rather than pre-proceeding costs.

[74] Mr Erickson was on stronger grounds with his alternative submission that the costs incurred for the relatively brief period in question were unreasonable. I accept that submission. Although I do not want to be too critical of Ms Ironside in this regard because I accept that throughout she would have been acting on instructions, it should have been clear to her from an early stage in the communication chain that the case was not going to be resolved through meetings and exchanges of correspondence between her firm and the defendant and/or its solicitors.

[75] This head of claim also included unspecified costs in respect of an unsuccessful mediation which the parties attended at the instigation of Mr Rodkiss. Although I accept that it is a discretionary matter, I am not prepared to award costs on the mediation in this case. On this issue, I respectfully adopt the following statement from an older Canadian case cited recently in *Knebush v Maygard*:[48]

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[48] *Naneff v Con-Crete Holdings Ltd* 1993 CarswellOnt 4387, 11 B.L.R (2d) 218n, 43 A.C.W.S (3d) 1066, at [19] cited in *Knebush v Maygard* [2014] FC 1247 at [36].

> The parties engaged in a lengthy mediation process … they made a genuine effort to settle. They are to be commended for this effort withstanding that, in the end, it was unsuccessful. In my view the costs of the mediation process – which is a voluntary effort to find a suitable out of court resolution – should be borne equally by the parties engaging in it. Otherwise, parties will be discouraged from engaging in what can in many instances be a fruitful exercise leading to a self made result, for fear that at the end of the day, if it is not successful and the proceedings are consequently lengthened, they will bear more costs.

[76] Doing the best that I can from my knowledge of the case, I consider that the reasonable pre-proceeding costs should not have exceeded $7,500, and I award that sum under this head of claim. I make no award for the disbursements claimed which are normal office overheads.

(b) The stay application

[77] The defendant applied for a stay of the two orders made by the Authority, namely the substantive determination for it to pay $6,000 as compensation to Mr Rodkiss and the subsequent costs determination in the sum of $6,710. The matter was dealt with on the papers by way of written submissions. In a judgment dated 19 May 2014, Judge Corkill dismissed the application and reserved the question of costs.[49] Mr Rodkiss now seeks costs in respect of this matter in the sum of $11,718.50.

[78] Ms Ironside submitted that the application lacked merit and was not made by the defendant until more than six weeks after the Authority had delivered its substantive determination on 28 November 2013 and after Mr Rodkiss had made demand for payment of the sums awarded by the Authority. The basis of the application was an allegation by the defendant that Mr Rodkiss was not in a financial position to repay the amounts awarded by the Authority if the defendant succeeded on its cross-challenge. Ms Ironside produced correspondence she had written to the defendant's solicitors in response to the application providing full details, with supporting financial documentation, showing that Mr Rodkiss was far from impecunious.

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[49] *Rodkiss v Carter Holt Harvey Ltd (No. 2)* [2014] NZEmpC 77.

[79] Mr Rodkiss filed a notice of opposition to the application and an affidavit in support. On 18 February 2014, Ms Ironside gave written notice to the defendant's solicitors that if the application was pursued then Mr Rodkiss would be seeking full indemnity costs from the defendant. The defendant did not respond to that letter. Ms Ironside submitted that the only reasonable explanation for such a stance was that the defendant intentionally set out to prolong the proceedings and increase costs for Mr Rodkiss. In those circumstances and against the background that Mr Rodkiss had made Calderbank offers on 13 May 2013 and 9 January 2014, Ms Ironside seeks full indemnity costs under this head.

[80] In response, Mr Erickson submitted that the defendant held genuine concerns based on the information it had received regarding Mr Rodkiss' financial position and, although its arguments were not accepted by the Court, they were presented in good faith.

[81] Although the costs claimed appear to be on the high side, Ms Ironside correctly submitted that the defendant did not contend that they were excessive or that anything done was unreasonable or unnecessary. Counsel submitted that the costs incurred were comparable to those in the High Court rules for opposing an application on a 2B basis.

[82] I accept Ms Ironside's principal submission that the application for a stay was completely devoid of merit and indicated an intention by the defendant to prolong the proceedings and increase costs for Mr Rodkiss. The amount in issue was modest and it should have been abundantly clear to the defendant from the financial documentation Ms Ironside had provided that Mr Rodkiss was far from impecunious. Had the application been meritorious in any way then I suspect that Judge Corkill would have ordered the amount involved to be paid into the Court but he did not do so. The defendant had been invited by Ms Ironside to withdraw the application and warned that indemnity costs would be claimed if it was pursued. Against that background, I am satisfied that the defendant acted unreasonably and unnecessarily in pursuing the stay application and that it is appropriate for Mr Rodkiss to be awarded indemnity costs under this head of claim. I, therefore, award costs in the full amount sought, namely, $11,718.50.

(c) Application to exclude evidence

[83] I have described the nature of this application by the defendant in [9] above. The background to the application was that the defendant had taken exception to the following statement Mr Rodkiss had included in his brief of evidence to the Authority about what had happened at the end of the unsuccessful mediation:

> As I was leaving I told the mediator that I was leaving, that the mediation had been unsuccessful in resolving my grievance and that I did not want to mediate further. I told him that I was resigning from my position and not returning to the workplace. I asked the mediator to pass this information on to Mr Adams and Mr Andrews. I then left the mediation building with my wife and lawyer.

[84] The Authority issued a preliminary determination on 23 August 2013 holding that the statement in question was admissible in that it was made about Mr Rodkiss' intentions for the future and not for the purposes of the mediation.

[85] The defendant commenced a challenge to that determination in this Court on 19 September 2013 which was discontinued on 29 November 2013. The same issue arose again later when the defendant took objection to the inclusion of the statement in the brief of evidence Mr Rodkiss was proposing to give to this Court. In an interlocutory judgment dated 19 May 2014, Judge Corkill dismissed the defendant's application to exclude the evidence in question concluding on the facts that the statement was not made for the purposes of mediation.

[86] Under this head of claim, Ms Ironside seeks costs on an indemnity basis in the amount of $7,239.25, submitting for similar reasons to those advanced in respect of the stay application, that it lacked merit and only served to prolong the litigation and increase Mr Rodkiss' costs. Ms Ironside submitted that the amount claimed in respect of the application was less than could be claimed on a 2B basis under the High Court Rules scale of costs for opposing an interlocutory application.

[87] In response, Mr Erickson accepted that Mr Rodkiss was entitled to costs on the discontinuance of the first challenge calculated in the usual manner but he rejected the submission that the application heard before Judge Corkill warranted an award of indemnity costs against the defendant.

[88] I accept that this interlocutory application by the defendant contained more merit than the stay application. Although in the end it was decided on the facts, Judge Corkill noted that while previous decisions had clarified the applicable principles, the Court had not had to consider a situation identical to the one before him. His Honour also made the point that it might well have been desirable for Ms Ironside to have conveyed the information about Mr Rodkiss' pending resignation to the company's representatives which, as the judgment states, "would have avoided placing the mediator in a difficult position where he was asked to convey information that was not for the purposes of the mediation".[50]

[89] In all the circumstances, I am prepared to accept that the actual costs figure of $7,239.25 is reasonable but I do not consider it appropriate to award this amount on a full indemnity basis. Instead, I fix the defendant's contribution at 85 per cent, giving an award under this head of $6,153.37.

(d) Costs on the de novo challenge

[90] Although it was not entirely clear from her initial submissions, Ms Ironside clarified in her submissions in reply that the costs claimed by Mr Rodkiss under this head fell into two parts. The first was for costs incurred up to the date of Mr Rodkiss' second Calderbank offer of 9 January 2014. The actual costs for that period were said to have been $7,066.11 (inclusive of GST). Mr Rodkiss sought 90 per cent of that amount which is $6,359.49. For the period subsequent to the Calderbank offer of 9 January 2014, the actual costs said to have been incurred amounted to $139,388.45 (inclusive of GST). This amount represented 416.92 hours at a charge out rate of $280 per hour or $116,739.00 (exclusive of disbursements and GST). Mr Rodkiss sought to recover that amount as full indemnity costs.

[91] Mr Erickson submitted that the total claimed was unreasonable. Both counsel referred to costs awards in a number of other cases which I found of marginal relevance and assistance. There was no dispute, however, over the relevant principles applicable to costs awards in this jurisdiction which have been referred to above.

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[50] *Rodkiss v Carter Holt Harvey Ltd (No. 2)*, above n 49, at [19].

[92] Mr Erickson submitted that reasonable costs for the period in question would have been $120,000 and he suggested an appropriate starting point would be 66 per cent of that figure, namely $79,200. Mr Erickson accepted that it would be appropriate to apply an uplift in the contribution towards costs from 66 per cent to 75 per cent on account of the defendant's rejection of the 9 January 2014 Calderbank offer, resulting in an award of $90,000. From this amount, Mr Erickson maintained that a deduction of $5,000 should be made because of a late claim raised by Mr Rodkiss for exemplary damages which was pursued but rejected by the Court. Based on these figures, Mr Erickson submitted that an appropriate contribution for the defendant to make towards the plaintiff's costs in relation to the Court proceedings was $85,000.

[93] I accept Ms Ironside's submission that the case required substantial work "to ready the proceedings for a lengthy hearing". There were significant issues over disclosure and the fact that the case ran for eight days is a fair indication of its complexity. For the reasons mentioned above, I am not persuaded that the second Calderbank offer calls for any distinction in the applicable uplift in costs. However, the original Calderbank offer remained relevant.

[94] Having given the matter careful consideration, I accept Mr Erickson's submission that reasonable costs on the substantive challenge would have amounted to $120,000. I do not consider it appropriate to award the full amount of those costs on an indemnity basis but, in my view, the justice of the case can best be met by my allowing an increase in the contribution from the standard 66 per cent percentage to 80 per cent, resulting in a figure of $96,000. I do not propose to make any additional allowance on account of the exemplary damages issue. Of the disbursements claimed under this head, I am prepared to award the hearing fee of $2,831.17 and the photocopying charge of $1,577.92. The other items are properly normal office overheads and are disallowed.

(e) Costs on submissions

[95] Finally, Ms Ironside seeks on behalf of Mr Rodkiss costs in the sum of $8,145.35 for costs incurred in connection with her submissions on costs and the associated preparation of the bundle of relevant invoices and documentation.

Mr Erickson submitted that Mr Rodkiss should not be entitled to any contribution towards his costs in this regard which he described as "costs on costs".

[96] I accept that counsel's submissions were necessary and helpful to the Court in its task of making an award as to costs. Ms Ironside's principal submissions ran to 149 paragraphs and her submissions in reply comprised of 37 paragraphs. I am prepared to allow $2000 under this head of claim.

Conclusions

[97] The amounts I have fixed under the different heads are set out below:

(i)	Costs in the Authority:	$20,000.00
(ii)	Disbursements in the Authority:	$1,714.84
(iii)	Pre-proceeding costs:	$7,500.00
(iv)	Stay application:	$11,718.50
(v)	Application to exclude evidence:	$6,153.37
(vii)	Costs on the de novo challenge:	$96,000.00
(viii)	Disbursements in Court:	$4,409.09
(ix)	Costs on submissions:	$2,000.00
	TOTAL:	$149,495.80

[98] Rounding these figures off, I award Mr Rodkiss costs and disbursements totalling $149,500.

[99] In the opening paragraph of this judgment I record that Mr Rodkiss had incurred legal expenses totalling $230,313.61. He recovered $51,258.85 under this Court's substantive judgment of 24 March 2015 and under this costs judgment he has recovered an additional $149,500. On those figures he will still be left significantly out of pocket. I say at once that such an outcome is unsatisfactory and of

considerable concern. Mr Rodkiss, with justification, must be left wondering whether it has all been worthwhile.

[100] It may be timely to respectfully remind counsel practising in this jurisdiction of the following passage from the judgment of the Court of Appeal in *Alton-Lee* delivered nearly one and a half decades ago:[51]

> The parties, and those who practise in this field (where this case cannot be regarded as wholly exceptional) might well reflect on the consequences of conducting litigation without proper focus on the issues and without tight control on the escalation of costs.

A D Ford
Judge

Judgment signed at 2.00 pm on 27 August 2015

[51] *Victoria University of Wellington v Alton-Lee*, above n 35, at [65].