

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2015] NZERA Auckland 21  
5440177

BETWEEN VICKI ELIZABETH McLEAN  
Applicant

A N D BARKERS PARK LIMITED  
First Respondent

A N D SUNG HO PARK  
Second Respondent

Member of Authority: Rachel Larmer

Representatives: Penny Swarbrick, Counsel for the Applicant  
Brian Foote, Counsel for the Respondent

Investigation Meeting: On the papers

Submissions Received: 22 December 2014 from the Applicant  
20 January 2015 from the Respondent  
21 January 2015 from the Applicant

Date of Determination: 28 January 2015

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**COSTS DETERMINATION OF THE AUTHORITY**

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**The substantive determination**

[1] In the substantive proceedings determined on 05 December 2014<sup>1</sup> Ms McLean succeeded in establishing that she had been unjustifiably dismissed and unjustifiably disadvantaged in her employment by Barkers Park Limited's (Barkers Park's) failure to adequately consult her over the proposed restructuring and by failing to adequately consult her regarding redeployment opportunities before she was made redundant.

[2] Ms McLean's various specific claims that Barkers Park had breached her employment agreement and had breached its statutory good faith obligations did not

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<sup>1</sup> [2014] NZERA Auckland 502.

succeed. Nor did her claim against Mr Park that he had aided and abetted breaches by Barkers Park of Ms McLean's employment agreement.

### **The application for costs**

[3] The parties were invited to resolve costs by agreement but that has not occurred. Ms McLean now seeks an award of indemnity costs in her favour. She relies on a without prejudice except as to costs (*Calderbank*) offer sent to the respondents on 21 May 2014. She says that the Authority has awarded her significantly more than she would have been prepared to settle for in her *Calderbank* offer and she has been obliged to expend legal fees to achieve that result.

[4] Ms McLean seeks \$20,252.94 legal costs plus \$1,097.16 disbursements.

[5] Mr Foote, in his submissions, says that the Authority should apply its usual notional daily tariff based approach to costs. He submits that applying the current notional daily tariff of \$3,500 means that not more than \$5,250 should be awarded as costs reflecting the 1.5 days of hearing time required to deal with Ms McLean's substantive claims.

### **Costs principles**

[6] The Authority has a broad discretion to deal with the issue of costs under clause 15 of Schedule 2 to the Employment Relations Act 2000 (the Act). That includes the discretion when assessing costs to take into account *Calderbank* offers<sup>2</sup>. The Employment Court and Court of Appeal have previously stated that a "steely" approach to *Calderbank* offers is generally warranted<sup>3</sup>.

[7] It is unusual for the Authority to award indemnity costs. The Authority's usual practice is to adopt a notional daily tariff based approach to costs with the notional daily tariff being adjusted to reflect the particular circumstances of the case. That is the approach that I prefer to take in this case.

[8] This case involved 1.5 days of hearing time so the starting point for assessing costs is \$5,250. I must then assess whether there are any factors which warrant adjusting that notional starting tariff.

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<sup>2</sup> *PBO Ltd (formerly Rush Securities Ltd) v. Da Cruz* [2005] 1 ERNZ 808

<sup>3</sup> *Blue Star Print Group (NZ) Ltd v. Mitchell* [2010] NZCA 385

### **Factors warranting an increase to the notional daily tariff**

[9] Ms Swarbrick submits that if the daily tariff was applied then, despite being successful, Ms McLean would be left with no tangible benefit after paying her legal costs. Ms Swarbrick says such a result would be inequitable and not in accordance with the Authority's equity and good conscience jurisdiction.

[10] I do not accept this is a factor that should increase costs. The modest costs regime in the Authority is well known and is a factor parties need to consider when deciding how much resource to commit to pursuing claims before the Authority. The Authority does not normally increase the amount of costs awarded just because of the level of legal costs they have decided to incur.

[11] I am satisfied that the *Calderbank* offer was made sufficiently in advance (some 5½ months prior to the investigation meeting). I am also satisfied that Barkers Park was given sufficient time to consider it. Ms McLean's proposal was also at a substantially lower level than what she achieved from the Authority and was obviously reasonable in light of the substantive outcome.

[12] I accept Ms Swarbrick's submission that it was unreasonable for Barkers Park to reject that proposal which meant litigation subsequent to that point resulted in both parties incurring costs unnecessarily. That is a factor that should increase costs significantly. I find the tariff should be doubled to \$7,000 per day reflect this.

[13] I also consider that the fact that the first day of the hearing went until 6pm meant that the time required was actually more than required in most one day investigation meetings. A slight adjustment of \$500 is appropriate to reflect that.

### **Are there any factors which warrant a reduction in the notional daily tariff?**

[14] Mr Foote submits that Ms McLean was not wholly successful in respect of all her claims. Her claims against Mr Park personally did not succeed. I note that there were multiple claims in which Ms McLean did not succeed. None of her breaches of employment agreement claims succeeded nor did any of her breach of good faith claims succeed. I accept Mr Foote's submission that these additional claims extended the length of the hearing.

[15] I consider it appropriate to reduce the notional daily tariff by a third (i.e \$1,166 to reflect this lack of success.

[16] I do not accept Ms Swarbrick's submission that the claims Ms McLean did not succeed on involved evidence which supported the claim of unjustified dismissal. The claims that Ms McLean did not succeed on did not need to be pursued as separate claims. There was considerable time and effort required by all involved in addressing each of these as separate claims so the fact Ms McLean did not succeed in respect of them in my view does need to be reflected in costs.

[17] Whilst it was open to Ms McLean to invite the Authority to treat as an unjustified disadvantage any facts that were established in connection with the unjustified dismissal claim, particularly if her substantive dismissal claim had not succeeded, she did not actually do so – despite being encouraged by the Authority prior to the investigation meeting to consider doing so.

#### **What if any disbursements should be awarded?**

[18] Ms McLean claims \$71.56 for her filing fee, \$153.33 for hearing fees in the Authority, \$50 for photocopying, \$175 for counsel's accommodation and meals; and \$647.27 for counsel's travel to Rotorua (airfare, parking and departure tax). Ms McLean claims total disbursements of \$1,097.16.

[19] I find that Ms McLean is entitled to be reimbursed \$224.89 for her filing fee and hearing fees in the Authority. I am not minded to award photocopying costs as there has been no specific information given about that to establish that it is not just an ordinary office expense associated with instructing counsel. The onus is on Ms McLean to establish that was a specific photocopying disbursement she incurred and I find she has failed to do so.

[20] I also accept Mr Foote's submissions that Barkers Park should not have to pay for Ms McLean selecting out of town counsel who then incurred \$822.27 in disbursements relating to travel and the like. There was no explanation as to why local counsel was not instructed. Whilst it is open to Ms McLean to decide who she wishes to instruct the additional costs associated with out of town counsel shouldn't be borne by the respondents in these circumstances.

[21] I therefore decline to award the other disbursements that have been claimed.

**Outcome**

[22] Within 28 days of the date of this determination Barkers Park is ordered to pay Ms McLean \$9,834 towards her legal costs together with \$224.89 to reimburse her filing fee and hearing costs.

**Rachel Larmer**  
**Member of the Employment Relations Authority**