**IN THE EMPLOYMENT RELATIONS AUTHORITY**
**CHRISTCHURCH**

[2016] NZERA Christchurch 195
5522403

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| | BETWEEN | AMANDA VAN DEN TILLAART<br>Applicant |
| | A N D | MBS (2008) LIMITED t/a NELSON BEAUTY THERAPY<br>Respondent |
| | BETWEEN | MBS (2008) LIMITED t/a NELSON BEAUTY THERAPY<br>Applicant |
| | A N D | AMANDA VAN DEN TILLAART<br>Respondent |

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| Member of Authority: | David Appleton |
| Representatives: | Anjela Sharma, Counsel for Ms van den Tillaart<br>Kevin Murray and Shayne Boyce, Advocates for MBS (2008) Limited |
| Submissions Received: | 11 October 2016 for Ms van den Tillaart<br>None received for MBS (2008) Limited |
| Date of Determination: | 31 October 2016 |

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## COSTS DETERMINATION OF THE AUTHORITY

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[1] By way of a determination dated 25 August 2016[1] the Authority found that Ms Tillaart had suffered an unjustified disadvantage in her employment, and that MBS (2008) Limited (MBS) had breached terms of her employment agreement and had failed to comply with the Holidays Act 2003. The Authority dismissed all of the counterclaims against Ms Tillaart.

[1] [2016] NZERA Christchurch 143

[2] By way of a second determination dated 21 October 2016[2], the Authority ordered MBS to pay Ms Tillaart unpaid holiday pay, interest on that pay, and outstanding KiwiSaver contributions.

[3] I had reserved costs in both determinations, and had given the parties a chance to seek agreement between them as to how costs would be dealt with. In the absence of agreement, the parties then had a set time within which to serve and lodge memoranda in respect of costs. The Authority has received a memorandum from Ms Sharma on behalf of Ms Tillaart but nothing from Ms Boyce and Mr Murray on behalf of MBS, even though the deadline for service and lodgement of their memorandum has passed, and no application has been made for an extension. Accordingly, this determination addresses costs without the benefit of submissions from MBS. Ms Tillaart seeks an urgent determination on costs in light of what I understand are enforcement concerns.

[4] Ms Sharma has annexed an invoice addressed to Ms Tillaart in the sum of $23,000 plus GST ($26,450 in total). This appears to cover all of the work carried out by Ms Sharma in representing Ms Tillaart in the proceedings before the Authority, including matters arising after the first determination was issued, but not including all of the work done in respect of the second determination. Although this is a relatively high sum, I am mindful of the fact that a significant number of documents were disclosed by MBS in pursuance of its counterclaim, and that the evidence was somewhat dense in respect of that matter. I accept that this sum is reasonable in the context of the work Ms Sharma had to do.

[5] Ms Sharma relies upon a letter written by her marked *without prejudice save as to costs*, to argue that there should be an uplift by the Authority of the usual daily tariff. She also states that the starting point is $4,500 for the first day of investigation meeting, and $3,500 for the subsequent days, but she is mistaken in this respect, as the change in the daily tariff took effect in respect of applications lodged from 1 August 2016, whereas Ms Tillaart's application to the Authority was lodged before that date[3]. Accordingly, the appropriate daily tariff is $3,500 for each day as a starting point.

[6] Ms Sharma has annexed three letters to her submissions marked *without prejudice save as to costs*. The first is dated 14 January 2016, and offers to resolve

[2] [2016] NZERA Christchurch 190
[3] I refer to paragraph 4 of the Practice Note 2 of the Authority dated 30 June 2016.

the matter fully if MBS were to pay to Ms Tillaart the sum of $6,000 and $3,500 plus GST as a contribution towards her legal costs.

[7] The second letter is dated 2 March 2016, and offers to resolve the matter fully if MBS were to pay to Ms Tillaart the sum of $6,000 and $9,000 plus GST as a contribution towards her legal costs.

[8] The third letter is dated 4 October 2016, but it postdates the first (most substantial) investigation meeting and offers to withdraw Ms Tillaart's partial challenge in the Employment Court, and so is not relevant to the Authority.

**The legal principles**

[9] The Authority's power to award costs is set out in paragraph 15 of Schedule 2 of the Employment Relations Act 2000 (the Act), which provides as follows:

> **15 Power to award costs**
> (1) The Authority may order any party to a matter to pay to any other party such costs and expenses (including expenses of witnesses) as the Authority thinks reasonable.
> (2) The Authority may apportion any such costs and expenses between the parties or any of them as it thinks fit, and may at any time vary or alter any such order in such manner as it thinks reasonable.

[10] When determining how legal costs and expenses should be dealt with, the Authority must take into account the principles set out in *PBO Ltd v. Da Cruz*[4]. These principles include the following:

a. There is discretion as to whether costs would be awarded and in what amount.

b. The discretion is to be exercised in accordance with principle and not arbitrarily.

c. The statutory jurisdiction to award costs is consistent with the equity and good conscience jurisdiction of the Authority.

d. Equity and good conscience are to be considered on a case by case basis.

[4] [2005] 1 ERNZ 808

e. Costs are not to be used as a punishment or as an expression of disapproval of the unsuccessful party's conduct although conduct which increased costs unnecessarily can be taken into account in inflating or reducing an award.

f. It is open to the Authority to consider whether all or any of the parties' costs were unnecessary or unreasonable.

g. That costs generally follow the event.

h. That without prejudice offers can be taken into account.

i. That awards will be modest.

j. That frequently costs are judged against a notional daily rate.

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

[11] *Ogilvy & Mather (NZ) Ltd v. Darroch*[5] sets out the two principal criteria that must be satisfied when a *Calderbank* offer is made so as to not prejudice unfairly the recipient of the offer by exerting undue pressure. These safeguards are as follows:

(a) A modicum of time for calm reflection and the taking of advice before a decision has to be made to accept the offer or reject it; and

(b) The offer must be transparent if the offeror is later to be given the protection the *Calderbank* offer furnishes.

[12] In *Bluestar Print Group (NZ) Ltd v Mitchell*[6] the Court of Appeal stated, at paragraph [18]:

> In the employment context it has also recognised … that 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.

[5] [1993] 2 ERNZ 943
[6] [2010] NZCA 385, [2010] ERNZ 446

[13] It was in *Bluestar Print Group* that the Court of Appeal advocated its well-known *steely approach* in respect of Calderbank offers. The Employment Court confirmed in *Davide Fagotti v Acme & Co Limited*[7] that the "steely approach" applies equally to the Authority as it does to the Employment Court[8].

**Discussion**

[14] There is no question that MBS should make a contribution to Ms Tillaart's costs, as Ms Tillaart was successful in all aspects of her claims (save the last minute attempt to bring in a constructive dismissal claim at submission stage, which took up little time in discussion), and defeated all of the counterclaims against her.

[15] The starting point is the daily tariff of $3,500 per day. The Authority's investigation meeting took place over four days (8 to 10 March 2016 and 18 August 2016) albeit not all were full days. Taken together, they lasted a little over 18 hours (including the usual short breaks) and so I believe that it just to treat the investigation meeting as having lasted three full days in total. Therefore, the starting point is $10,500. Should this be uplifted?

[16] I take the *without prejudice save as to costs* offer dated 2 March 2016 as the relevant letter. It states that it was to be read in conjunction with the letter dated 14 January 2016. That letter explained the basis of the offer, and made clear the consequences of non-acceptance of the offer. The March letter gave MBS two days within which to consider the offer.

[17] I consider that the March letter, when read in conjunction with the January letter, complies with the requirements of a Calderbank letter, as it is clear, transparent (dealing with costs as well as the substantive aspects of the claim and counter claim) and gave MBS a "modicum of time for calm reflection and the taking of advice".

[18] The offer made in the March letter was also reasonable on its face, and Ms Tillaart was awarded substantially more than $6,000 by the Authority, having been awarded $15,000 compensation, the benefit of a penalty in the sum of $2,000, holiday pay of $3,096.83, plus interest, and a sum in relation to KiwiSaver of $247.98.

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[7] [2015] NZEmpC 135
[8] At [109]

[19] It is not known why MBS rejected the offer, but I must infer that it was not reasonable for it to have done so, if only because it had always known that it owed Ms Tillaart holiday pay, and could have at least have settled that aspect of the claim, and because Ms Tillaart's offers were eminently reasonable. If the counterclaim was a factor for the rejection, I believe that MBS did not examine sufficiently critically and objectively the evidence it was relying upon in that respect.

[20] I accept that it is appropriate for the Authority to apply an uplift to the daily tariff, in recognition of the attempts made by Ms Tillaart to settle the matter. I do not believe that it is appropriate to order that MBS pay Ms Tillaart's costs on an indemnity basis, as that is done only in exceptional circumstances, which I do not accept apply in this case.

[21] However, a steely approach is warranted, and I believe that it would be just to increase the daily tariff to $6,000. Therefore, the contribution towards Ms Tillaart's costs should be $18,000.

[22] As Ms Tillaart was a party to these proceedings in her personal capacity I award her GST on that sum, in reliance on the Employment Court's judgement in *Banks v Hockey Manawatu Incorporated*[9].

[23] It is appropriate for MBS to reimburse Ms Tillaart for the lodgement fee of $71.56 that she incurred. Although the investigation meeting took place over more than one day, she was not charged additional hearing fees by the Authority because that additional time was largely taken up by considering MBS's counterclaims against Ms Tillaart.

[24] Finally, Ms Tillaart also seeks a contribution of $500 towards the cost of Ms Sharma preparing her cost submissions. I believe this is reasonable, and assume this sum is a GST inclusive figure, as Ms Sharma has not indicated otherwise.

**Orders**

[25] I order MBS to pay to Ms Tillaart the following sums as a contribution towards her costs:

a. $18,000 plus GST on that sum;

[9] [2016] NZEmpC 97 at [80] et seq.

b. $71.56; and

c. $500 including GST.

David Appleton
Member of the Employment Relations Authority