

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2011] NZERA Auckland 359
5311584

BETWEEN ALEX BROUGHTON
Applicant

AND MICROSOFT NEW
ZEALAND LIMITED
Respondent

Member of Authority: Rachel Larmer

Representatives: Tony Drake, Counsel for Applicant
Mark Lawlor and Adam Weal, Counsel for Respondent

Investigation meeting: On the papers

Submissions: 11 March 2011, Respondent's submissions
17 March 2011, Respondent's submissions
8 April 2011, Applicant's submissions
14 April 2011, Respondent's submissions
27 May 2011, from Respondent
24 June 2011, from Applicant
24 June 2011, from Respondent
27 June 2011, from Respondent
28 June 2011, from Respondent
29 June 2011, from Applicant

Determination: 16 August 2011

COSTS DETERMINATION OF THE AUTHORITY

A Mr Alex Broughton is ordered to pay Microsoft New Zealand Limited ("MSNZ");

(a) \$48,000 towards its legal costs; and

(b) \$4,538.16 towards its disbursements.

B MSNZ is ordered to pay Mr Broughton \$750 towards his legal costs.

[1] In a determination dated 24 February 2011 I found Mr Alex Broughton had been justifiably dismissed on the grounds of redundancy¹. His claims for breaches of good faith and breaches of contract and his application for penalties to be paid to him personally were all unsuccessful.

[2] Costs were reserved and the parties were encouraged to resolve costs between them. A timetable was set for costs to be dealt with by exchange of memoranda if agreement was not reached.

[3] The parties have been unable to resolve costs so MSNZ has applied for a costs order. Submissions and memoranda have been filed which set out the parties' respective positions on costs. MSNZ incurred actual costs of \$130,254.61 and disbursements of \$4,538.16.

[4] The substantive investigation into Mr Broughton's employment relationship problem was adjourned on the second day of the hearing to give him more time to prepare his evidence. MSNZ applied for costs at the time of the adjournment but I determined that all costs would be dealt with at the conclusion of the substantive matter.

Without prejudice letter

[5] MSNZ's submissions appended a without prejudice letter dated 17 November 2010. Mr Drake did not take any issue with that in his submissions of 8 April 2011. Neither party identified whether privilege had been waived.

[6] I queried with the parties whether it was appropriate for me to consider this without prejudice communication and I asked if privilege had been waived. MSNZ confirmed it had waived privilege but Mr Drake advised he had not. He submitted both parties had to waive privilege and that his failure to address the production of a without prejudice letter in his submissions had not impliedly waived privilege.

[7] I find it is not appropriate for me to have regard to the 17 November 2010 letter when setting costs because it was a without prejudice communication and privilege had not been waived by both parties.²

¹ *Broughton v Microsoft New Zealand Limited* [2011] NZERA Auckland 73

² *Pauanui Publishing Limited v Loh* Chief Judge Goddard, WC 43B/01, 20 December 2001

MSNZ's submissions

[8] MSNZ made a number of alternative costs submissions. In addition to disbursements of \$4,538.16, MSNZ sought (in descending order of preference) an award of:

- (a) indemnity costs of \$82,488.31, being the amount it incurred subsequent to 15 September 2010 after the first *Calderbank* offer was not accepted; or
- (b) an amount equivalent to two thirds of its indemnity costs (no figure was provided); or
- (c) \$65,000, being fifty percent of its overall actual/reasonable costs; or
- (d) \$52,000 plus GST being \$8,000 plus GST multiplied by 6.5 days.

[9] In terms of claim (d) above, MSNZ submitted the Authority should adopt a daily tariff of \$8,000 applied to 6.5 days which had been calculated on the following basis:

- (a) 3.5 days for the investigation meeting;
- (b) 2 days preparation;
- (c) 1 day for submissions.

[10] MSNZ said it had made two reasonable *Calderbank* offers which the applicant did not accept. Whilst neither of the offers were strictly *Calderbank* offers because Mr Broughton was wholly unsuccessful, that is the term the parties used in their submissions so I have adopted their terminology.

[11] The first offer was made in a letter dated 8 September 2010 which offered Mr Broughton, on a denial of liability basis and in an attempt to limit ongoing legal costs, a total of \$50,000. This included \$10,000 including GST towards Mr Broughton's legal costs. The offer was stated to remain open until 4.30pm on 15 September 2010. No response was received and on 30 September 2010 MSNZ advised Mr Broughton its offer had been withdrawn.

[12] The second *Calderbank* offer was made by letter dated 19 November 2010 and it proposed that Mr Broughton withdraw his claims with there being no issue as to costs. The offer remained open until 5.00pm that day. Mr Broughton rejected that offer.

[13] MSNZ also submitted that the inefficient manner in which Mr Broughton conducted his case and the seriousness of the allegations he made against Microsoft Corporation Limited's ("Microsoft") senior managers significantly increased its legal costs.

Mr Broughton's submissions

[14] Mr Broughton applied for costs in respect of his successful interlocutory application for disclosure of documents. He sought costs equivalent to half a day at the daily hearing rate adopted by the Authority. I deal with this claim at the end of the determination.

[15] Mr Drake submitted MSNZ had not made any *Calderbank* offers. He said the letter of 8 September 2010 was sent after he had left New Zealand for three and a half weeks' holiday and was timed to expire 12 days before he got back from overseas. Mr Drake submitted this timing meant Mr Broughton had no opportunity to consider the offer and take advice about it, so the Authority should not have regard to it.

[16] Mr Drake said the 19 November 2010 letter set out a "walk away" proposal with no monetary sum offered, so it did not meet the *Calderbank* requirements of acknowledging the offeree's costs already incurred. Mr Drake cited the Court of Appeal's decision in *Hira Bhana & Co Ltd v PGG Wrightson Ltd*³ as authority for his proposition that a walk away offer cannot give rise to indemnity or increased costs.

[17] Mr Drake submitted the Authority should set costs by adopting a notional tariff of \$2,500 per day to be multiplied by 3.125 days of investigation meeting time.

[18] Mr Drake also submitted a large award of costs would cause undue hardship to Mr Broughton because he had not found employment; he had lost significant income since his employment had ended; and he financially supported his wife and mother. Mr Drake submitted that these reasons warranted a decrease in the daily tariff from \$2,500 to \$1,500 per day.

³ [2007] NZCA 342

[19] Mr Drake submitted the criticism that the applicant's case had been conducted in an inefficient manner was not justified.

[20] Mr Drake criticised the timetabling of an investigation meeting shortly after his return from overseas on the basis it did not allow sufficient time to review MSNZ's evidence or to prepare for the investigation meeting.

[21] Mr Drake explained he had not objected to the investigation being set down on 29 and 30 September 2010 because he was able to comply with the timetable; the Authority process was primarily run by the Member; and the Authority's preference was to allocate those dates.

[22] Mr Drake submitted the nature of the allegations would not have increased MSNZ's costs.

[23] Mr Drake also challenged MSNZ's travel disbursements on the basis Mr Ackhurst (who is now based in Singapore) and Mr Bullwinkel (who is based in Sydney) routinely travelled to Auckland for MSNZ business.

[24] Mr Drake submitted Mr Ackhurst and Mr Bullwinkel's travel should not be reimbursed because there were cheaper alternatives available for them to give their evidence without them travelling to Auckland. Mr Drake suggested Mr Bullwinkel did not need to be present for all of the investigation meetings and could have saved on travel costs if he had given his evidence by video conference or telephone conference.

[25] Mr Drake suggested the primary purpose of Mr Bullwinkel travelling to New Zealand for the November investigation was so he could conduct a disciplinary interview on 24 November 2010 with another one of Mr Drake's clients.

[26] Mr Drake submitted the travel disbursements claimed were inflated because they included GST which MSNZ would have already received back in its GST returns.

[27] In summary, Mr Drake submitted the Authority should:

- (a) Award Mr Broughton the equivalent of half a day's costs;

- (b) Award MSNZ costs of \$4,687.50 being a daily rate of \$1,500 multiplied by 3.125 days of investigation meeting time;
- (c) Make no award for disbursements.

Comment on Mr Drake's submissions

Investigation dates

[28] In July 2010 the Authority provided the parties with fourteen dates in September 2010 during which it was available to investigate Mr Broughton's matter. It also advised that witness availability and scheduling would be discussed at a case management conference ("CMC") on 9 August 2010. This was done to ensure the parties had sufficient time to consider witness and scheduling issues prior to the matter being set down.

[29] During the CMC on 9 August 2010 Mr Drake declined the Authority's offer of an investigation in early September and selected 29 and 30 September 2010 as suitable investigation dates. The Authority did not indicate a preference to hear this matter in September and counsel did not ask for an October or November hearing. The hearing date was set by agreement.

Manner in which Mr Broughton's case was conducted

Timetable directions

[30] Timetable directions are made to ensure the investigation of a matter proceeds in an efficient and effective manner. An orderly exchange of evidence in advance of an investigation ensures the parties are on notice of the case they must answer and the Authority is forewarned of the evidence each party will be relying on. Timetabling is an important part of the Authority's investigation process.

[31] In this case the timetable directions were agreed by counsel during the CMC. Written timetable directions were also issued subsequent to the CMC and the parties were invited to raise any queries. Neither did so.

Adjournment of first hearing

[32] Mr Drake submitted the adjournment was needed because Mr Broughton had insufficient time to prepare for the investigation after receiving MSNZ's evidence and the joint bundle of documents. I reject that submission.

[33] The joint bundle did not include any new documents which Mr Broughton had not already seen during the discovery process. The adjournment was not required to enable Mr Broughton to respond to new documents. Nor was it required because new and unexpected evidence had arisen during the first day of the hearing. Mr Ackhurst's evidence was entirely consistent with his statement, which in turn was consistent with what Mr Broughton had been told during the consultation process. The adjournment was not required because MSNZ's statements contained new and unexpected evidence.

[34] The September hearing was adjourned as an indulgence to Mr Broughton to give him more time to provide evidence about why he alleged the CAM position was the same as his CL role and why he believed he had been undertaking the corporate affairs work the CAM position was responsible for, which were critical elements of his case.

[35] The adjournment occurred because Mr Broughton had not provided specific evidence in support of these key elements of his claim. Although I attempted to obtain this evidence by questioning Mr Broughton, his responses were so difficult to follow it was almost impossible to understand why he held the view he did.

[36] From the outset MSNZ had disagreed with Mr Broughton's view that his CL position was the same as the CAM position or that he had been doing corporate affairs work. Mr Broughton had been asked during the consultation process to explain why he held the view he did, but did not explain himself. Mr Broughton did not provide that information in his personal grievance letter or his Statement of Problem.

[37] The similarity or otherwise of the CL and CAM positions and whether Mr Broughton had been doing corporate affairs work were critical aspects of his claim that his redundancy was a sham. It was obvious these issues needed to be dealt with in Mr Broughton's statement because that information had not been provided previously.

[38] Mr Broughton's failure to address these issues in his statement was such a glaring omission that I raised it during a telephone conference with counsel on 28 September 2010. I wanted to clarify whether Mr Broughton intended to pursue his claims that the CL and CAM positions were the same and that he had been doing corporate affairs work because he had not provided evidence in his statement to support those allegations.

[39] When Mr Drake confirmed he was, I asked Mr Broughton to provide a supplementary statement which explained why he held the view he did. This was particularly important because Mr Ackhurst, who was leaving the country after the first day of the investigation, was the first witness to be heard. Mr Ackhurst gave evidence before Mr Broughton to ensure his evidence had been completed by the end of the first day of the hearing. It was therefore important that he knew what Mr Broughton's view was based on, so he could respond to it.

[40] If Mr Broughton had properly complied with the agreed timetable directions, the September hearing would not have been adjourned.

Way in which new documents were produced

[41] The manner in which Mr Broughton introduced extensive new documentation was unacceptable.

[42] After the afternoon adjournment on 29 September 2010 (the first day of the first hearing) Mr Broughton produced 68 pages of loose documentation which were not indexed or paginated. There was no satisfactory explanation as to why this material had not been provided before the hearing started or even during the lunch break or during the morning or afternoon adjournments.

[43] If a party intends to introduce new material during a hearing that should be done at the earliest opportunity so the other party and the Authority have an opportunity to review the material as soon as possible. It is not acceptable for a party to sit on new documents over the course of a whole day and then present them at the end of the day, which prevents the other party and Authority from reviewing the new material during the breaks in the hearing.

[44] The manner in which Mr Broughton presented his new documents was unacceptable because:

- (a) The Authority had specifically raised concerns about obvious deficiencies in Mr Broughton's evidence in a telephone conference the previous day which should have resulted in Mr Drake discussing what evidence Mr Broughton had to support his claims and then arranging for that to be provided in an orderly way; and
- (b) Mr Drake and Mr Broughton were both aware Mr Ackhurst (who had to respond to the new documents) had by then already given his evidence and was leaving the country the next morning;
- (c) Mr Drake offered a copy of the new documentation to the Authority but did not have a copy for MSNZ, which caused obvious difficulties.

[45] When I adjourned the hearing I directed Mr Drake to provide Mr Lawlor with the new documentation as soon as possible so Mr Ackhurst could review it overnight. Mr Ackhurst agreed to attend the Authority en route to the airport so he could answer questions about the new documents before he went overseas.

[46] Despite that direction Mr Drake did not provide Mr Lawlor with a copy of all of the new documentation that evening. Mr Drake did eventually send them to Mr Lawlor but he did that so late the next morning that by then Mr Lawlor and MSNZ were already at the Authority. This meant MSNZ attended the second day of the hearing still without having seen all of Mr Broughton's new documents.

[47] After the matter was adjourned Mr Broughton filed a second bundle which consisted of 152 pages of new documents.

[48] In addition to the second bundle Mr Drake filed another 47 pages of various different documents late on the afternoon of Friday 19 November 2010 (the second hearing started on Monday 22 November 2010).

[49] Mr Broughton then produced an extra 30 pages of loose documentation during the course of the second hearing.

[50] This meant that during the second hearing MSNZ was faced with 77 pages of loose documentation which was not indexed, paginated, or collated. This was surprising in light of the disapproval I had expressed when Mr Broughton had produced 68 pages of loose new documentation during the first hearing.

[51] Mr Drake’s explanation for new documents being provided in this manner was unsatisfactory. He suggested that was a normal part of the Authority process. I do not accept that, especially when timetable directions have been made, and a seven week adjournment had been granted specifically to enable a party to get their evidence together.

[52] Section 157 of the Employment Relations Act 2000 (“the Act”) requires the Authority to comply with natural justice and to aim to promote good faith behaviour. I consider that the production of extensive new material for the first time during a hearing is contrary to these principles and, unless there is a good reason for that to occur, it is to be discouraged. There was no good reason in this case.

Relevant law

[53] Clause 15 of Schedule 2 of the Act confers a wide discretion on the Authority to award costs and expenses. This discretion is to be exercised judicially and in accordance with principle. Each case is to be treated in light of its own circumstances.

[54] The primary purpose of costs is to compensate the successful party. However, if an award of costs on the usual basis would cause excessive or disproportionate hardship, costs may be reduced to reflect the unsuccessful party’s circumstances.⁴

[55] The leading case on costs in the Authority is the Full Employment Court’s decision in *PBO Ltd (formerly Rush Security) v Da Cruz*.⁵

[56] The following well established principles, (predominantly taken from *Da Cruz*) apply to costs in the Authority:

- (a) Costs are discretionary, both as to whether they will be awarded, and if so as to how much;
- (b) The Authority’s discretion must be exercised in accordance with principle and not arbitrarily;

⁴ *Gates v. Air New Zealand Ltd* [2010] EMPC 26

⁵ [2005] ERNZ 808

- (c) The Authority's costs jurisdiction is consistent with its equity and good conscience jurisdiction;
- (d) Costs are not to be used as punishment or as an expression of disapproval of the unsuccessful party's conduct;
- (e) Conduct which unnecessarily increased costs may be taken into account;
- (f) Costs generally follow the event;
- (g) The Authority may consider whether any costs incurred were unnecessary or unreasonable;
- (h) The nature of the case can influence an award of costs, for example test cases may result in costs lying where they fall;
- (i) Costs are usually assessed based on a notional daily rate;
- (j) The Authority's usual daily tariff based approach should not be applied in a rigid manner without having regard to the particular characteristics of each case;
- (k) Without prejudice offers can be taken into account;
- (l) Awards will generally be modest.

[57] I have had regard to these key principles when fixing costs in this matter.

[58] The Court of Appeal has recognised that public interest in the fair and expeditious resolution of disputes requires there to be costs consequences if an unsuccessful party has ignored a *Calderbank* offer.⁶ The Court of Appeal has approved *Calderbank* offers as a way of encouraging the proper settlement of employment cases.⁷

[59] The Employment Court in *Idea Services Ltd v Collins*⁸ confirmed the Authority may take a *Calderbank* offer into account where an applicant has been

⁶ *Aoraki Corporation Ltd v Mc Gavin* [1998] 1 ERNZ 601; *Bluestar Print Group (NZ) Ltd v Mitchell* [2010] NZCA 385

⁷ *Health Waikato Ltd v Van der Sluis* [1997] ERNZ 236.

⁸ (2009) 6 NZELR 495

completely unsuccessful because the failure to accept a *Calderbank* offer was a “*compelling factor to be considered by the Authority in the exercise of its discretion [...]*”.

Issues

[60] The issues for the Authority to determine are;

- (a) Is MSNZ entitled to costs?
- (b) If so, how should costs be calculated?
- (c) What costs should be awarded?
- (d) What, if any, disbursements should be awarded?
- (e) Is Mr Broughton entitled to costs on his discovery application?

Is MSNZ entitled to costs?

[61] MSNZ was wholly successful in respect of all the issues and claims Mr Broughton raised. There is no good reason to depart from the usual principle that costs follow the event. MSNZ as the successful party is entitled to a contribution towards its actual costs.

How should costs be calculated?

[62] MSNZ sought indemnity costs or a proportion of its indemnity costs.

[63] Indemnity costs may be awarded to censure unmeritorious cases or procedural abuses by parties or their representatives.⁹ The Employment Court in *Postles v Airways Corporation of New Zealand Limited (No 2)*¹⁰ identified the issues to be considered in connection with an award of indemnity costs. I do not consider indemnity costs are appropriate in this case.

[64] I have decided to adopt the Authority’s usual tariff based approach to costs. This involves starting with a notional daily tariff which is then adjusted, in a

⁹ *Order of St John Midland Regional Trust Board v Greig* [2004] 2 ERNZ 137

¹⁰ [2002] 2 ERNZ 817

principled way, to reflect the particular circumstances of a matter in order to meet the justice of the case.¹¹

What costs should be awarded?

[65] The tariff approach requires consideration of the following issues:

- (a) What notional daily tariff should adopted?
- (b) Should the notional daily tariff be decreased?
- (c) Should the notional daily tariff be increased?
- (d) What daily tariff should be applied?
- (e) How many days should the tariff be applied to?
- (f) Are the costs awarded under the tariff based approach reasonable or should they be adjusted?

What notional daily tariff should be adopted?

[66] I consider a notional daily rate of \$3,000 is an appropriate starting point for this matter.

Should the notional daily tariff be decreased?

[67] Mr Drake submitted the notional daily tariff should be decreased to avoid causing Mr Broughton undue hardship.

[68] A party raising the issue of undue hardship is expected to provide evidence in support of such a claim.¹² After receiving Mr Drake's submissions, I invited him to provide additional evidence about Mr Broughton's financial position, but he did not respond.

[69] I accept Mr Broughton has lost his MSNZ remuneration, he has not found new employment, and he now supports his mother in addition to his wife. I have also had regard to the evidence available from the substantive hearing, namely:

¹¹ *Da Cruz* ibid 5 and *Carter Holt Harvey v Eastern Bays Independent Industrial Workers Union & Others* [2011] NZEMPC 13

¹² *Ibid* 5

- (a) Mr Broughton financially supports his wife who does not work;
- (b) Mr Broughton had been employed by MSNZ as a senior executive for three years;
- (c) When made redundant his remuneration was \$292,300 gross per annum;
- (d) Prior to his MSNZ roles, Mr Broughton had worked in senior management for 23 years;
- (e) Upon termination Mr Broughton received a total gross payment of \$112,642.91, which included redundancy compensation of \$71,056.80;
- (f) At the time of the investigation Mr Broughton had savings, which he said he was living off;
- (g) Although Mr Broughton had not (at that point) obtained new employment, he had:
 - (i) Set up a business in conjunction with a former MSNZ employee; and
 - (ii) Undertaken paid consultancy work since his redundancy.

[70] In the circumstances, I do not consider the tariff should be reduced to avoid potential hardship to Mr Broughton. The Employment Court in *Gates v Air New Zealand Limited* recognised the hardship that may arise, particularly for some individuals, was an expected and acceptable consequence of their decision to engage in unsuccessful litigation¹³.

[71] I do not consider there are any other factors which warrant decreasing the notional daily tariff.

¹³ Ibid 5

Should the notional daily tariff be increased?

[72] I find there are two good reasons to increase the notional daily tariff:

- (a) Mr Broughton could have accepted the generous settlement offer made on 8 September 2010 and the realistic settlement offer made on 19 November 2010; and
- (b) The manner in which Mr Broughton conducted his matter unnecessarily increased MSNZ's costs.

Calderbank offers

[73] The two *Calderbank* offers gave Mr Broughton genuine and reasonable opportunities to settle his case which, if accepted, would have left him much better off than he has ended up as a result of proceeding with his claims. These offers were made at a time when the costs of both parties were significantly lower.

[74] The offer of 8 September 2010 was made after Mr Broughton had filed his evidence but before MSNZ had finalised its evidence. The 19 November 2010 offer was made after the first hearing but before the second hearing had commenced. I find that Mr Broughton's failure to accept either reasonable offer caused MSNZ to unnecessarily incur additional costs of \$82,488.31.

[75] I do not accept Mr Drake's submission that I should not take account of the offer of 8 September 2010 because it was received and expired whilst he was overseas. Given the length of Mr Drake's absence it was reasonable for MSNZ to expect him to have made arrangements for Mr Broughton's case to be handled in his absence, particularly when the matter was to be heard shortly after his return.

[76] There was no evidence Mr Drake had not been made aware of the existence of the offer, and even if he had not, he could still have responded to it on his return. I find that Mr Drake's absence overseas does not prevent me from considering the September settlement offer.

[77] I do not accept Mr Drake's submission that I cannot consider the 19 November 2010 offer because it was a "walk away" offer. The Court of Appeal's decision in

*Hira Bhana*¹⁴ which Mr Drake relied on involved an appeal against costs awarded by the High Court in a commercial dispute. The appellant had claimed increased and indemnity costs pursuant to r.48C of the High Court Rules.

[78] The Court of Appeal recognised the purpose of *Calderbank* offers but held that where a “walk away” offer made early in the proceedings was rejected, the mere fact the party which rejected it subsequently lost did not automatically mean they were required to pay indemnity or increased costs. The timing of the offer more than 12 months before trial was a decisive factor.

[79] The current case can be distinguished. *Hira Bhana*¹⁵ involved a different jurisdiction with its own discrete costs regime. The circumstances of the offer made by MSNZ were quite different from *Hira Bhana*. The 19 November 2010 offer occurred very late in the proceedings when the parties were in a very good position to undertake a realistic risk assessment and to weigh up the possible outcome against the costs that would need to be expended by continuing.

[80] If MSNZ’s realistic offer of 19 November 2010 had been accepted the parties would have avoided incurring the costs of a further two days of hearing time and the need to prepare extensive closing and costs submissions.

[81] I find that both settlement offers were properly made in a timely fashion. They were also clear and transparent. Mr Broughton had 22 days to consider the first offer and whilst the time for accepting the second offer was short, the parties had been to mediation; they had the benefit of a full day of evidence as a result of the first hearing; counsel had been engaged in settlement discussions by telephone on 16 November and without prejudice communications were exchanged on 17 November 2010.

[82] The offer of 19 November 2011 followed on from that, so Mr Broughton was well aware of the issues he needed to consider in order to properly weigh this offer. I find that, in the circumstances, Mr Broughton had adequate time to consider it.

¹⁴ Ibid 3

¹⁵ Supra

Mr Broughton's conduct unnecessarily increased MSNZ's costs

[83] The manner in which Mr Broughton's case was presented was inefficient and significantly and unnecessarily increased MSNZ's costs. At least an extra day and a half of hearing time was required because of way in which Mr Broughton presented his case. I find that even more hearing time would have been required had it not been for the very efficient manner in which MSNZ presented its case.

[84] I find MSNZ's costs were unnecessarily increased by Mr Broughton's conduct because:

- (a) Elements of Mr Broughton's claim were so obviously without merit he should have been aware of that from the outset;
- (b) The serious and wide ranging scope of the allegations made by Mr Broughton broadened the issues MSNZ had to respond to and the evidence it was required to call;
- (c) Mr Broughton's repeated breaches of the Authority's directions meant MSNZ had to continually respond to new evidence outside of the agreed timetable.

[85] This conduct resulted in the Authority granting Mr Broughton various indulgences to enable him to better prepare and advance his case. These included:

- (a) Adjourning the first hearing to give him more time to file evidence on critical aspects of his claim which he had not provided in his earlier statements;
- (b) Delaying hearing the evidence of MSNZ's Senior Programme Manager until the second hearing because Mr Drake said he was not in a position to cross examine the witness at the first hearing;
- (c) Admitting Mr Broughton's additional witness statements which were provided outside the timetable agreed to in August;
- (d) Admitting Mr Broughton's 229 pages of new documentation provided outside the agreed timetable.

[86] The way in which Mr Broughton drip fed his new material to MSNZ increased its costs because it had to take ongoing instructions about new matters. This was more costly and inconvenient than usual because its two most important witnesses were not based in New Zealand.

What daily tariff should be applied?

[87] This matter calls for a substantial increase to the daily tariff. The Authority has awarded a tariff of \$5,000 or more per day on a number of occasions and the Court has also approved tariffs at or above that level.

[88] In *Whitten v. Ogilvy New Zealand Ltd*¹⁶ the Authority adopted a daily tariff of \$9,000 on the basis a high award of costs was appropriate due to Ms Whitten's success and Ogilvy's conduct. The matter involved a two day investigation but the tariff of \$9,000 was applied to three days to take account of further evidence and closing submissions filed after the investigation hearing.

[89] In *Ellis v Oaks Hotels & Resorts NZ Limited*¹⁷ the tariff was increased to \$5,000 because the matter went part heard and therefore required two hearings. In *Lloyd-Barker v The Society for the Prevention of Cruelty to Animals Auckland Inc*¹⁸ the tariff for a one day investigation was increased to \$7,000 as a result of the unsuccessful party's rejection of a reasonable *Calderbank* offer.

[90] In *Autagavia v Tinytown Learning Centres Limited*¹⁹ the daily tariff for a one day investigation was increased to \$5,500 because the successful applicant had offered to settle at an early stage for much less than she was ultimately awarded by the Authority.

[91] Although the Authority's investigation in *Keightley (Labour Inspector) v Hon Ly t/a Taumaranui Bakery*²⁰ took considerably less than one day, \$10,000 costs were awarded because of the substantial preparation required to prove the wage arrears claim. In *Wood v Board of Trustees of Woodford House School*²¹ \$5,500 was awarded for a one day investigation meeting. The tariff was increased from \$3,000 to \$5,000 to

¹⁶ Member Ulrich, 21 June 2010, AA200A/10

¹⁷ Member Doyle, 5 May 2010, CA 49A/10

¹⁸ Member Anderson, 26 May 2010, AA 12A/10

¹⁹ Member Larmer, 20 December 2010, AA 478A/10

²⁰ [2011] NZERA Auckland 77

²¹ [2011] NZERA Wellington 87

take account of a *Calderbank* offer and by a further \$500 for the cost associated with an unnecessary claim.

[92] In *Faulkner v Secretary for Justice*²² the Authority increased the tariff to \$7,500 per day for a two day investigation because of the unsuccessful party's rejection of reasonable *Calderbank* offers. In that case the applicant had only succeeded on three of her five claims for remedies. The Authority in *John v Airways Corporation of New Zealand Limited*²³ awarded costs of \$17,500 for a three day investigation because of the sheer extent of the matter. This was the equivalent of a daily tariff of \$5,834.

[93] In *Filta Vacuum Products Limited*²⁴ the Court suggested that had the Authority adopted a tariff based approach to costs (instead of awarding the successful party 66% of its actual costs, which is what it did) \$5,000 per day for three days might have been appropriate. Although a *Calderbank* offer had been made in that case the Authority had found the offer was not realistic or reasonable and did not address the personal grievance. The matter was considered to be factually complex and each party arguably had some measure of success.

[94] In *Carter Holt Harvey v Eastern Bays Independent Industrial Workers Union & Others*²⁵ the Court upheld the Authority's decision to impose a daily tariff of \$5,000 for five days of investigation time plus a day and a half of preparation time due to the complexity of the matter, which had involved extensive documentation that required detailed analysis.

[95] In *Da Cruz*²⁶ the Full Employment Court increased the Authority's award of costs for a one day investigation from \$2,000 to \$7,000 because:

- (a) The successful party had also successfully resisted a significant counterclaim against her, which had obviously taken time to prepare; and
- (b) The unsuccessful party had not accepted a realistic settlement offer.

²² [2011] NZERA 324

²³ Member Crichton, 2 December 2009, CA95A/09

²⁴ Judge Travis, 9 July 2009, AC28/09

²⁵ [2011] NZEMPC 13

²⁶ Ibid 5

[96] I consider this matter warrants a higher tariff than was approved in *Eastern Bays*²⁷ or suggested in *Filta*.²⁸ Those cases can be distinguished on the grounds they were both inherently complex, so required more time than usual. Neither case involved a situation where the unsuccessful party had caused the successful party to unnecessarily incur costs, which was what occurred in this case.

[97] I consider *Da Cruz*²⁹ is closer to the current fact situation in that the unsuccessful party's conduct had increased the successful party's costs. However, there are some important differences which I consider warrant the imposition of a higher daily tariff than the Full Employment Court adopted in *Da Cruz*.³⁰

[98] The cases were of an entirely different magnitude. *Da Cruz* was an uncomplicated one day matter. The Court valued the successful parties' costs in respect of the counterclaim at \$2,000 whilst the costs MSNZ unnecessarily incurred as a result of Mr Broughton's conduct far exceeded that. The costs incurred by *Ms Da Cruz* after her without prejudice offer was not accepted were approximately \$5,000 and the Full Court awarded her that entire amount.

[99] The counterclaim in *Da Cruz*³¹ can be likened to the wide ranging scope of Mr Broughton's claims because they both required the other party to incur costs in responding to them. However, the "*wide ranging scope of the allegations*"³² was but one way in which Mr Broughton's conduct unnecessarily increased MSNZ's costs.

[100] In terms of the general run of redundancy dismissal cases involving an individual applicant heard by the Authority over the course of a normal year, this case was more significant in terms of what was at stake, it took longer to investigate, and required more resources than the majority of such cases. The daily tariff needs to reflect that.

[101] None of the forgoing cases in which the tariff has been increased had the combination of factors which I have found warrant an increase to the tariff in this matter, namely:

²⁷ Ibid 25
²⁸ Ibid 24
²⁹ Ibid 5
³⁰ Supra
³¹ Supra
³² Paragraph [84] of this determination

- (a) The sheer extent of the matter;
- (b) The failure to accept two reasonable settlement offers;
- (c) Conduct which unnecessarily increased the successful party's costs.

[102] My view is that an increase of the daily tariff to \$10,000 would not have been unwarranted. However, I consider myself constrained from increasing the tariff above \$8,000 per day because that is the figure MSNZ submitted should apply if I adopted a tariff based approach to costs.

[103] I therefore find the tariff should be increased to \$8,000 per day.

How many days should the daily tariff be applied to?

[104] MSNZ submitted the tariff should be applied to 6.5 days whilst Mr Broughton submitted it should be applied to 3.125 days.

Hearing time

[105] This matter required three full days of hearing time plus just over an hour of time on the second day of the hearing (30 September 2010), before it was adjourned. I consider the total hearing time was 3.5 days because, whilst the second day of the hearing did not involve an entire half day, the November hearing started earlier than normal each day and had shortened lunch breaks. This together with the time on the second day would amount to an entire half a day of hearing time.

Extent of this matter

[106] This matter exceeded what would normally be expected or required for a normal redundancy dismissal investigation. In contrast to the usual written submissions, one CMC, and typically a one day investigation meeting, this matter involved:

- (a) three and a half days of hearing time;
- (b) three pre hearing telephone conferences;
- (c) a full discovery exercise;
- (d) post investigation memoranda from MSNZ and Mr Broughton;

- (e) two hearings held seven weeks apart;
- (f) in excess of 480 pages of documents, consisting of three bundles each filed at different times.

Submissions

[107] When setting costs in the Authority, the Court in *Chief Executive of Department of Corrections v Tawhiwhirangi (No 2)*³³ allowed one day for submissions on a two day Authority hearing. This matter involved extensive submissions/memoranda post the hearing, so I consider it appropriate to allow one day for submissions.

Preparation time

[108] It is unusual, but not unheard of, for preparation time in the Authority to be recognised when assessing costs.³⁴ In this case I consider it appropriate to allow one and a half days' preparation time because:

- (a) This was a substantial case which required extensive preparation;
- (b) MSNZ's preparation shortened the hearing time that would otherwise have been required;
- (c) The adjournment required MSNZ to prepare for two hearings held seven weeks apart;
- (d) MSNZ had to respond to four extra statements from Mr Broughton which were filed outside the timetable;
- (e) It had to brief Mr Bullwinkel, who was based in Sydney, twice.
- (f) It had to brief Mr Ackhurst again after he had moved to Singapore;
- (g) It had to call a new witness (Mr Waldo) to respond to new evidence Mr Broughton filed after the first hearing;

³³ [2008] ERNZ 73

³⁴ *Eastern Bays* ibid 25 (one day preparation for 3.5 days Authority hearing); *Tawhiwhirangi* supra (6 days preparation for two day Authority hearing).

- (h) It had to review in excess of 480 pages of documents, 229 of which had been introduced by Mr Broughton for the first time after the hearing had begun, and some of which were produced during each hearing.

[109] None of MSNZ's evidence was superfluous. MSNZ's case was well prepared and presented efficiently and in a manner which assisted the Authority's investigation. MSNZ complied with the Authority's directions, its witness statements were clear and concise and covered all relevant matters in sufficient detail. MSNZ witnesses were familiar with their statements and the relevant documentation. They listened properly to the questions they were asked and gave clear and concise responses. This was all possible because of the preparation MSNZ had undertaken.

[110] MSNZ's competent preparation made the issues, evidence, and relevance of the documentation (at least from its perspective) clear which was extremely helpful in mitigating the effects of the manner in which Mr Broughton presented his case.

[111] I find the daily tariff should be applied to six days.

Are the costs calculated awarded reasonable or should they be adjusted?

[112] The Full Court in *De Cruz*³⁵ warned that the tariff approach should not be applied rigidly without regard to the particular circumstances of a case. It is therefore still important for me to stand back and reflect on the level of costs I have awarded to ensure it is a reasonable contribution which does justice between the parties.

[113] At the forefront of my mind is the general principle that cost awards in the Authority will usually be modest and that an award of costs should not cause excessive or disproportionate hardship. I also recognise that costs must not be used to punish an unsuccessful party, although they may reflect conduct which has unnecessarily increased costs.

[114] There was a significant amount at stake financially for MSNZ because Mr Broughton sought remedies of \$417,300 inclusive of \$20,000 in penalties he requested be paid to him personally. Mr Broughton also sought interest which, if awarded, would have amounted to \$36,000. Even more importantly MSNZ's independent legal and HR structures were under challenge and the reputations of three

³⁵ Ibid 5

very senior Microsoft employees had been called into question. The considerable resources applied by MSNZ to this matter must be seen within that context.

[115] The bulk of MSNZ's costs, \$82,488 or 67% of its actual total costs, were incurred after 15 September 2010, once the first reasonable settlement offer had not been accepted.

[116] The costs award of \$48,000 represents approximately 37% of MSNZ's actual total costs, which I consider to be a modest contribution. Although my view is that the particular circumstances of this matter would have been warranted a greater contribution, the constraints on setting the level of the daily tariff have kept the costs awarded down to \$48,000. I do not consider this costs award has punished Mr Broughton, rather it has reflected his particular conduct which unnecessarily increased MSNZ's costs.

[117] I invited Mr Broughton to provide evidence of his financial position in support of his submission that a large award of costs would cause him hardship but he elected not to do so. There is no basis from which to conclude the level of costs awarded will cause him excessive or disproportionate hardship. In any event, some hardship is an expected and acceptable occurrence of his decision to engage in unsuccessful litigation³⁶.

Costs order

[118] Mr Broughton is ordered to pay MSNZ \$48,000 towards its actual legal costs.

What, if any, disbursements should be awarded?

[119] MSNZ initially submitted its travel disbursements amounted to \$8,892. However, in response to the Authority's indication that a pro rata deduction should be made to travel expenses if Mr Bullwinkel or Mr Ackhurst had conducted other MSNZ business when in New Zealand for the hearing of Mr Broughton's matter, this claim was revised to \$4,538.16.

[120] Because of the adjournment, Mr Ackhurst had to fly back from Singapore. His travel disbursements for that were \$2,534.90. Because of the adjournment, Mr Bullwinkel had to make two trips to New Zealand. His travel disbursements were

³⁶ Ibid 4

\$2,003.26. These disbursements were properly itemised and were supported by receipts. I find the travel expenses claimed were incurred, reasonable, and recoverable.

[121] It was appropriate for Mr Ackhurst and Mr Bullwinkel to be present for the duration of the hearing because they were both important witnesses who were required to respond to the evidence given by other witnesses. Mr Drake did not apply for either Mr Ackhurst or Mr Bullwinkel to give their evidence remotely. Even if he had, such an application would have been declined given the nature of the allegations and the need for me to carefully assess credibility issues.

[122] Mr Broughton is ordered to pay MSNZ \$4,538.16 towards its disbursements.

Is Mr Broughton entitled to costs?

[123] Mr Broughton applied for half a day's costs on his successful interlocutory discovery application.

[124] I find he is entitled to costs, but that an award of half a day would be excessive. The discovery application involved a two page letter and attendance at a telephone conference. I consider \$750 is a reasonable contribution.

[125] MSNZ is ordered to pay Mr Broughton \$750 towards his costs.

Rachel Larmer

Member of the Employment Relations Authority