

**IN THE EMPLOYMENT COURT OF NEW ZEALAND  
AUCKLAND**

**I TE KŌTI TAKE MAHI O AOTEAROA  
TĀMAKI MAKĀURAU**

**[2020] NZEmpC 34  
EMPC 104/2019**

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
AND IN THE MATTER	of a challenge to a costs determination of the Employment Relations Authority
AND IN THE MATTER	of an application for costs
BETWEEN	VERONICA BYRNE Plaintiff
AND	THE NEW ZEALAND TRANSPORT AGENCY Defendant

Hearing: (on the papers)

Appearances: R M Harrison, counsel for plaintiff  
G Cain and R M Butler, counsel for defendant

Judgment: 18 March 2020

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**COSTS JUDGMENT OF JUDGE B A CORKILL**

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**Introduction**

[1] This judgment resolves issues as to a costs determination issued by the Employment Relations Authority following an investigation on 14 May 2019,<sup>1</sup> and costs in the Employment Court following the issuing of a substantive judgment on 13 December 2019.<sup>2</sup>

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<sup>1</sup> *Byrne v The New Zealand Transport Agency* [2019] NZERA 283 (Member Trotman) (*Byrne – Costs determination*).

<sup>2</sup> *Byrne v The New Zealand Transport Agency* [2019] NZEmpC 187.

[2] The litigation concerned whether a non-disparagement clause in a record of settlement had been breached.

[3] The Authority found that the New Zealand Transport Agency (NZTA) had not breached the agreement.<sup>3</sup> In its subsequent costs determination, the Authority determined that costs should follow that event. The Authority stated the starting point for an award of costs would be based on its daily tariff which produced a figure of \$4,500. This was increased by \$1,000, because the Authority considered Mrs Byrne's conduct of the proceeding had unnecessarily increased NZTA's costs.<sup>4</sup> It also concluded that a Calderbank offer was unreasonably rejected, so that the costs assessed to that point should be increased by a further \$2,000.<sup>5</sup> Mrs Byrne was therefore ordered to pay NZTA the sum of \$7,500 towards its legal costs.<sup>6</sup> Subsequently, this liability was stayed by the Court on the basis Mrs Byrne pay \$2,000 to the Registrar, which duly occurred.<sup>7</sup>

[4] Turning to the position in this Court, I concluded that NZTA had breached the record of settlement; I went on to make a compliance order that it was not to disparage Mrs Byrne, expressly or impliedly, in respect of any matters connected with the employment relationship she had with NZTA.<sup>8</sup>

[5] I then stated that Mrs Byrne was entitled to costs. Counsel were invited to agree the issue if possible. I indicated, provisionally, that costs should be considered on a Category 2, Band B basis under the Court's Guideline Scale. If agreement could not be reached, Mrs Byrne could apply for appropriate orders. Submissions with regard to a challenge Mrs Byrne had previously brought to the Authority's cost determination were to be dealt with at the same time.<sup>9</sup> Counsel were unable to resolve the costs issues, so that the assistance of the Court has now been sought.

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<sup>3</sup> *Byrne v The New Zealand Transport Agency* [2019] NZERA 179 (*Byrne – Substantive determination*).

<sup>4</sup> *Byrne – Costs determination*, above n 1, at [9] and [13].

<sup>5</sup> At [23].

<sup>6</sup> At [25].

<sup>7</sup> *Byrne v The New Zealand Transport Agency* [2019] NZEmpC 127.

<sup>8</sup> *Byrne – Substantive judgment*, above n 2, at [159].

<sup>9</sup> At [160].

## **Parties' submissions**

[6] In summary, Mr Harrison, counsel for Mrs Byrne, submitted:

- a) Since Mrs Byrne's challenge had succeeded, costs in the Authority should follow that event.
- b) It was reasonable for Mrs Byrne to have declined a proposal advanced on a Calderbank basis by NZTA shortly before the Authority's investigation meeting. Although a sum of \$10,000 was offered as well as reimbursement of costs incurred, a draft record of settlement to which Mrs Byrne was asked to agree contained a clause which stated that she would inform NZTA if she secured work with an NZTA supplier if it was likely she would be working on an NZTA project or programme; following such disclosure NZTA would engage directly with Mrs Byrne and attempt to negotiate in good faith whether it would be necessary for her to interact with NZTA staff while working on that project or programme, and if so how those interactions would be managed.
- c) That clause was inappropriate, because it provided the opportunity for NZTA to undermine any new employment Mrs Byrne may have obtained; the clause in effect provided a waiver from the original non-disparagement clause which the parties had agreed.
- d) Accordingly, no adjustment should be made in respect of the Calderbank offer. Given the successful challenge to the Authority's determination, Mrs Byrne should be awarded costs with regard to the Authority's investigation at the tariff rate of \$4,500, as well as reimbursement of a filing fee.
- e) Costs with regard to the hearing of the challenge was sought on a 2B basis, amounting to \$28,919, and disbursements being fees payable to the Ministry of Justice.

[7] Mr Cain, counsel for NZTA, submitted in summary:

- a) When assessing costs in the Authority, the Calderbank offer should be taken into account. The Court also should have regard to the Authority's comments about the way in which the case was conducted by Mrs Byrne in the Authority. Costs should lie where they fall.
- b) Developing submissions with regard to the Calderbank offer, it was submitted that NZTA indicated that not only would it pay \$10,000 and costs, but there would be a mechanism which would allow the parties to engage with each other so as to discuss and manage appropriate interactions with NZTA staff, were that situation to arise. The proposal did not go so far as to enabling NZTA to instruct or require Mrs Byrne to have restricted contact with particular individuals at NZTA, or to require her to be removed from any project or role. Nor did the clause state that a prospective employer/supplier would be involved in relevant discussions.
- c) Turning to the position with regard to the hearing of the challenge, it was submitted that the Calderbank offer made shortly before the Authority investigation should be taken into account, even if it was not renewed. For this reason, costs in the Court should lie where they fall.
- d) Alternatively, issues were raised with some steps utilised in the plaintiff's calculation of scale costs.

### **Relevant principles**

[8] With regard to costs in the Authority, it is common ground that these may be assessed with regard to the Authority's notional daily rate. Nor is there any controversy as to the actual notional daily rate used as a starting point in this case, of \$4,500.<sup>10</sup> This arises from the practice note as to costs issued by the Chief of the Authority on 30 June 2016.

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<sup>10</sup> *Fagotti v Acme & Co Ltd* [2015] NZEmpC 135, [2015] ERNZ 919 at [108].

[9] The Authority retains, however, an overall discretion to order costs as it thinks reasonable.<sup>11</sup>

[10] Also relevant to the costs challenge is the proposition that the Court will review the Authority's costs in light of the ultimate conclusion reached by the Court, rather than the Authority.<sup>12</sup>

[11] Turning to the position with regard to costs in the Court, the parties are agreed that the Court's Guideline Scale is applicable, on a 2B basis, there being only two factual aspects of that assessment requiring consideration.

[12] However, the application of the Court's Scale is subject to NZTA's primary point that the settlement offer made prior to an Authority investigation, but not renewed, may nevertheless be relevant for costs purposes. Such a proposition is well supported by case law.<sup>13</sup>

### **Costs challenge**

[13] There are three considerations with regard to the challenge of the Authority's costs determination.

[14] The first relates to the starting figure. The Authority proceeded on the basis that NZTA had succeeded, and that costs should follow that event.

[15] Because I have allowed the challenge, so that Mrs Byrne is the succeeding party, costs must follow that different event.

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<sup>11</sup> Employment Relations Act 2000, sch 2 cl 15.

<sup>12</sup> *Commissioner of Salford School v Campbell* [2015] NZEmpC 186 at [27]. This proposition was not considered on the dismissed appeal: *The Commissioner of Salford School v Campbell* [2016] NZCA 126.

<sup>13</sup> *Stormont v Peddlethorpe Aitken Ltd* [2017] NZEmpC 159 at [23]; *Stevens v Hapag-Lloyd (NZ) Ltd* [2015] NZEmpC 137, [2015] ERNZ 1080 at [18]–[21]; and *Rodkiss v Carter Holt Harvey Ltd* [2015] NZEmpC 147 [2015] ERNZ 333 at [29]–[33].

[16] The Authority confirmed that the investigation meeting took place over one day.<sup>14</sup> Using the normal daily tariff, the starting point, as already indicated was \$4,500. I agree with this assessment for present purposes.

[17] The second point relates to the question of conduct unnecessarily increasing costs. The Authority explained in its determination that this arose because three statements of problem were filed for Mrs Byrne that resulted in NZTA being required to file three statements in reply. Mrs Byrne's claim was not fully and fairly particularised despite directions being issued for that to occur, so that NZTA also incurred the expense of filing various memoranda, having to attend an additional case management conference, and obtain an affidavit from a summonsed witness so as to understand the case against it and to avoid an interim investigation meeting.<sup>15</sup>

[18] I have no reason to doubt the accuracy of these findings. Accordingly, the starting point figure should be reduced to \$3,500.

[19] The third point relates to the question of whether the Calderbank offer was unreasonably rejected.

[20] It is worth summarising the terms of the without prejudice offer made on Friday, 15 February 2019, noting that the investigation meeting was scheduled to commence on Monday, 18 February 2019.

[21] The offer, as already noted, was that Mrs Byrne would be paid \$10,000 and her reasonable legal fees, but that she would also sign a comprehensive record of settlement.

[22] The preamble in the draft of that document stated that it was intended to "restate and clarify the parties' mutual non-disparagement obligations" as set out in the original record of settlement.

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<sup>14</sup> *Byrne – Costs determination*, above n 1, at [9].

<sup>15</sup> At [10]-[13].

[23] The clause which has attracted controversy was expressed in these terms:

6. [Mrs] Byrne agrees to inform the Agency if she secures work with an Agency supplier and is likely to be working on an Agency project or programme. Following such disclosure, the Agency will engage directly with [Mrs] Byrne and attempt to negotiate in good faith whether it will be necessary for her to interact with the Agency's staff while working on the Agency project or programme, and if so, how those interactions will be managed. This will not be regarded as a breach of the Agency's obligations (under this agreement or the [record of settlement]) not to disparage [Mrs] Byrne.

[24] First, it is to be noted that ultimately no monetary award was obtained. Mrs Byrne did claim a penalty against NZTA in her challenge, but at the hearing Mr Harrison did not press the application, stating that it was a matter for the Court having regard to factors set out in s 133A of the Employment Relations Act 2000.<sup>16</sup> I declined to award a penalty. From a financial perspective the offer made at the time of the Authority's investigation was therefore more favourable. I also note that full costs at the point of the offer would have been reimbursed; that is to be contrasted with the position now where a contribution to costs, only, is sought.

[25] However, the issue of vindication must be balanced against these economic considerations. This issue was debated on in some detail in both counsel's submissions.

[26] Mr Cain submitted that it was doubtful the concerns now outlined about vindication were as important to Mrs Byrne at the time of the offer as they are now.

[27] There is no direct evidence on that point one way or the other. Nor do I think an inference should be drawn to support the submission. Given that NZTA would have provided Mrs Byrne with the monetary sums she was seeking, the fact that the offer was rejected can only be construed as meaning that the other elements of the offer were not satisfactory to her, having regard to the vindication she was seeking by way of a declaration and compliance order.

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<sup>16</sup> *Byrne – Substantive judgment*, above n 2, at [131].

[28] In *Blue Star Print Group (NZ) Ltd v Mitchell*, the Court of Appeal said this:<sup>17</sup>

[19] We accept that there may be cases where vindication through seeking a statement of principle in the employment context may be relevant to the exercise of the Court's discretion. Thus the relevance of reputational factors means that cost assessments are not confined solely to economic considerations. But equally, an offer to pay compensation at a level that is reasonable might well be regarded as conveying a distinct element of vindication to the plaintiff.

[29] I consider that the orders ultimately made by the Court represent significant vindication.

[30] These orders must be considered against all elements of the Calderbank offer, particularly the terms of the proposed agreement.

[31] The draft document proposed a significant restatement of the obligations which were agreed by the parties in their original settlement agreement. The original terms provided for a clean break between the parties on the issues which were settled; this included Mrs Byrne agreeing to resign but with an acknowledgement that the complaints made against her had not been investigated and that the parties would commit to a mutual non-disparagement clause.<sup>18</sup> By contrast, the proposed clause compromised this important outcome by setting up a mechanism which had the potential for NZTA's untested concerns about Mrs Byrne to be the subject of further interactions between the parties.

[32] The clause would have required Mrs Byrne to inform NZTA about work she may have secured in certain circumstances, which was then to be followed by direct engagement with her; NZTA could then attempt to negotiate in good faith whether it would be necessary for her to interact with NZTA staff in certain circumstances, and if so how those interactions would be managed.

[33] Mr Cain submitted that this did not mean NZTA would engage with Mrs Byrne's employer, only with her; and that the proposal did not go so far as to

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<sup>17</sup> *Blue Star Print Group (NZ) Ltd v Mitchell* [2010] NZCA 385, [2010] ERNZ 446 (citations omitted).

<sup>18</sup> *Byrne – Substantive judgment*, above n 2, at [20].



enable NZTA to instruct or require Mrs Byrne to have restricted contact with certain individuals, or that she be removed from a project or role.

[34] However, were concerns to have been raised in that context, it is not difficult to see that a good faith negotiation on Mrs Byrne's part, and the practical implications of any particular work arrangement, may well have required her to inform her new employer of particular restrictions or issues raised by NZTA, and/or the management by NZTA of relevant interactions. The possibility of her having to involve her employer in these negotiations was not ruled out by the draft clause. Were that to occur, it would likely have led to questions about Mrs Byrne's prior relationship with NZTA, just as occurred with WSP Opus. As Mr Harrison submitted, because that would occur by agreement under cl 6, the effect of the non-disparagement clause would in effect be waived.

[35] In summary, I consider that the proposal was a significant modification of the clean break provisions of the original settlement agreement.

[36] Given the background of the very significant difficulties which had arisen with WSP Opus, which led to Mrs Byrne being asked to step down from the project on which she had been employed by that entity to work on, it was unsurprising that the offer was rejected, even given its financial component.

[37] I find that Mrs Byrne ultimately obtained a better outcome in the Court, when it made a declaration and compliance order which reinforced the terms of the original settlement by which each party would move on and not disparage the other about past events because they had not been tested. The Calderbank offer was not unreasonably rejected.

[38] Mr Cain submitted that Mrs Byrne failed unreasonably to negotiate the effect of cl 6, if that was her concern. I disagree. The circumstances that were to be reviewed at the Authority's investigation meeting, which was about to commence, were obviously difficult; at that late stage there was no doubt a focus on those matters. Moreover, it is speculative as to where negotiation as to the terms of cl 6 would have got to.

[39] Mr Cain submitted that it is ironic Mrs Byrne now complains about the proposed mechanism because it would have led to engagement with a new employer, since the Court had criticised NZTA for not entering into dialogue with WSP Opus in the circumstances which arose. But NZTA was criticised for not discussing the neighbourhood issues which had been raised by its Senior Project Manager with WSP Opus.<sup>19</sup> The point was that such a communication would have not breached the relevant settlement agreement since such a discussion would not have been based on the circumstances which gave rise to the settlement agreement.<sup>20</sup>

[40] In short, the Calderbank offer was not unreasonably rejected. The result is that the amount payable by NZTA to Mrs Byrne for costs in the Authority is \$3,500.

### **Costs in the Court**

[41] Given the conclusion just expressed as to the effect of the pre-investigation Calderbank offer, it is unnecessary to consider that topic further with regard to costs in the Court.

[42] It remains only to consider the calculation of the scale costs, as detailed in the schedule attached to Mr Harrison's submissions.

[43] The first issue raised by Mr Cain relates to a claim for 0.4 of a day in respect of the filing of a memorandum for the first directions conference; he submits the figure should be 0.2 of a day. This is in accordance with Step 12 of the Guideline Scale. No such memorandum was filed, but rather a succinct email. I agree that this item should be reduced to 0.2, being a figure of \$478.

[44] A claim is also made for one day for a preparation of a list of issues, agreed facts, authorities and a common bundle. In fact, no agreed facts or authorities were filed; and the list of issues and common bundle were prepared by Mr Cain. I disallow the one day claimed for this item.

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<sup>19</sup> *Byrne – Substantive judgment*, above n 2, at [146].

<sup>20</sup> At [147].

[45] In the result, costs according to the Court's Guideline Scale totals \$26,051.

### **Conclusion**

[46] NZTA is to pay Mrs Byrne as follows:

- a) Costs in the Authority in the sum of \$3,500 and a disbursement of \$71.56, filing fee, being a total of \$3,571.56.
- b) Costs in the Court for \$26,051 and disbursements for fees paid or to be paid to the Ministry of Justice totalling \$955.76, a total of \$27,006.76.

[47] The funds currently held by the Registrar of the Court, plus accumulated interest, as paid by Mrs Byrne as security for costs, are to be released to her, or as she may direct.

B A Corkill

Judge

Judgment signed at 12.20 pm on 18 March 2020