IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

AA 217/07
5088543

	BETWEEN	GULF RUBBER NZ LTD AND SKELLERUP RUBBER SERVICES (A BUSINESS UNIT OF SKELLERUP INDUSTRIES LIMITED) Applicant
	AND	NZ AMALGAMATED ENGINEERING, PRINTING & MANUFACTURING UNION Respondent

Member of Authority:	Marija Urlich
Representatives:	Neil McPhail, Counsel for Applicant Tony Wilton, Counsel for Respondent
Submissions received:	10 and 20 July 2007 from Applicant 12 July 2007 from Respondent
Determination:	24 July 2007

COSTS DETERMINATION OF THE AUTHORITY

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[1] The applicants lodged an application on 23 May 2007 alleging breaches of good faith and seeking orders from the Authority. Urgency was requested. On 29 May 2007 a telephone conference was held with the parties' representatives. The parties agreed to attend mediation on 8 June 2007 and in the event that was unsuccessful an investigation meeting was set for 26 June 2007 and an attendant timetable agreed.

[2] On 19 June 2007 the applicants wrote to the Authority withdrawing their application on the following grounds:

> *"The applicants have been advised by the respondent that it has withdrawn the notices initiating bargaining with the applicants in respect to the Metal and Manufacturing Industries Collective Agreement … The effect of this withdrawal is that the respondent has agreed with one of the remedies sought by the applicants, although matters of good faith and costs still remain unresolved.*
>
> *In view of the fact that the applicants have succeeded in obtaining the abovementioned remedy, they are now prepared to withdraw the remedies sought in 3.1, 3.2 and 3.3 of the Statement of Problem. However, whilst the applicants are prepared to put aside the good faith issues insofar as these relate to the events leading up to the application, they nevertheless seek a determination from the Authority as to costs, given that they have been put to considerable expense by the actions of the respondent. Hence, the remedy sought in paragraph 3.4 of the Statement of Problem remains a live issue.*

[3] Paragraph 3.4 of the statement of problem refers to costs of and incidental to the application.

[4] On 20 June 2007, by minute, I set a timetable for the filing of costs memoranda, which the parties have complied with.

[5] Mr McPhail advises that the applicants have incurred actual costs of $6,554.93. He submits that these costs have been unnecessarily incurred because the respondent had an opportunity at a very early stage to resolve this matter without litigation. He submits further that the respondent's actions compelled the applicants to file a statement of problem and prepare for a mediation, which was abandoned.

[6] Mr Wilton submits that, at this stage of the matter, there is no basis upon which the Authority could make an award of costs; the Authority has not made any finding of bad faith conduct from which remedies could flow. He submits that the respondent's withdrawal of its bargaining notices did not amount to, and cannot be regarded as, an acceptance of wrongdoing. He says it was a pragmatic response to the applicant's reaction to the initiation of bargaining. He submits that the withdrawal was not, and cannot be regarded as, an acceptance of the applicants' allegations of bad faith behaviour subsequent to initiation of bargaining. Mr Wilton submits that until

the Authority has inquired into and determined the issues brought before it in the statement of problem there is no basis for a costs award.

[7] The Authority may make an award of costs against any party *"to a matter"*[1]. The power to award costs is discretionary and must be exercised in accordance with principle.

[8] Costs may be awarded when an application has been withdrawn immediately prior to an investigation meeting date. In such a situation the Authority may find the applicant's late expressed intention to abandon his or her claim has put the respondent to the unnecessary expense of preparing a scheduled investigation meeting.

[9] No witness statements or supporting documentation were filed by the applicant for the purposes of the scheduled investigation meeting. The Authority suspended the timetable for filing such when the applicant advised, after the date for filing had passed, that the bargaining initiation notices were likely to be withdrawn. This was confirmed in writing on 19 June 2007.

[10] From the invoice supplied by the applicants, it appears the costs incurred relate to bargaining, the preparation and lodging of the statement of problem and preparation for mediation. The last date for which work was invoiced is 31 May 2007. There is no invoiced work which relates to the scheduled investigation meeting. The parties were not directed to mediation by the Authority.

[11] The circumstances of the withdrawal of the remedies sought is not a situation akin to a "9th hour" withdrawal of a personal grievance; no witness statements or supporting documents were filed, there is no evidence any costs were incurred after 31 May 2007, there is no evidence that any costs were unnecessarily incurred for the purposes of the scheduled investigation meeting.

[12] Stepping back from the preparation for the investigation meeting. If this matter had been determined any award of costs against the respondent would have to flow from a finding of unlawful conduct. I have made no findings, and am unable to make any findings, as to the conduct of the respondent. The employment relationship

problem, lodged by the applicant, has not been investigated. There is no basis upon which the Authority can make an award of costs.

[13] For the above reasons there will be no award of costs in favour of the applicant.

Marija Urlich
Member of the Employment Relations Authority

[1] Schedule 2 clause 15(1) Employment Relations Act 2000