IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

AA 1A/08
5035340 and 5048075

	BETWEEN	KEITH SMITH Applicant First Respondent (5048075)
	AND	ENGINEERING & TECHNICAL RECRUITMENT LIMITED Second Respondent (5048075)
	AND	CAREER ENGINEER LIMITED Respondent Applicant (5048075)

Member of Authority:	R A Monaghan
Representatives:	T Skinner, Advocate for Applicant/Respondents P Akbar, Counsel for Respondent/Applicant
Submissions received:	15 February 2008 from Applicant/Respondents 22 February 2008 from Respondent/Applicants
Determination:	26 February 2008

COSTS DETERMINATION OF THE AUTHORITY

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[1] In a determination of the above matters dated 7 January 2008, I found Mr Smith had been dismissed unjustifiably but that he had contributed to the circumstances of his personal grievance. I also found Mr Smith breached clauses 20 and 21 of the parties' employment agreement, and ordered the payment of penalties in respect of two discrete breaches of clause 21. I dismissed claims for penalties against Mr Smith's company, ETRL.

[2] Costs were reserved. The parties have filed memoranda seeking orders for costs.

[3] Mr Skinner sought an order that Career Engineer pay $5,512 in respect of Mr Smith's costs. His submissions commented only on the outcome of the personal grievance. They did not address the outcome of Career Engineer's claims for breach of contract and for penalties. Since both parties' claims were heard together, and the 7 January determination incorporated all of the respective claims, I assume the decision not to address the breach of contract matter was deliberate. I will, however, be determining costs in respect of the entirety of the matters I heard.

[4] Mr Akbar submitted that, had the personal grievance been the sole matter for determination, an appropriate reflection of the outcome would have been to allow costs to lie where they fell. However the further findings in respect of Mr Smith's breaches of contract meant there should be an order that Mr Smith contribute to Career Engineer's costs.

Delays

[5] Both parties addressed delays which occurred before the matters were heard. Mr Skinner complained of Mr Hatton's declining an invitation to attend mediation in the immediate aftermath of the dismissal. The grievance was formally referred to mediation in July 2006, after Mr Smith's statement of problem had been filed in the Authority. By then Mr Akbar had been instructed, and Career Engineer indicated it was willing to mediate. In August 2006 Career Engineer filed its statement of problem in respect of its allegations of breach of contract and its claims for penalties. That matter, too, was referred to mediation.

[6] There was further extensive delay because a dispute arose over whether both matters should be addressed in the course of the same mediation, or whether each should be the subject of a separate mediation. The matter became so intractable that, in response to an application, the Authority issued a direction dated 13 December 2006 that both matters be mediated together. Mr Skinner then applied to the Employment Court for judicial review of that direction. The application for judicial review was withdrawn in May 2007. Matters were then able to advance.

[7] That background is unfortunate. However both parties contributed to various aspects of the delays and I see no reason to visit the result of their actions on either of them in costs relating to the substantive determination.

Determination

[8] The principles to be applied in determining costs in the Authority are contained in **PBO Limited (formerly Rush Security Ltd) v da Cruz**[1].

[9] There was no single successful party here. Regarding the personal grievance, Mr Smith was successful in that I found his dismissal was unjustified. A remedy, albeit reduced, was awarded. Similarly any order for costs should be reduced to take account of the limited nature of the success, but I would not go as far as to say costs in respect of the grievance alone should be allowed to lie where they fall. In short, Mr Smith's success in respect of his grievance should attract some contribution to his costs associated with the grievance.

[10] One of the claims of breach of contract was withdrawn at the investigation meeting because there was no evidence to support it. Otherwise Mr Smith had no defence to the claims. Overall, Career Engineer was substantially the successful party.

[11] Taking into account the length of the investigation meeting, the relatively straightforward way in which it proceeded, and the very reasonable levels of costs actually incurred by both parties, I would regard $4,000 as an appropriate contribution to costs if one of the parties had been successful on all matters.

[12] As just set out, the matter of who was the successful party was not clear cut. I turn now to decide how the notional $4,000 should be allocated.

[13] In what is necessarily a rough approach, I allocate one half of that amount to each set of claims. In respect of the grievance Mr Smith would receive a notional contribution of $2,000 to his costs, but I would reduce that to $1,000 because he was not entirely successful. In respect of the claims for breach of contract, Career Engineer would also receive a notional contribution of $2,000 to its costs. Its overall

[1] [2005] 1 ERNZ 808

degree of success was greater than Mr Smith achieved in respect of his personal grievance, and I would reflect that by reducing the notional $2,000 to $1,750.

[14] The outcome of that balancing exercise is an award of $750 in favour of Career Engineer. Mr Smith is therefore ordered to contribute to Career Engineer's costs in the sum of $750.

R A Monaghan
Member of the Employment Relations Authority