IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON

[2017] NZERA Wellington 87
3015472

BETWEEN	TRULIN TOATOA Applicant
AND	COMPLETE SITEWORKS COMPANY LIMITED First Respondent
AND	PERA TE AMO Second Respondent

Authority Member:	Michele Ryan
Representatives:	Regena Sommers, Counsel for the Applicant Laurence McLain, Advocate for the Respondent
Submissions received:	11 August 2017 from the Applicant 15 August 2017 from the Respondents
Determination:	18 September 2017

COSTS DETERMINATION OF THE AUTHORITY

Background

[1] During an Investigation Meeting the parties agreed to Terms of Settlement, including that the respondent would pay an agreed sum of compensation to the applicant on or by 30 June 2017. That matter was incorporated into a Consent Determination dated the same day.[1]

[2] The payment of compensation due on 30 June 2017 was not made. Correspondence was subsequently exchanged between the parties but the breach was not remedied.

[3] On 18 July 2017 the applicant, through his representative, applied to the Authority for an order to have the respondents comply with the Consent Determination plus penalties and interest. The Authority scheduled a case management call for 9 August 2017. In the period between these events the respondents paid the agreed compensation to the applicant on 25 July.

[4] On 26 July 2017 the applicant sent a 'Without prejudice save as to costs' letter to the respondents requesting $500 plus the filing fee to resolve all matters. The respondents did not reply to the offer.

[5] In the lead up to the case management conference call counsel for the applicant sensibly withdrew the application for compliance and later, the request for a penalty having become aware that the remedy is not available.

The costs application

[6] Counsel for the applicant now seeks costs corresponding to the application.
She submits the respondents' failure to abide by the Terms of Settlement reflected an ongoing pattern of avoidance to deal with the applicant in good faith. She says the applicant should recover actual and reasonable costs of $2,300 to restore him to the position had the respondents complied with the Consent Determination.

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[1] *Toatoa v Complete Siteworks Ltd and Te Amo* [2017] NZERA Wellington 50.

Analysis

[7] Section 15 of Schedule 2 of the Employment Relations Act provides that the Authority with a broad discretionary power to award costs. The principles that guide the Authority's discretion when assessing both whether costs should be awarded and the quantum of any such award are set out in *PBO Ltd (formerly Rush Ltd) v Da Cruz.*[2]

[7] That the Authority was not required to determine the substantive claim does not materially alter its discretion to award costs. The law allows costs to be awarded despite the withdrawal of a statement of problem (or claim) before the matter is investigated (or heard).[3]

[8] The respondent says the delay in payment was negligible. However I am unwilling to conclude, as the respondent contends, that costs should lie where they fall. There is no real argument that at the time the applicant lodged his statement of problem the respondent had not complied with its obligations pursuant to the Terms of Settlement and Consent determination. Whilst it is not fitting in an assessment as to costs to make findings about the substantive claim, in the particular circumstances of this matter the principle that costs must follow the event remains appropriate. I accept that costs should not be used as a "*punishment or expression or as an expression of disapproval of the unsuccessful party's conduct".*[4]

Determination

[9] Having assessed both what is reasonable in the circumstances and the overall fairness and justice of the situation I consider an award of $1,000 plus the filing fee of $71.56 is appropriate. I am satisfied that the applicant was required to incur additional costs to pursue monies owed.

[10] The respondent's failure to agree to a valid and modest *Calderbank* offer is conduct that further increased the applicant's costs and is a matter I have taken into account. That

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[2] [2005] 1ERNZ 808
[3] *Eden v Rutherford & Bond Toyota Ltd* [2010] NZEmpC 43 at [5]
[4] Ibid at n.1

failure has resulted in a moderate uplift to my initial assessment. I do not consider it suitable to award interest on this matter.

Order

[12] Pursuant to Section 15 of Schedule 2 of the Employment Relations Act I order the respondents to pay the applicant the sum of $1,000 as a contribution towards the applicant's costs plus $71.56 as the filing fee. This sum must be paid within 21 days of this determination.

Michele Ryan
Member of the Employment Relations Authority