IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

[2015] NZERA Christchurch 27
5417845

BETWEEN	NICHOLAS HOGEBOOM Applicant	
A N D	QUALITY FIREWOOD LIMITED Respondent	

Member of Authority:	David Appleton
Representatives:	Phillip de Wattignar , Advocate for the Applicant Christine McKay, Advocate for the Respondent
Submissions Received:	9 December 2014 and 25 February 2015 from Applicant 24 and 25 February 2015 from Respondent
Date of Determination:	2 March 2015

COSTS DETERMINATION OF THE AUTHORITY

A. The issue of costs was not part of the settlement agreement between the parties.

B. The respondent is to pay to the applicant the sum of $360 in respect of the applicant's costs.

[1] By way of a determination of the Authority dated 5 December 2014[1], the Authority ordered the respondent to pay sums previously ordered by the Authority to be paid to the applicant in a single lump sum by no later than Wednesday, 24 December 2014, together with a lodgement fee of $71.56 incurred by the applicant within five working days of the date of the determination. Any other costs sought by the applicant were reserved.

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1 [2014] NZERA Christchurch 204

[2] The parties were seemingly unable to agree how much should be paid as a contribution to the applicant's legal costs and so, by way of a memorandum from Mr de Wattignar served and lodged in accordance with directions, the applicant informed the Authority and the respondent that he was seeking a contribution of $360 costs. The respondent's position is that, since the Authority's determination, the parties reached a full and final settlement of all matters, including costs, and that no further costs are due to the applicant. The applicant denies that the agreement reached between the parties included the issue of costs, and so seeks a determination that her costs be paid by the respondent.

Background

[3] The Authority has been copied into correspondence between the parties since the issuing of the Authority's determination, the gist of which is as follows.

[4] On 6 January 2015, Mr de Wattignar wrote to one of the directors of the respondent, Mr Camerone McDougall, advising that no payments had been received by the applicant in respect of the Authority's orders and that, if payment were not made before 5pm on Friday, 9 January 2015, then enforcement action would be commenced against the company in the Employment Court.

[5] On 12 January 2015, Ms Christine McKay, the other director of the respondent, sent an email to Mr de Wattignar which stated the following:

> *Good morning Phillip,*
>
> *After discussions over the weekend we have chosen to make full and final payment of monies outstanding in relation to ERA file 5417845 Nicholas Hogeboom and Quality Firewood Limited.*
>
> *Can you please advise what the final amount owing is.*
>
> *Regards,*
> *Christine McKay*
> *Quality Firewood Ltd*

[6] Mr de Wattignar replied by email on the same day stating the following:

> *Good morning Christine,*
>
> ***1. The orders of the Authority***
>
> *I understand that on 5 December 2014 the Authority directed payment to be made of two amounts:*

> A. *$5,246.91 being the remaining sum due from the determination [2014] Christchurch 28* [sic] *as at 5 December 2014.*
> *I understand that after 5 December 2014 QFL had continued to pay $40 per week into Nick's account.*
> *So we accept that five payments of $40 made since equals a deduction of $200.*
> *Therefore the remaining sum due from the money awards in the determination is the amount of $5,046.91.*
>
> B. *The Authority judgment fee of $71.56.*
>
> *This gives a total of $5,118.47 in relation to the orders of the Authority on 5 December 2014. That is the final amount owing.*
>
> ***2. Costs***
>
> *There is still the outstanding matter of Costs for which we have submitted an amount of $360.*
> *The Authority had directed QFL to respond by 4pm on Monday 5 January 2015.*
> *If you wish to include settlement of this matter we would inform the Authority upon payment being made.*
>
> *Yours sincerely,*
> *Phillip de Wattignar*
> *WorkRights*

[7] There then followed an email exchange between Ms McKay and Mr de Wattignar dated 12 and 13 January 2015 respectively. Ms McKay's email stated that their bank records showed that they had paid 38 instalments of $40 into Mr Hogeboom's account, being a total sum of $1,520, which left the remaining sum due from the determination of $4,882.91. Adding the lodgement fee of $71.56 brought the total being offered to $4,954.47. Ms McKay asked Mr de Wattignar to confirm that that amount was correct *so payment can be made*.

[8] Mr de Wattignar's email in return said the following:

> *13 January 2015*
>
> *Hello Christine,*
>
> *Yes Nick has checked the bank deposits and a total of 38 instalments is correct. Your figure of $4,882.91 is accepted.*
>
> *If you include the judgment fee of $71.56 then the payment would be $4,954.47.*

[9] On 18 February 2015, Mr de Wattignar wrote to the Authority advising that he had not received any submission from the respondent on costs and sought information as to whether the Authority had. The Authority wrote to Mr McDougall and Ms McKay advising that their submissions on costs had not been received and that, if no response was received within five days, the Authority would proceed to determine costs.

[10] On 24 February 2015, Ms McKay wrote to the Authority in the following terms:

> *In response to your email dated 20 February 2015 we understand that the matter of Nicholas Hogeboom verses* [sic] *Quality Firewood to be concluded.*
>
> *On 12th January 2015 we advised Phillip de Wattignar by email, that we had chosen to make "full and final payment" of monies outstanding and asked Philip for the final amount (copy of the email and subsequent emails attached).*
>
> *Phillip replied with a figure of $5,118.47 and asked if we wished to include the $360 for Costs, which we chose not to pay.*
>
> *On 13th of January we replied with an amount of $4,954.47 in full and final settlement, we asked Phillip to confirm this figure.*
>
> *On 14th of January Phillip was advised that the cheque for $4,954.47 was available for collection at* [address omitted], *this cheque was collected the following day by Phillip's representative, Wayne Idour. Copy of Cheque attached.*
>
> *At no time prior to receiving or upon receipt of the cheque did Mr de Wattignar stipulate that it was not accepted in full and final satisfaction.*
>
> *I refer you to the case of* CIR v. Kadesh Farm Limited *(High Court, Rotorua, CIV-2006-463-19),*
>
> > *"In that case, the Court confirmed that: it is well established that 'accord and satisfaction' is a matter of agreement and before a person will be taken to have accepted a smaller sum in satisfaction of a larger disputed one, that person's agreement must be clearly spelt out; where a cheque is sent on condition that banking the cheque will be taken to be acceptance of that sum as full and final payment of a greater amount, it is not an 'accord and satisfaction' if the recipient creditor makes it clear that the banking is not acceptance of that stipulation;*
> >
> > *This will clearly be the case if the creditor tells the debtor before, or contemporaneously with, banking the cheque that it is not accepted in full and final satisfaction;*

> ***If the cheque is banked before the creditor makes known to the debtor that the condition is rejected, the banking can be presumptive evidence that the creditor accepts the debtor's terms."***
>
> *As the cheque was banked 6 weeks ago and we have heard nothing further from Phillip or been copied into any correspondence from Phillip to the ERA we can only assume that Phillip accepted the payment as full and final payment in the Nicholas Hogebook vs Quality Firewood Ltd case file 5417845.*
>
> *Kind regards,*
> *Christine McKay*
> *Director*

[11] Mr de Wattignar disputes this interpretation of the correspondence between them.

The issues

[12] There are two issues to be determined by the Authority:

a. whether the cheque tendered by the respondent to the applicant in the sum of $4,954.47 was accepted by the applicant in full and final settlement of all outstanding matters between them, including legal costs, or whether the issue of costs fell outside of the scope of their agreement; and

b. if the parties did not reach a binding agreement that included costs, what contribution towards the applicant's costs should the respondent make?

Did the full and final settlement agreement include costs?

[13] In determining that matter, it is necessary to examine the communications between the parties and to assess this evidence against the principles of contract formation; namely offer and acceptance, intention to be legally bound and consideration.

[14] The first approach made by the respondent was by way of Ms McKay's email of 12 January 2015 in which she stated that the respondent had chosen to make full and final payment of monies outstanding and asked what the final amount owing was. This was an offer to settle subject to agreement on the sum to be paid.

[15] Mr de Wattignar replied the same day setting out the sum that he said was owing in respect of the orders of the Authority, together with a further amount of $360 in respect of what he called *"the outstanding matter of costs"*. He then stated that the Authority had directed the respondent to respond by 4pm on Monday, 5 January 2015 (on the matter of costs) and added *if you wish to include settlement of this matter we would inform the Authority upon payment being made*. This was an in-principle acceptance of the offer to settle, again, subject to agreement on the sum to be paid.

[16] The next communication was from Ms McKay 18 minutes later querying the sum quoted by Mr de Wattignar in respect of the orders of the Authority on the basis that 38 instalments of $40 each had already been paid. Ms McKay made no mention of costs at all.

[17] The next communication was from Mr de Wattignar accepting that a total of 38 instalments had been made and the figure of $4,882.91 plus $71.56 making a payment of $4,954.47. He also made no mention of costs. At this stage, the amount being agreed, there was a binding agreement formed for the respondent to pay the sum of $4,954.47. What is not clear, however, is what was being settled; the entire matter or just the sums that had been the subject of the Authority's determination.

[18] A cheque in the sum of $4,954.47 dated 14 January 2015, payable to Mr Hogeboom, was then picked up by Mr Idour on behalf of Mr de Wattignar and, seemingly, banked.

[19] The next communication from Mr de Wattignar was his email to the Authority asking whether the respondent had made any submissions with respect to costs.

[20] When analysing this exchange, the starting point is that Ms McKay's first email was sent in response to the letter sent by Mr de Wattignar dated 6 January 2015 threatening to commence enforcement proceedings in the Employment Court. It is to be noted that Mr de Wattignar's letter made no mention of the costs his client had incurred in bringing his application to the Authority, only the costs of any Employment Court proceedings.

[21] It is against this context that Ms McKay's communication of the respondent's desire to make full and final payment of monies outstanding should be read. Her

enquiry as to what amount was due should also be read in that context, as Mr de Wattignar had not stated the sum due in his letter of 6 January.

[22] In my view, therefore, Ms McKay's email of 12 January communicated a willingness to pay all monies owed as alluded to in Mr de Wattignar's letter of 6 January, which did not include costs.

[23] In his reply, Mr de Wattignar included the sum of $360 in respect of costs. On the face of it, his sentence *if you wish to include settlement of this matter we would inform the Authority upon payment being made*, is ambiguous. It could either mean that he was giving a choice to the respondent not to pay the applicant's costs at all (and if this was the meaning, it is not surprising that the respondent would choose not to do so), or he was saying that $360 could either be included in the sum being tendered or the matter of costs could be dealt with separately.

[24] Although the sentence in itself is ambiguous, it must be read in the context of the entire communication from Mr de Wattignar, and the overall chain of communication that had ensued to that point. In his email of 12 January Mr de Wattignar clearly set out two categories of sum owed, those ordered to be paid by the Authority and the separate category of costs. In other words, he had introduced an additional category of monies into the discussion, which had not been part of the chain of communication up to then.

[25] When Ms McKay responded, she made no reference to the separate category of costs and, unfortunately, nor did Mr de Wattignar in his reply.

[26] On analysing this chain of communication between the parties, I am satisfied of the following:

a. In her email of 12 January, Ms McKay was clearly addressing only the issues raised by Mr de Wattignar's letter of 6 January, and not costs;

b. that the intention conveyed by Mr de Wattignar in his email of 12 January 2015 was that the respondent could either include the sum of $360 in the full and final settlement figure being offered by it, or it could choose to put in its submissions on costs if it did not agree with that sum. I believe that this is clearly Mr de Wattignar's intention because of his reference to *the outstanding matter of costs* and the

reference to the Authority's direction to the respondent to give its submissions on costs by Monday, 5 January 2015;

c. when Ms McKay replied raising issues about the sum claimed by Mr de Wattignar, by failing to address the costs element, she was not accepting an offer by Mr de Wattignar to waive costs. She was simply not addressing costs, so they remained at large;

d. even if the respondent genuinely believed that the applicant was giving the respondent a choice of not having to pay costs, I do not accept that this was Mr de Wattignar's (and by extension, by the agency of Mr de Wattignar, the applicant's) intention.

[27] Addressing this final point, there was a disconnect between the intention of the applicant and the intention of the respondent as to whether or not costs were to be included in this *full and final settlement*. Given that there was not a coincidence of intention, there was no meeting of minds, which is a necessary component of forming a contract. Therefore, in the absence of a meeting of minds on the issue of costs, I cannot accept that the issue of costs is to be included in the sum paid by the respondent to the applicant of $4,954.47.

[28] Accordingly, I accept Mr de Wattignar's submissions that the costs element remains to be determined and has not been discharged as part of the settlement between the parties, which was not in full and final settlement of all issues remaining between the parties.

What contribution towards the applicant's costs should the respondent make?

[29] The Authority's power to award costs is set out in paragraph15 of Schedule 2 of the Employment Relations Act 2000 (the Act), which provides as follows:

> ***15 Power to award costs***
> *(1) The Authority may order any party to a matter to pay to any other party such costs and expenses (including expenses of witnesses) as the Authority thinks reasonable.*
> *(2) The Authority may apportion any such costs and expenses between the parties or any of them as it thinks fit, and may at any time vary or alter any such order in such manner as it thinks reasonable.*

[30] There are some very well-known principles which the Authority must take into account when determining how legal costs and expenses should be dealt with, which are set out in *PBO Ltd v. Da Cruz* [2005] 1 ERNZ 808. These principles include the following:

a. There is discretion as to whether costs would be awarded and in what amount.

b. The discretion is to be exercised in accordance with principle and not arbitrarily.

c. The statutory jurisdiction to award costs is consistent with the equity and good conscience jurisdiction of the Authority.

d. Equity and good conscience are to be considered on a case by case basis.

e. Costs are not to be used as a punishment or as an expression of disapproval of the unsuccessful party's conduct although conduct which increased costs unnecessarily can be taken into account in inflating or reducing an award.

f. It is open to the Authority to consider whether all or any of the parties' costs were unnecessary or unreasonable.

g. That costs generally follow the event.

h. That without prejudice offers can be taken into account.

i. That awards will be modest.

j. That frequently costs are judged against a notional daily rate.

k. The nature of the case can also influence costs and this has resulted in the Authority ordering that costs lie where they fall in certain circumstances.

[31] First, on the principle that costs follow the event, it is appropriate for the respondent to make a contribution towards the applicant's costs. The next step is to determine what that contribution should be.

[32] Mr de Wattignar states that the costs of $360 were incurred in pursuing Mr Hogeboom's claim against the respondent, and were made up as follows:

> *Taking instructions with client/phone calls 0.7 hours*
> *Draft and lodge application for compliance order 0.5 hours*
> *Liaise with Authority regarding statement in reply and determination by consent 0.8 hours*
> *Memorandum on costs 0.4 hours*

[33] This amounts to a total of 2.4 hours. Mr de Wattignar advises that his charge out rate is $150 per hour, and 2.4 hours multiplied by $150 indeed amounts to $360.

[34] It is my view that this is a modest sum which appears to have been reasonably incurred, by reference to the steps taken and how long Mr de Wattignar was engaged on each step. There was no investigation meeting, so the daily tariff approach is not appropriate.

[35] Overall, I believe that it is appropriate for the respondent to pay to Mr Hogeboom the sum of $360 to reimburse him for the reasonable and modest costs incurred by him in pursuing his claim.

Order

[36] I order that the respondent pay to the applicant the sum of $360 in respect of costs incurred by him.

David Appleton
Member of the Employment Relations Authority