

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Glenn Wheeler (Applicant)
AND Fishers Meats Limited (Respondent)
REPRESENTATIVES Alison Clements, Counsel for Applicant
Quentin Stratford, Counsel for Respondent
MEMBER OF AUTHORITY Leon Robinson
SUBMISSIONS RECEIVED 22 December 2006
31 January 2007
DATE OF DETERMINATION 9 February 2007

DETERMINATION OF THE AUTHORITY AS TO COSTS

Fishers Meats Limited is ordered to pay to Glenn Wheeler the sum of \$790.00 being the legal fees incurred and the Authority's lodgement fee

The problem

[1] The applicant Glen Wheeler ("Mr Wheeler") asks the Authority to order that the Respondent Fishers Meats Limited ("Fishers") pay him costs.

[2] The application has been determined on the basis of counsels' written submissions.

The facts

[3] The parties entered into a settlement agreement the terms of which were recorded in writing in a "Record of Settlement" signed by Mr Wheeler on 18 August 2006 and by Fishers (by its solicitor) on 16 August 2006.

[4] The Record of Settlement provided:-

*1. The Employer agrees to pay the Employee compensation in the sum of \$6,500 pursuant to section 123(c)(i) of the Employment Relations Act 2000 **by close of business on 25 August 2006**. The settlement sum will be paid by the Employer by way of deposit into the Employee's bank account.*

The emphasis is mine.

[5] Mr Wheeler's solicitors wrote to Fishers' solicitors by email of 23 August 2006 attaching a copy of the Record of Settlement and emphasising the date for satisfaction. They further invited the solicitor to contact them in the event Fishers had not retained Mr Wheeler's bank account details.

[6] Fishers did not attend to payment by close of business on 25 August 2006. Mr Wheeler's solicitors wrote by letter dated 28 August 2006 to Fishers' solicitors seeking an explanation and giving notice of enforcement action.

[7] Fishers' solicitors responded by facsimile letter dated 29 August 2006 advising they had emailed Fishers the previous evening and asking that any enforcement proceedings be withheld.

[8] Fishers' solicitors wrote again to Mr Wheeler's solicitors by email of 31 August 2006. The solicitors advised Mr John Fisher had been away sick and further, that payment would be made the following day. The solicitors requested Mr Wheeler's bank account details.

[9] Mr Wheeler's solicitors provided the bank account details later that same day by email.

[10] Mr Wheeler's solicitors lodged an application for compliance in the Authority by hand on 5 September 2006. That very same day, Fishers deposited the sum of \$6,500.00 to Mr Wheeler's bank account.

The merits

[11] Ms Clements asks for costs. She advises the Authority Mr Wheeler has incurred \$720.00 legal costs and the Authority's lodgement fee of \$70.00. She provides copy of an unsigned invoice dated 8 February 2007 as requested by the Authority.

[12] Ms Clements submits that Fishers was in "clear" breach, 11 days late, without apology or explanation. She further submits Fishers was given clear warning of the enforcement application. Finally, while eventual payment is acknowledged, it is said that Mr Wheeler had no way of knowing whether he would ever be paid.

[13] Mr Stratford advises the Authority that Fishers did not delay. He points out Fishers' chairman Mr John Fisher was away on sick leave and, as I understand the situation, did not receive Mr Stratford's advice of 28 August 2006 until 31 August 2006. The essence of Mr Stratford's submissions is that an intending litigant, such as Mr Wheeler seeking compliance, runs a risk that payment may be forthcoming prior to service of such proceedings.

The determination

[14] I regard Mr Stratford's principal submission as unmeritorious. I have however derived some assistance from the submission. The better view is that a defaulting party is always on notice and runs the risk of being required to meet the costs of enforcement.

[15] Mr Wheeler was not obliged to give notice to Fishers seeking compliance or make demand for payment. The Record of Settlement was clear, payment was due by 25 August 2006. No further notice or demand was necessary, and Fishers knew from the day its solicitor executed the settlement on 18 August 2006 that payment would be required on or before 25 August 2006.

[16] It matters not that Fishers did not receive a reminder to pay after it defaulted. It failed to meet its obligations and comply with the Record of Settlement. Mr Wheeler incurred costs of enforcement which I find reasonable both as to quantum and the fact of their incurrence.

[17] Records of settlement are to be complied with in every instance. Fishers did not comply and Mr Wheeler incurred costs he should not have. He is entitled to recover those costs.

The resolution

[18] Fishers Meats Limited is ordered to pay to Glenn Wheeler the sum of \$790.00 being the legal fees incurred and the Authority's lodgement fee.

Leon Robinson
Member of Employment Relations Authority