

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

[2017] NZERA Christchurch 43  
3000958

BETWEEN            HEATHER MADDOCK  
Applicant

A N D                CANTERBURY MOVERS LTD  
Respondent

Member of Authority:    Peter van Keulen

Representatives:        Paul Brown, Counsel for Applicant  
Pat McMahon, representative for Respondent

Submissions Received:    Written submissions for Applicant on 7 March 2017  
Written submissions for Respondent on 21 March 2017

Date of Determination:    24 March 2017

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**COSTS DETERMINATION OF THE AUTHORITY**

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[1]    On 9 December 2016 the applicant, Ms Maddock filed an application seeking compliance with a record of settlement. Ms Maddock complained that the respondent, Canterbury Movers Ltd (Canterbury Movers) had failed to pay her \$1,500.00 plus GST for legal costs due to her on 19 November 2016, in accordance with the record of settlement.

[2]    In reply, Canterbury Movers says it advised Ms Maddock's lawyer on 18 November 2016 that it would pay the amount due for costs in two instalments, \$1,000.00 on 20 December 2016 and \$725.00 on 20 January 2017. And, it made the two payments by the dates it had advised.

[3]    After receiving the two payments, Ms Maddock discontinued her application for compliance. However, she still seeks costs for filing the application. Ms Maddock's counsel says:

- a. Canterbury Movers deliberately breached the term of the record of settlement pertaining to payment of legal costs.
- b. Counsel repeatedly raised the requirement to comply with counsel for Canterbury Movers but did not receive a reply.
- c. By failing to comply with the record of settlement Canterbury Movers effectively forced Ms Maddock to incur further legal costs.
- d. Based on the principles set out in *PBO Ltd (formerly Rush Security Ltd) v. Da Cruz*<sup>1</sup> an award of costs should be made in favour of Ms Maddock.

[4] Ms Maddock seeks an award of \$1,223.98 (including GST and disbursements).

[5] Canterbury Movers says:

- a. It met all of its obligations under the record of settlement.
- b. It advised counsel for Ms Maddock of the delay in paying legal costs and set out a reasonable proposal for payment, which it then met.
- c. The delay in payment arose because it had to prioritise paying employees' wages over the holiday period.
- d. Counsel for Ms Maddock did not respond to its email setting out the delay and proposed payment and it should not be held responsible for Ms Maddock's counsel's failure to respond (and accept) its proposal.

[6] The power of the Authority to award costs arises from clause 15 of Schedule 2 of the Act. The principles and approach adopted by the Authority in respect of this power are settled and outlined in *Da Cruz*.

[7] Whether I should award costs is a matter of discretion and any decision should be consistent with equity and good conscience. And generally, costs should follow the event.

[8] I am satisfied that I should award costs to Ms Maddock. Canterbury Movers failed to meet its obligations under the record of settlement and whilst it made a proposal for payment,

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<sup>1</sup> [2005] 1 ERNZ 808

which it met, this does not excuse the breach. Ms Maddock was not obliged to accept the proposal and had every right to seek compliance with the term for payment that Canterbury Movers had agreed to meet. The simple point is Ms Maddock was left waiting for a payment for costs; a cost she may well have already met herself and as Canterbury Movers had not met the original date for payment there was every reason to question whether Canterbury Movers would make the proposed payments.

[9] In terms of quantum I am obliged to consider the following principles:

- a. The starting point for the assessment of quantum is to apply the daily tariff, however the Authority can depart from using the daily tariff in appropriate cases;
- b. Costs awards in the Authority will be modest;
- c. It is open to the Authority to consider whether all or any of the parties' costs were unnecessary or unreasonable;
- d. Costs are not to be used as a punishment or an expression of disapproval of a party's conduct although conduct which increases costs unnecessarily can be taken into account;
- e. Without prejudice offers can be considered;
- f. Impecuniosity of the other party may be relevant;
- g. A decision on quantum should be also in line with principle and not determined arbitrarily bearing in mind the equity and good conscience jurisdiction of the Authority.

[10] This is not an appropriate matter for applying the daily tariff. I will assess quantum based on the following principles: (i) cost awards should be modest; (ii) costs should not be a punishment; (iii) are the actual costs claimed unreasonable; and (iv) the impecuniosity of Canterbury Movers.

[11] An award of \$1,223.98 (including GST and disbursements) for costs is a modest sum for a successful application but in my view, this is an unreasonable amount for the actual work completed.

[12] Counsel for Ms Maddock says that it charged Ms Maddock for two hours and forty-five minutes of counsel's time in chasing up payment of costs, drafting the application for compliance and dealing with correspondence and submissions for the application. There was also some additional time charged for time spent by support staff tracking payments.

[13] To award \$1,223.98 (including GST and disbursements) would be excessive and would have an element of punishment for Canterbury Movers' non-compliance.

[14] There is no actual evidence of Canterbury Movers' financial circumstances but if it had to prioritise the payment of employees' wages over the payment of costs of \$1,500 plus GST then it appears that at the very least, it has cash flow difficulties.

[15] Weighing all of these considerations, I am prepared to award costs based on one and a half hours of counsel's time for preparing and attending to the application for compliance. Counsel's charge out rate is \$350.00 plus GST so this is an award of costs for \$525.00.

[16] I will award GST on that sum, applying the principles set out in *Keerithi Merennage v Ritchie's Transport Holdings Ltd*<sup>2</sup>.

[17] I will also order payment of \$71.56 for the filing fee on the application for compliance.

### **Conclusion**

[18] I determine that Canterbury Movers must pay Ms Maddock \$525.00 plus GST as a contribution to Ms Maddock's legal costs reasonably incurred by her in making her application for compliance and \$71.56 for the filing fee on that application.

Peter van Keulen  
Member of the Employment Relations Authority

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<sup>2</sup> [2016] NZEmpC 22