IN THE EMPLOYMENT COURT
AUCKLAND

[2014] NZEmpC 103
ARC 96/13

IN THE MATTER OF	a compliance order
BETWEEN	PETER HILL Plaintiff
AND	TECK PROPERTIES LIMITED Defendant

Hearing:	On the papers, filed on 11 andf 23 April, 4 June 2014
Appearances:	E L Miles, counsel for plaintiff E Shattock, agent for the defedant
Judgment:	20 June 2014

COSTS JUDGMENT OF JUDGE CHRISTINA INGLIS

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[1] The plaintiff seeks an order of costs against the defendant. The costs sought are associated with an application for orders in respect of an earlier compliance order made by the Employment Relations Authority (the Authority).[1] The proceeding was set down for hearing but was subsequently vacated.

[2] While the substantive proceeding has effectively been brought to an end, the plaintiff seeks reimbursement of the costs he has incurred in this Court. The defendant company did not file a statement of defence or take any other steps in the proceeding but has filed submissions in response to the plaintiff's costs memoranda.

[3] It is necessary to understand the background to this matter to put the application for full costs, and the defendant's response, into context. The plaintiff, Mr Hill, was dismissed from his employment with the defendant company (Teck

[1] [2013] NZERA Auckland 491.

Properties Limited). He pursued a grievance. The grievance was settled at mediation and a record of settlement, signed on 4 July 2013 pursuant to s 149 of the Employment Relations Act 2000 (the Act), was entered into. Ms Shattock, a director of Teck Properties Limited (Teck Properties), signed the agreement on the defendant's behalf.

[4] Under the agreement Teck Properties was to pay Mr Hill the sum of $4,000 (under s 123(1)(c)(1) of the Act). Interest was to be paid on any amount owed after 31 July 2013, at a rate of 7.5% per annum. The agreement was certified by a mediator, confirming that the parties had been advised that it would be final and binding. It is apparent that three payments of $200 were made, the last of which was on 2 October 2013. Mr Hill sought compliance orders from the Authority. The Authority found that Teck Properties had breached its obligations under the settlement and that the agreement did not provide for payment by instalments. The Authority made an order requiring Teck Properties to pay Mr Hill the outstanding sum of $3,400, plus interest on that sum at a rate of 7.5%, within 14 days in order to effect compliance with the settlement agreement.

[5] The Authority drew Teck Property's attention to the fact that a failure to comply with its order under s 137 of the Act may provide a basis for an application to the Court for enforcement, and the potential ramifications of this.

[6] The Authority also imposed a penalty of $1,000, $500 of which was to be paid to Mr Hill. Costs of $900 were also ordered in his favour, together with disbursements of $71.56.

[7] The 14 day timeframe specified by the Authority expired on 12 November 2013. Teck Properties did not make any payment to Mr Hill within that time. A letter of demand was sent to Teck Properties on 12 November and this appears to have prompted further communication with the Authority, with Ms Shattock raising concerns about the basis of the settlement and its terms, and whether a review of the Authority's determination might be pursued. I pause to note that the defendant's challenge rights had earlier been specifically drawn to its attention by the Authority. That option was never pursued.

[8] A telephone conference was convened between the parties and the Authority member on 14 November to discuss matters. During the course of the telephone conference Ms Shattock, on behalf of Teck Properties, advised that the company was not currently in a position to make the payment ordered against it. Mr Hill's counsel requested further information in relation to this and an indication was given that it could be provided after some horse sales, which were taking place three weeks hence. Ms Shattock appears to have emailed the defendant's accountants the same day requesting the financial information that had been sought.

[9] No further contact was made by the defendant, although two additional emails were sent by Mr Hill's counsel on 18 and 28 November requesting the financial information and payment as a result of a horse sale that, it was said, had been made in the intervening period. The defendant did not respond.

[10] On 10 December 2013 a claim was filed in this Court seeking the relief foreshadowed in the Authority's earlier determination. The defendant did not file a statement of defence. It did however make a payment on 24 December 2013, minus the penalty and legal cost components of the Authority's orders. Ms Shattock advised, by way of email dated 24 December 2013, that the defendant had a number of commitments to other parties and that it did not have excess funds available to pay the additional amount that it did not consider it was liable for. An offer to negotiate time payments in relation to legal costs was mooted.

[11] The short point made on behalf of the plaintiff is that he has been put to unnecessary cost in bringing a claim against the defendant to enforce orders made by the Authority.

[12] The defendant accepts that it did not comply with the Authority's 14 day timeframe for payment set out in its determination. However, it is said that that was because it was taking steps to pursue a review of the Authority's determination. That is not reflected in the documentation before the Court. The email exchanges filed by the defendant suggest that it did nothing until the day that the 14 day period was due to expire. The first reference to a possible review can be found in an email to the Authority (not copied to the plaintiff's counsel) on 12 November 2013.

[13] It is further submitted that the defendant was facing financial pressures and that this impacted on its ability to meet the orders made against it in a timely manner. While it is accepted that a letter of demand was received by the defendant, it is said that it advised the plaintiff of its financial difficulties, confirmed that the full amount would be paid, and that there was no response to this letter. No such correspondence is before the Court. Mr Hill confirms in his sworn affidavit that there was no response to the letter of demand. There is an email from Ms Shattock dated 24 December 2013, in which the defendant's claimed financial position is referred to and an offer to negotiate time payments made. However this communication came two weeks after the statement of claim had been filed.

[14] The defendant submits that while it did not have the resources to instruct counsel it has paid all money owing under the claim. It is submitted that payment had been promised prior to the statement of claim being filed and that in these circumstances there was no need to commence the claim, that the plaintiff unnecessarily incurred costs, and that no order for costs should be made. There is no correspondence before the Court that supports the submission that there was an undertaking to make the payments ordered in the plaintiff's favour prior to the claim being filed. The plaintiff sought financial information in response to the concerns identified by the defendant during the course of the teleconference with the Authority on 14 November but it is evident that this was not provided. The plaintiff's counsel followed up with email communications, to no avail.

[15] Clause 19(1) of sch 3 to the the Act confers a broad discretion as to costs. It provides that:

> The court in any proceeding may order any party to pay to any other party such costs and expenses … as the court thinks reasonable.

[16] The general approach to costs in this jurisdiction is to take a starting point of two thirds of actual and reasonable costs and then assess whether there are factors which justify an increase or a decrease. Full costs may be appropriate, depending on the circumstances.

[17] The plaintiff has not filed detailed evidence relating to the costs incurred and what the claimed costs comprise. That will generally impact on the Court's ability to assess the extent to which claimed costs are actual and reasonable. However, in the present case the sums involved are relatively modest and I accept, based on the material before the Court (which includes an affidavit from the plaintiff), that the plaintiff has incurred the actual costs and disbursements claimed. I also accept, having regard to the steps that were taken, that the amount charged is reasonable.

[18] The history of this matter, detailed above, leads inexorably to the conclusion that the plaintiff commenced proceedings in this Court because of the defendant's failure to meet the orders made against it in the Authority, including the timeframe for payment. The original sum owed to the plaintiff had been agreed at formal mediation. It was the defendant's failure to meet its obligations under the settlement agreement that provided the springboard for compliance orders to be made and resulted in the imposition of a penalty against the defendant.

[19] While the plaintiff could have chosen to wait to see if and when the defendant would meet its obligations he was not obliged to do so. Nor was he obliged to accept the defendant's assurance that payment would be made, particularly in circumstances where the plaintiff had been put to the trouble of seeking and obtaining a compliance order from the Authority, and the financial information that had earlier been requested had not been provided. The fact that the defendant did make payment relatively shortly after the claim was filed reinforces the causal connection between the two events. And it was the payment by the defendant that ultimately led to the fixture being vacated.

[20] Some information relevant to the defendant's ability to pay has been provided but this falls well short of persuading me that payment of the sum sought would cause undue hardship.[2]

[21] The plaintiff was put to unnecessary cost in seeking to enforce orders made in his favour. In the particular circumstances I am satisfied that the defendant should meet the plaintiff's full costs.

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[2] See *Metallic Sweeping (1998) Ltd v Ford* [2010] ERNZ 433 at [53].

[22] The defendant is accordingly ordered to pay the plaintiff $1,856.56 by way of costs and disbursements of $444.67, comprising $306.67 (filing fee) and $138.00 (server's fee).

Christina Inglis
Judge

Judgment signed at 4.30 pm on 20 June 2014