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Arneson v Actrix Networks Limited (Wellington) [2017] NZERA 2017; [2017] NZERA Wellington 17 (23 March 2017)

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Arneson v Actrix Networks Limited (Wellington) [2017] NZERA 2017 (23 March 2017); [2017] NZERA Wellington 17

Last Updated: 1 April 2017

IN THE EMPLOYMENT RELATIONS AUTHORITY WELLINGTON

[2017] NZERA Wellington 17
3000198

BETWEEN DAVID ARNESON Applicant

AND ACTRIX NETWORKS LIMITED Respondent

Member of Authority: Trish MacKinnon

Representatives: Applicant in person

Howard Lewis, for Respondent

Investigation Meeting: 23 March 2017

Submissions Received: On the day from both parties

Determination: 23 March 2017

ORAL DETERMINATION OF

Employment relationship problem

[1] David Arneson worked for a company that was then known as Actrix Networks Limited and has been known, since the company's sale in November 2016, as West 175 Networks Limited. For the purposes of this determination I shall refer to that company as "Actrix". During his time at Actrix an employment relationship problem arose that resulted in Mr Arneson and his employer signing a Record of Settlement on 3 August 2016. This recorded the terms on which the parties had agreed to settle the employment relationship problem. It was signed by a duly authorised Mediator employed by the Ministry of Business, Innovation and Employment. The Record of Settlement was made pursuant to [s. 149](#) of the [Employment Relations Act 2000](#) (the Act).

[2] In a statement of problem lodged in the Authority on 9 November 2016 Mr Arneson claimed Actrix had breached one of the agreed terms in the Record of Settlement. That term was that Actrix would pay Mr Arneson a total of \$1,000 in monthly instalments of \$83.33, by way of direct credit into his nominated bank account, over a 12 month period starting from 3 September 2016. The purpose of the payment was stated as being to enable Mr Arneson to make a donation to an LGBT youth charity of his choice. At the date of lodging his statement of problem Mr Arneson had received no such payments in accordance with that term of the settlement agreement.

[3] He sought the immediate payment of the total amount of \$1,000 by direct credit to his nominated bank account and the cancellation of the monthly instalments provision agreed to in the Record of Settlement. Mr Arneson also sought reimbursement of his administrative costs, time, and filing fees related to his application to the Authority in the amount of \$500. He asked the Authority to review the breach of the Record of Settlement and impose penalties on Actrix for its failure to fulfil that term.

[4] Actrix agrees it has not complied with this term of the Record of Settlement. It says it was unaware of this until receiving a copy of Mr Arneson's statement of problem. It says that, following the agreement reached on 3 August 2016, its then Chief Executive Officer (CEO) instructed Actrix's Finance Manager to make the monthly payments as documented in the Record of Settlement. A copy of the email dated 4 August 2016 from Howard Lewis, then CEO, to the then Finance Manager instructing her to establish the monthly payment from 3 September 2016 for a period of 12 months was provided to the Authority.

[5] In its statement in reply Actrix apologised for the payments not being made and said it would have addressed the situation had it been aware that term of the Record of Settlement was not being fulfilled. It undertook to commit to making the monthly payments starting in January 2017.

[6] In subsequent correspondence Mr Arneson rejected the offer of monthly payments starting from January 2017.

The Authority's investigation

[7] Following a telephone conference between the parties on 13 February 2017, and some further correspondence the matter was set down for a half day investigation meeting. In the course of that meeting Mr Arneson withdrew his claim for a financial payment to cover his time and administrative costs, and indicated he sought only the reimbursement of the Authority's filing fee.

The Record of Settlement

[8] The agreement reached and signed by both parties and the Mediator on 3

August 2016 contains a number of terms. Only one of those terms is the subject of this determination and it is not necessary for any other terms to be disclosed. Accordingly I order that all other terms remain confidential to the parties.

Relevant law

[9] The Authority has the power to order compliance under [s.137\(1\)\(b\)](#) of the Act in a number of specified situations. Relevant to the current situation is [s.137\(1\)\(a\)\(iii\)](#) which provides that the Authority may order compliance where any person has not observed or complied with any terms of settlement or decision that [s.151](#) provides may be enforced by compliance order.

[10] [Section 151\(1\)\(a\)](#) of the Act provides that mediated terms of settlement under [s.149](#) are terms that may be enforced by order of the Authority.

[11] [Section 149\(4\)](#) provides that a person who breaches an agreed term of settlement in situations such as those currently applicable, is liable to a penalty imposed by the Authority.

Discussion

[12] Based on the evidence of the parties I find, as acknowledged by Actrix, that it did indeed breach one term of the Record of Settlement it entered into with Mr Arneson on 3 August 2016, namely, the commencement of monthly payments of \$83.33 from 3 September 2016.

[13] I accept the evidence of Mr Lewis, which was supported by documentary evidence, that he issued a written instruction on 4 August 2016 to the person who was

at the time the company's Finance Manager to make those payments. I also accept that, until such time as it received a copy of the statement of problem Mr Arneson lodged in the Authority, Actrix was unaware the payments had not commenced in accordance with Mr Lewis' instruction. By that time the employment of the Finance Manager had been terminated following advice from New Zealand Immigration that she had no authority to be working for Actrix.

[14] I further accept Mr Lewis' evidence that, if Mr Arneson had contacted Actrix to advise the monthly payments agreed in the Record of Settlement were not being made, the matter could have been quickly addressed. It is unfortunate Mr Arneson did not take such a simple course of action. It was his evidence that he made one attempt to contact the company by phone but did not achieve a connection. He subsequently emailed the Mediation Service but made no further attempt to contact Actrix.

[15] The Employment Relations Authority is an institution established by [s. 156](#) of the Act. Its powers derive from the Act. As noted above it has the power to order compliance when a party fails to observe or comply with terms of a settlement agreement reached under [s. 149](#). The Authority does not have the power to order that any of the terms of such a settlement agreement be varied.

[16] The Act specifically provides that terms of settlement agreed under s. 149 may not be brought before the Authority except for enforcement purposes¹. Mr Arneson's request for the immediate payment of the full amount of \$1,000 and the

cancellation of the term in the settlement agreement that provides for the payment of that amount in monthly payments does not fall within the Authority's powers to award as it is a request for variation rather than enforcement. That request is therefore declined.

[17] If monthly payments had commenced from September 2016 as instructed by Mr Lewis, seven such payments would have been made as of the date of the Authority's investigation meeting, comprising \$583.31 of the \$1,000 total. Evidence was provided at the meeting that two payments had been made to date, in February and March 2017. Presently five payments are in arrears, totalling \$416.65.

[18] In the course of the hearing Actrix offered to pay the arrears for the months of

November 2016 to January 2017, and to continue making monthly payments of

\$83.83 until the \$1,000 was paid in total. That would have had the effect of extending the 12 month period specified in the Record of Settlement to 14 months. At a later point in the hearing Mr Lewis indicated Actrix would be prepared to pay all the outstanding arrears and continue making the agreed monthly payments until the full sum had been paid.

[19] I find that is the only way Actrix can properly address its failure to adhere to the breached term of the Record of Settlement and I will make orders accordingly.

Should a penalty be imposed on Actrix?

[20] Applying the multi-step approach of a Full Court of the Employment Court in *Boorsboom v Preet PVT Ltd & Warrington Discount Tobacco Ltd*² I note there was a breach of one term of a s. 149 Record of Settlement. That breach could be considered to be five separate breaches, if each of the failures to make agreed monthly payments between September 2016 and January 2017 were to be treated as an individual breach. However, I am inclined to treat those failures as a single breach in light of the evidence I have accepted from Actrix of the reason for its failure to make the agreed

monthly payments.

[21] The maximum penalty for such a breach is \$20,000³. A consideration in assessing the amount of any penalty is the severity of the breach. This is required to establish a provisional starting point for the penalty including an adjustment for aggravating and mitigating factors.

[22] I regard any breach of a Record of Settlement agreed under s. 149 of the Act to be serious. In this particular instance I accept the failure by Actrix to make the agreed monthly payments to Mr Arneson to enable him to make a donation to an LGBT youth charity of his choice was upsetting to him. I find, however, his distress was as much related to matters that led to the parties agreeing a Record of Settlement in the first instance as it was to the loss of the monetary amounts. I do not find there are any aggravating factors.

[23] I do find, however, there are several mitigating factors. These include Actrix's explanation for the failure to make the first four monthly payments; its prompt

¹ Section 149(3)(b)

² [\[2016\] NZEmpC 143](#)

apology for that failure in its statement in reply once it was brought to its attention; its explanation that it had instructed its Finance Manager to establish the monthly payment regime and not realised this had not been done; its assertion that it would have addressed the issue earlier had the breach been brought to its attention; and its establishment of a monthly payment regime in accordance with the settlement agreement from February 2017.

[24] Taking those factors into account I find it would not be appropriate to impose a penalty on Actrix and I decline to do so.

Determination

[25] I order the company formerly known as Actrix Networks Limited, and currently known as West 175 Networks Limited, to pay Mr Arneson, within seven days of this determination, the sum of \$416.65. I further order it to continue making monthly payments of \$83.33 to Mr Arneson until the full amount of \$1,000 has been paid in accordance with the Record of Settlement of 3 August 2016.

Costs

[26] As neither party engaged legal counsel, no issue as to costs arises. However, Mr Arneson is entitled to be reimbursed the cost of the Authority's filing fee and I order the respondent to reimburse him the sum of \$71.56.

Trish MacKinnon

Member of the Employment Relations Authority

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