

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 450/10
5318874

BETWEEN ANTONY BORICH
 Applicant

AND MULTIZONE RECYCLING
 LIMITED
 Respondent

Member of Authority: Alastair Dumbleton

Representatives: Applicant in person
 No appearance for respondent

Investigation Meeting: 18 October 2010

Determination: 19 October 2010

DETERMINATION OF THE AUTHORITY

Application for Compliance Order

[1] Mr Antony Borich has applied for an order under s 137 of the Employment Relations Act 2000 to enforce by compliance a determination given by the Authority in his favour.

[2] On 18 August 2010 under AA367/10 the Authority determined that Mr Borich had not been paid \$1,000 for his final week of employment with the respondent Multizone Recycling Ltd. The Authority was also satisfied that he had not been paid \$688 as annual holiday pay accruing to him after his total of nine weeks of employment with the company and that he was entitled to be reimbursed expenses of \$492.

[3] In addition to the total amount awarded of \$2,180 the Authority ordered Multizone Recycling Ltd to pay interest at the rate of 4.75% per annum from 6 October 2009, the date Mr Borichs' employment ended, until the full amount had been paid. The company was also ordered to reimburse the \$70 fee paid by Mr Borich to bring his application to the Authority.

[4] The Authority directed Multizone Recycling Ltd to pay to Mr Borich by 2 September 2010 the sums assessed and the interest. After that date Mr Borich wrote several times to Multizone requesting payment of the amounts.

[5] It is clear from communications received by the Authority from Multizone Recycling Ltd and from Mr Borich that the company has not complied with the Authority's determination and direction although it did, on 14 September 2010, file in the Employment Court a *de novo* challenge to that determination. The Authority has not been advised of any directions or orders made by the Court in furtherance of the challenge and its hearing.

[6] On 13 September 2010 nearly two weeks after the date on which Multizone was required to pay the amounts awarded to Mr Borich, he applied to the Authority for enforcement of its determination.

[7] The application was duly served on Multizone which was directed to lodge a statement in reply within 14 days. When that period had elapsed without a statement in reply being received by the Authority, a Notice of Investigation Meeting was sent to the parties on 29 September 2010. It advised that the Authority intended holding an investigation meeting in relation to an application for compliance on Monday 18 October 2010.

[8] At about 5pm on Wednesday 13 October the manager of the company Mr Mark Wilson sent the Authority by email an application to have the investigation meeting adjourned. Next day Mr Borich advised of his opposition to the adjournment application.

[9] The parties were advised on Thursday 14 October by the Authority of its decision to decline the application for adjournment. The Authority noted in its direction that Multizone had not filed a statement in reply and accordingly was not able to reply or respond to the compliance application unless it requested and obtained leave from the Authority.

[10] Although there is a challenge filed against the Authority's determination of 18 August 2010, as expressly provided by s 180 of the Employment Relations Act the taking of that step does not operate as a stay of proceedings on the determination unless the Court, or the Authority, makes an order to that effect. No order of the Authority has been applied for by Multizone Recycling Ltd and no stay has been given by the Authority.

[11] Mr Borich attended the notified meeting of 18 October to support his application for compliance. Entirely predictably and consistently with the course of the earlier Authority investigation meeting and meetings with a mediator scheduled at various times to take place earlier this year, Multizone Recycling Ltd made no appearance.

[12] The Authority is satisfied that an order under s 137 of the Act is required to prevent further non-observance or non-compliance with its determination given on 18 August 2010 under AA367/10. Despite protests and objections made by Mr Wilson of Multizone Recycling Ltd in several quarters including the Employment Court, the Authority can find no reason why there should be further delay before Mr Borich receives the entitlements from his employment relationship that the Authority was previously satisfied he should have been paid.

[13] The total amount originally claimed by Mr Borich was not large at \$2,180, yet Multizone has avoided opportunities to resolve this matter in any way offering time and cost efficiency. Multizone can hardly complain if by failing to look after its interests itself with mediation it has become necessary for the Authority to intervene in resolving Mr Borich's employment relationship problem.

[14] Mr Borich brought his original application to the Authority almost a year ago, on 4 November 2009. A statement in reply was received from Multizone in which the company claimed that Mr Borich had only been employed by it for one month only. The statement suggests that Mr Borich was paid a further \$4,000 although he had not earned it, and the statement ends with the following comment:

The plaintiff's employment should have been concluded after one month. If the plaintiff returns the \$4,000 then respondent will pay the claimed amount.

[15] This somewhat facetious comment about the length of employment is contradicted by the copy of an individual employment agreement provided by Mr Borich and which was served on Multizone Recycling Ltd. The contract was initialled by Mr Wilson who has insisted Mr Borich was only employed for a month. However clause 3 of the agreement provides:

This agreement will commence on 10 August 2009, and will end on 6 November 2009.

[16] The Authority was satisfied that in fact Mr Borich started on 3 August 2009, which appears to be confirmed in an email from a director of the company, Ms Lilac Liu, dated 4 June 2009. He worked for nine weeks until 1 October. A copy of Ms Liu's email was also attached to the statement of problem.

[17] Multizone Recycling Ltd also made various contradictory claims about the employment, including that Mr Borich had been a contractor.

[18] Before applying to the Authority Mr Borich wrote to Multizone on 21 October requesting the company attend mediation with the Department of Labour, in an attempt to settle his claim for one week's wages, holiday pay and expenses.

[19] After becoming involved the Authority advised the parties that mediation needed to take place before it would investigate further on the application. The Authority wrote to the Mediation Service on 19 November 2009, asking it to arrange mediation with the parties. A reply was received on 5 February 2010 advising that mediation had been set for 12 March at Manukau. Then on 11 March the Authority was advised that Multizone Recycling Ltd had cancelled the mediation set for the following day.

[20] Mr Borich advised the Authority that following cancellation of the mediation he had tried through the Mediation Service to get Multizone to either resolve his dispute or attend mediation. He advised on 24 March that Multizone had not responded to this approach by the mediator and accordingly requested a direction from the Authority for the parties to attend mediation within 28 days.

[21] A direction was issued by an Authority member next day, on 25 March, and the Mediation Service duly advised on 26 March that a mediation had been set for 23 April at Manukau.

[22] Mr Wilson then sent on 21 April a copy of an airline ticket indicating travel by him to Christchurch on 22 April at 1.30pm. He advised the Mediation Service that he and the company's sole director Ms Liu would not be back in Auckland until 30 April because of their travel plans.

[23] The Mediation Service advised that alternative dates for mediation were available on 30 April at 12.30pm, or on 17 or 21 May.

[24] With some justification Mr Borich noted:

As I mentioned I don't see the point in attempting another mediation meeting. Multizone/Harxin has so far cancelled the 2 previous meetings, even after the ERA Directive to mediation. I would request the matter be referred to investigation at this point, as I don't believe Multizone/Harxin are acting in good faith and any further attempts at mediation will be used by them as a stalling tactic, by agreeing to a meeting months away and then cancelling. This has worked for them in the last two aborted meetings and stretched my waiting time a further four months.

[25] On 26 April the parties were reminded by the Authority that their participation in mediation had become the subject of a statutory order or direction made by it. They were advised that under s 181 of the Employment Relations Act any further failure to attend mediation and take part in good faith might have adverse consequences to the party in default, in the event of a challenge made to the Court.

[26] Mr Wilson responded on 27 April by protesting the way that the claim was being handled and stating that the company needed to take legal advice, including advice as to *whether we are best to accept mediation or an examination by the Authority. We will have a legal opinion next week and communicate with you immediately.*

[27] In the meantime the Mediation Service inquired again of Mr Wilson whether the company would be available to attend mediation on 30 April or on the alternative dates offered of 17 or 21 May. A response copied to the Authority was that the company had taken legal advice, which was that it was entitled to take such advice before proceeding further.

[28] The Mediation Service followed up again with the company whether it was able to attend mediation. It offered no less than nine alternative dates spread over May and June 2010 for the convenience of the company to attend mediation. It also

advised that Mr Borich remained flexible to fit in with any of the dates the company might choose.

[29] Mr Wilson advised the Mediation Service on 5 May that the company director Ms Liu was returning from overseas shortly and that:

She is working out the dates and I will reply to you on the weekend once these are known.

[30] Mr Borich understandably became more frustrated with the delay and gave his view that the Authority, Mediation Service and Department of Labour had done nothing to help him resolve the employment relationship problem. He noted that he had followed all the procedures set out for dispute resolution and had acted in good faith and made himself available for mediation for every meeting scheduled, yet he was the one being let down by the process. He considered that Multizone was being allowed to control the process.

[31] On 6 May the Authority was advised by Mr Wilson that Ms Liu was going back overseas and would not know her final plans until the weekend. He reconfirmed the advice he had been given by *lawyers* that the company was entitled to take legal advice before making any decisions and that Mr Borich could not prevent that.

[32] Mr Borich advised his view that matters had descended to *a childish tit-for-tat*.

[33] On 6 May 2010 the Authority once again directed the parties to mediation, which was ordered to take place no later than 15 June 2010.

[34] At the same time on 6 May the Authority set a date for an investigation meeting, doing so against the possibility that mediation would either not take place or would not resolve the matter. The meeting date was to be 17 August 2010. The parties were sent formal notice of the meeting.

[35] The Mediation Service upon receipt of the second direction then offered Multizone Recycling Ltd and Mr Borich five dates between 1 and 15 June 2010 for a mediation to take place. Mr Wilson replied that the company director would be away, although he did not say for how long, and that it was the company's legal advice that it would be a denial of natural justice for mediation to be held without its participation. He advised that a judicial review of the decision would be sought.

[36] No mediation apparently took place as directed because again Multizone Recycling failed to make itself available for this process despite the many opportunities offered over several months. Two statutory directions to the parties to attend mediation have not been complied with, the failure both times it appears being entirely that of Multizone.

[37] Multizone Recycling Ltd has wanted to ignore the reality from the evidence of an agreement signed by Mr Wilson that the company had employed Mr Borich under a written employment agreement on express terms as to remuneration. The company has continually failed to present to the Authority any semblance of a defence to Mr Borichs' claims. Although he is an energetic emailer Mr Wilson has remained unseen and incapable of fronting up to answer Mr Borichs' claims.

[38] No doubt this matter will proceed to the Employment Court both by way of the challenge already filed and a further application Mr Borich will unfortunately need to make to enforce the compliance order the Authority now makes in this determination. The amounts spent by the parties on Authority and Court fees alone will soon be a significant proportion of Mr Borichs' total claim. Mediation would have cost them nothing in fees.

Compliance order

[39] **Pursuant to s 137 of the Act the Authority orders Multizone Recycling Ltd to pay \$2,180 to Mr Borich as well as interest and \$70 application filing fee, as set out in the Authority's determination of 18 August 2010 issued under AA 367/10.**

[40] **The time within which this compliance order is to be obeyed is no later than Wednesday 27 October 2010.**

[41] Multizone Recycling Ltd may wish to consider s 140(6) of the Employment Relations Act. Under those provisions a company that fails to comply with a compliance order, as now made by the Authority, may be ordered on application to the Employment Court to have any proceedings it has brought there stayed or dismissed, or to have any defence to proceedings it is presenting there struck out, or to pay a fine not exceeding \$40,000, or by order to have its property seized and sold to pay the amounts owed.

[42] Mr Borich is entitled to recover the \$70 fee he has paid to bring this compliance application and also \$40 as a contribution to expenses for travel and parking as claimed. **Multizone Recycling Ltd is to pay those two sums as well to Mr Borich no later than Wednesday 27 October 2010.**

A Dumbleton
Member of the Employment Relations Authority