

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2014] NZERA Auckland 333  
5456956

BETWEEN PHILIP JOHN BRADCOCK  
Applicant

A N D WILHELMSSEN SHIPS  
SERVICE LIMITED  
Respondent

Member of Authority: Anna Fitzgibbon

Representatives: The Applicant in person  
Mark Donovan, Counsel for the Respondent

Investigation Meeting: 7 August 2014 at Auckland

Date of Determination: 11 August 2014

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**DETERMINATION OF THE AUTHORITY**

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**A. Mr Bradcock's application for a compliance order is declined.**

**B. Costs are reserved.**

**Employment relationship problem**

[1] Mr Bradcock was employed by Wilhelmsen Ships Service Limited (Wilhelmsen) as a port agent from 21 June 2003 until his dismissal on 1 November 2013. Mr Bradcock filed a statement of problem in the Authority claiming unjustifiable dismissal.

[2] Prior to the matter proceeding to an investigation meeting, the parties attended mediation and on 29 January 2014 entered into a Record of Settlement. The Record of Settlement was signed by a mediator in accordance with the requirements of s.149 of the Employment Relations Act 2000 (the Act).

[3] Under the terms of that Record of Settlement, the following term was agreed:

4. *Wilhelmsen Ships Service Limited shall make its best endeavours to retrieve and the supply the emails between Philip Bradcock and his father that are in the possession of the company. They shall do this with a view to providing them on or before February 7, 2014.*

[4] On 14 April 2014 Mr Bradcock applied to the Authority seeking a compliance order with the Record of Settlement that Wilhelmsen retrieve and supply him with the email correspondence with his late father, and seeking a penalty of \$20,000, a contribution to costs and compensation of \$10,000 should the files not be returned.

[5] Wilhelmsen filed a statement in reply in the Authority on 9 May 2014 claiming it had complied with the Record of Settlement because it had used its *best endeavours* to recover the emails requested by Mr Bradcock.

[6] The matter was directed to mediation on 12 May 2014 and a mediation meeting was held on 3 June 2014 but no resolution was reached in this meeting.

[7] An investigation meeting was held on 7 August. Mr Bradcock gave evidence, as did his support person, Karina Hart. Mr Nigel Smith, general manager of Wilhelmsen for the New Zealand and Pacific Islands region gave evidence, as did Mr Ryan Fielding in respect of Wilhelmsen's IT operations.

[8] Mr Smith says the reference in the Record of Settlement to *best endeavours* was deliberate because he was not sure if it was going to be possible to retrieve and supply the emails sought by Mr Bradcock. Mr Smith was happy to provide Mr Bradcock with a commitment by Wilhelmsen to use its *best endeavours* to do so.

[9] I accept the submission made by Mr Donovan, counsel for Wilhelmsen that the phrase *shall make its best endeavours* should be taken to indicate that retrieval and supply of emails between Mr Bradcock and his late father was not guaranteed.

[10] I also agree with Mr Donovan's submission that the phrase *in the possession of the Company* meant that Wilhelmsen's obligation was to retrieve and supply emails to Mr Bradcock in its possession. If emails were not in its possession, Wilhelmsen would not be able to provide them.

[11] Finally, Mr Donovan submitted that the phrase used in clause 4 of the Record of Settlement regarding the time by which the emails were to be retrieved and provided to Mr Bradcock was not couched in absolute terms, rather it stated *with a*

*view to providing them on or before February 7, 2014.* I interpret that phrase to mean that if it was possible for Wilhelmsen to retrieve and supply the emails then it would do so by 7 February 2014.

[12] By email at 4.27 pm on 31 January 2014 to his then advocate, Ms May Moncur, to Mr Donovan, Mr Bradcock provided details of the specific emails he was requesting from Wilhelmsen. The email chain produced to the Authority shows that Mr Smith received a copy of that email at 4.33pm. At 4.43pm Mr Smith requested that Mr Sek Loon Cho, the senior engineer IT support based in Malaysia, take steps to retrieve and supply the emails. There was a delay in replying because Mr Cho was on parental leave, but further communications were held in March between Mr Bradcock and Mr Smith regarding the retrieval of the emails.

[13] At the investigation meeting, Mr Ryan Fielding gave evidence regarding the IT issues concerning the retrieval and supply of emails as requested by Mr Bradcock. Mr Fielding stated that Wilhelmsen's emails are through a third party service provided by Microsoft known as Office 365. Mr Fielding said that the email data being sought by Mr Bradcock is deleted 30 days following the termination of an employee's employment. There is a window of 30 days following termination within which an employee may be able to request retrieval of their data. However, following the expiry of 30 days, such data cannot be retrieved. Mr Fielding's evidence was that at the time the Record of Settlement was entered into on 29 January, the emails had been deleted. This had occurred on about 3 December 2013, which was 30 days after IT support received the termination request in respect of Mr Bradcock's emails.

[14] Mr Smith received confirmation from Mr Fielding that all emails associated with Mr Bradcock's account had been deleted and were not retrievable. This information was made available to Mr Smith on 1 May 2014.

[15] It is my finding that Wilhelmsen did use its best endeavours to retrieve and supply Mr Bradcock the emails requested by him in accordance with the Record of Settlement. Accordingly, I decline to order compliance with the Record of Settlement dated 29 January 2014 as sought by Mr Philip Bradcock.

[16] Even if I am incorrect in this decision, under s.137(2) of the Act, the Authority has a discretion as to whether to order compliance. In *Timberlake v. Auckland Ring Co Ltd*<sup>1</sup> the following observations are made:

*[10] The Authority is required to exercise its discretion in a principled manner regarding the making or declining of a compliance order. This discretion must be carried out in accordance with the general principles which govern the exercise of discretions.*

*[11] I consider this is a case in which there would be no practical benefit in the Authority issuing a compliance order. The Auckland Ring Co does not have any ability to raise funds as it has large debts and no assets. Mr Duggan's evidence is that there is no prospect of further funds being injected into the company by the shareholders and owners.*

*[12] I consider this is a situation where compliance appears to be unlikely if not impossible in view of Auckland Ring Co's financial position. For this reason I consider it undesirable to exercise the Authority's discretion in favour of making a compliance order. Serious consequences arise from the failure to observe a compliance order, so I do not consider it appropriate to exercise the discretion or order compliance where there is no realistic prospect of the compliance occurring.*

[17] As stated above, the emails being sought by Mr Bradcock were not recoverable after 3 December 2013, they had been deleted. Therefore, it is not possible for Wilhelmsen to comply with Mr Bradcock's request for retrieval and supply of the emails between him and his late father. In such circumstances, it is not appropriate, even if I found Wilhelmsen to be in breach of the Record of Settlement, which I do not, to order compliance when there is no prospect of compliance occurring.

[18] As there is no finding that Wilhelmsen was in breach of the Record of Settlement, the question of penalties and compensation as sought by Mr Bradcock do not require determination.

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<sup>1</sup> [2014] NZERA Auckland 258

## **Costs**

[19] Wilhelmsen has 14 days from the date of this determination to file and serve a memorandum as to costs. Mr Bradcock has 14 days thereafter to file a memorandum in response.

**Anna Fitzgibbon**  
**Member of the Employment Relations Authority**