

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Oona Busby

AND Talent Base Limited

REPRESENTATIVES Michael Smyth, counsel for Oona Busby
Kate Blackman, counsel for Talent Base Limited

MEMBER OF AUTHORITY R A Monaghan

MEMORANDA RECEIVED 14 August 2006

DATE OF DETERMINATION 17 August 2006

DETERMINATION OF THE AUTHORITY (No 3)

[1] In a determination dated 20 July 2006 ("the 2 July determination")¹ I reopened an earlier investigation into Ms Busby's claims for monies owing² and amended orders I had made for payment. The amended orders were that:

- (a) the order for payment of salary and holiday pay be recalculated in accordance with findings made in the 2 July determination, with any balance in favour of Ms Busby to be remitted to her;
- (b) Talent Base Limited ("TBL") pay to Ms Busby the sum of \$7,610.27 in respect of unpaid commissions;
- (c) the parties reconsider their positions in respect of an overpayment of salary and failure to pay commission in February 2006; and
- (d) TBL pay interest on the unpaid monies at the rate of 7.5% from the date of termination of Ms Busby's employment to the date of payment; and
- (e) TBL pay a penalty of \$2,000 for breach of Ms Busby's employment agreement.

[2] By memorandum to the Authority dated 14 August 2006 Mr Smyth advised he had contacted TBL's solicitors by letter dated 25 July 2006, seeking to address matters outstanding in the above and including a suggested set of calculations. The letter had also set out his client's position on costs. Matters were not resolved and Mr Smyth sought a final determination from the Authority.

[3] The memorandum also set out an account of the parties' attempts to address the outstanding matters.

[4] By email message dated Friday 28 July Ms Blackman advised Mr Smyth she had only just been able to discuss Mr Smyth's fax with her client, and did not

¹ **Busby v Talent Base Limited** (AA 247/06, 20 July 2006)

² **Busby v Talent Base Limited** (AA 194/06, 2 June 2006)

have final instructions. She would endeavour to advise of TBL's response early the next week.

[5] Mr Smyth followed up by letter to Ms Blackman dated Wednesday 2 August, expressing concern about the lack of response, and further concerns that TBL had ceased trading and may attempt to evade payment. Ms Blackman replied by email message dated 3 August saying she had contacted her client, who had advised he had discussed the matter with his accountants and would be in a position to respond in a matter of days. The response did not come, and some 10 days later Mr Smyth approached the Authority.

[6] In those circumstances, on the afternoon of Monday 14 August the Authority advised Ms Blackman it required a response to the memorandum by 5 pm on Wednesday 16 August. Ms Blackman responded by advising she has made numerous attempts to contact her client, but was not able to speak with him and did not have instructions.

[7] I appreciate Ms Blackman's indication that she would continue to attempt to contact her client, but this has gone on for long enough. Mr Smyth had earlier raised an issue of TBL's good faith, which I addressed in the 2 July determination by saying I did not believe Mr Gunton's actions reached the point where they were deliberate, serious or sustained breaches in terms of the associated application for a penalty. While I had reservations about Mr Gunton's (hence TBL's) good faith, the fact that some payment was made to Ms Busby weighed in his favour. Now Mr Gunton's ongoing failures to address the obligation to pay Ms Busby the full amount owed, and what I find are obvious delaying tactics, means I have increasing doubts about the matter.

[8] I will not permit any further delay. Mr Gunton has had an opportunity to be heard on Mr Smyth's applications. He has been made aware of Mr Smyth's proposals on outstanding payments and costs, and his response is sought. He has not provided it.

[9] Mr Smyth has performed a calculation encompassing the matters referred to in (a), (b) and (c) in my summary of orders above. He seeks a final determination that Ms Busby is owed \$7,712.72 gross plus interest. I order accordingly.

[10] For the avoidance of doubt, the order in the 2 July determination for payment of a penalty was not left as a matter for further discussion between the parties and is unaffected by this determination. In short, it remains in force.

Costs

[11] Mr Smyth seeks an order encompassing the original order of reimbursement of the filing fee plus \$750 in the Authority's first determination, and acknowledging the additional costs incurred in addressing the application to reopen the investigation.

[12] Since Mr Gunton's failures to act led to the first investigation meeting proceeding in his absence, it is appropriate that the original order for payment of \$750 stand.

[13] It is also appropriate that costs of the application to reopen be considered. With reference to the approach set out in **PBO Limited v Da Cruz** (9 December 2005, Chief Judge Colgan, Judges Travis and Shaw, AC 2A/05), I record that the

second investigation meeting took less than a full day and proceeded effectively and efficiently. I appreciate the efforts of counsel in that respect.

[14] The outcome was that, while I was unimpressed with the application to reopen, it was apparent there was a need to recalculate the amounts owed and that was done. The remaining matter of substance concerned the existence or not of a cap on commission payments, and TBL was unsuccessful. Hence the overall outcome was mixed although most of the success was Ms Busby's. She is entitled to a further contribution to her costs. With reference to the range of awards of costs in the Authority for less than a full day's meeting, TBL is ordered to contribute to Ms Busby's costs in the further sum of \$1,500.

Summary of orders

[15] TBL is ordered to pay to Ms Busby the sum of \$7,712.72 gross plus interest at the rate of 7.5% from the date of termination of Ms Busby's employment to the date of payment.

[16] TBL is ordered to pay costs of:

- (a) \$750 plus the \$70 filing fee in respect of the first investigation meeting; plus
- (b) \$1,500 in respect of the application to reopen.

R A Monaghan
Member of Employment Relations Authority