

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2014] NZERA Auckland 417
5465109

BETWEEN TONY CANTWELL
Applicant

A N D CACAO LIMITED trading as
THEOBROMA CHOCOLATE
LOUNGE
Respondent

Member of Authority: T G Tetitaha

Representatives: D Vinnicombe, Advocate for the Applicant
B Malhotra, Representative for the Respondent

Investigation Meeting: On the papers

Submissions Received: 11 August 2014 from the Applicant

Date of Determination: 10 October 2014

DETERMINATION OF THE AUTHORITY

- A. A compliance order is made requiring Cacao Limited trading as Theobroma Chocolate Lounge to pay Employment Equity Limited the sum of \$2,550 by 17 November 2014 pursuant to s.137 of the Employment Relations Act 2000. Any further payments made by the respondent from 6 August 2014 may be deducted from the judgment sum.**
- B. I decline to order any penalty under s.4 of the Employment Relations Act 2000 because there is no application before me for a s4 breach of good faith, nor evidence of the breach and the matters in s4A justifying imposition of a penalty.**
- C. There is an order Cacao Limited trading as Theobroma Chocolate Lounge is to pay \$371.56 to Tony Cantwell as a contribution to his legal costs.**



Employment relationship problem

[1] The applicant, Tony Cantwell seeks a compliance order requiring the respondent, Cacao Limited trading as Theobroma Chocolate lounge, to comply with a Record of Settlement dated 20 March 2014.

[2] The Record of Settlement provided for the respondent to pay \$3,000 to the applicant's representative, Employment Equity Limited, by instalments. \$1,000 was due on 31 March 2014, \$1,000 on 7 April 2014 and a final payment of \$1,000 was due on 14 April 2014.

[3] The respondent made one payment of \$250 but failed to make any further payments in accordance with the Record of Settlement. The applicant seeks a compliance order and a penalty for non-compliance under s4 of the Employment Relations Act 2000 (the Act).

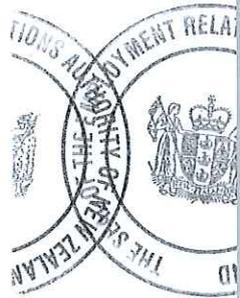
[4] The respondent has filed a statement in reply seeking to re-argue the personal grievance which gave rise to the Record of Settlement. It also contained concerns about the settlement process alleging its representative was "*cornered and pressured and had no support person to fall back on.*" It seeks an order allowing more time to pay in smaller instalments.

[5] At a teleconference on 28 July 2014 I made the parties aware of my limitations in investigating any record of settlement under s.149 of the Employment Relations Act 2000 (the Act). If the Record of Settlement meets the requirements of s.149(2) of the Act, I do not have any power to cancel the agreement or seek to review those terms (s.149(3)). Another Court may be able to do so, but I cannot.

[6] The parties sought some time to discuss settlement which was given. I directed the parties to file any further information/evidence by 11 August 2014. A decision was to be made thereafter on the papers.

[7] As at today's date the parties have not advised of any settlement.

[8] The applicant filed submissions on 11 August 2014 seeking the making of a compliance order "*to be held in abeyance*" on condition the respondent pays the sum of \$200 per week without deduction or demand until the full amount of \$3,000 is paid together with the cost of the application in the sum of \$300 and the filing fee of



\$71.56 paid in full. These conditions were derived from a “conditional without prejudice settlement” between the parties on 29 July 2014. The applicant’s advocate confirmed he has received \$200 on 5 August 2014. There is no information about any further payments.

[9] I do not have the power to hold a compliance order “*in abeyance*” or without any timeframe for payment. Section 137(3) of the Act states the Authority “*must specify a time within which the order is to be obeyed*”. If the applicant does not wish to seek further enforcement of the order because payments are being made, that is a decision for him.

[10] The applicant acknowledges he has received \$450 from the respondent. Therefore \$2,550 remains unpaid. At the rate of \$200 per week, the respondent should have repaid the debt in full within 13 weeks from 5 August 2014 or by 4 November 2014. The time to comply with any order can be at or around the last day for payment under the settlement agreement. A further two weeks after the last date for payment should suffice.

[11] I have had no further submissions or evidence from the respondent about this matter.

[12] On the face of it the Record of Settlement complies with s.149 of the Act. The mediator dealing with the matter has certified his compliance with the relevant sections of the Act. Both parties have signed the agreement. The agreement is clear as to its terms. Partial payment has been made by the respondent. Accordingly I determine a compliance order should issue on the terms set out below.

[13] A compliance order is made requiring Cacao Limited trading as Theobroma Chocolate Lounge to pay Employment Equity Limited the sum of \$2,550 by 17 November 2014 pursuant to s.137 of the Employment Relations Act 2000. Any further payments made by the respondent from 6 August 2014 may be deducted from the judgment sum.

Penalty

[14] The applicant seeks a penalty under s.4 of the Act. Penalties “under s.4” are set out in s.4A of the Act. These are penalties for breaches of good faith.



[15] The applicant has not clarified which part of s.4 he relies upon to give rise to a penalty. Section 4 deals with good faith obligations, not compliance orders. This application is for a compliance order. For a penalty under s4 the application should have specified the breach of good faith and evidence filed about the breach and the requirements set out in s.4A for imposition of a penalty. I do not have any of this information before me.

[16] In the circumstances, I decline to order any penalty under s.4 of the Employment Relations Act 2000 because there is no application before me for a s4 breach of good faith, nor evidence of the breach and the matters in s4A justifying imposition of a penalty.

Costs

[17] The applicant seeks costs of \$300 and his filing fee of \$71.56. These costs appear more than reasonable. The Authority's usual daily tariff is \$3,500. Given this matter is being dealt with on the papers, the starting point for an award of costs of half of the daily tariff (\$1,750) would have been appropriate.

[18] As the costs sought are less than the applicable tariff, the starting point shall be \$371.56. There are no factors requiring any uplift or reduction.

[19] Accordingly there is an order Cacao Limited trading as Theobroma Chocolate Lounge is to pay \$371.56 to Tony Cantwell as a contribution to his legal costs.



T G Tetitaha
Member of the Employment Relations Authority

