

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2014] NZERA Auckland 77
5445700

BETWEEN JUDITH ANN DAVIDSON
Applicant

A N D STEPHEN ROBERT KELLY
Respondent

Member of Authority: Anna Fitzgibbon

Representatives: Matthew Blomfield, Advocate for Applicant
Michael Locke, Counsel for Respondent

Investigation Meeting: On consideration of papers

Date of Determination: 05 March 2014

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] On 9 December 2013, a Deed recording agreed terms of settlement (the Settlement) was signed under s.149 of the Employment Relations Act 2000 (the Act). The applicant, Ms Judith Davidson, and the respondent, Mr Stephen Kelly, were parties to the Settlement. This Settlement was signed by Ms Davidson and Mr Kelly. The Settlement was signed by a mediator employed by the Ministry of Business, Innovation and Employment (MBIE).

Issues

[2] The issue brought to the Authority by Ms Davidson relates to non-payment by Mr Kelly of sums agreed to be paid by him and failure to comply with other terms of the Settlement.

[3] The Settlement states:

6. *Steve [Mr Kelly] shall pay the following sums in cleared funds without deduction to Judi [Ms Davidson]:*

- (a) \$20,000.00 no later than 18 December 2013.*
- (b) \$28,000.00 no later than 20 February 2013.*
- (c) \$24,000.00 in six instalments of \$4000.00 on the last day of the months January, February, March, April, May and June 2014. ...*

[4] The Settlement includes a number of other terms and conditions. However, at the date of the filing of the Statement of Problem, the dates upon which there was to be compliance had not been reached.

[5] The Settlement was certified under s.149 of the Act by the mediator. That certification confirmed that, before signing the Settlement, the parties were advised and accepted they understood the effect of s.149(3) of the Act which states that the agreed terms of settlement:

- (a) Were final, binding and enforceable; and*
- (b) Could not be cancelled; and*
- (c) Could not be brought before the Authority or the Court for review or appeal, except for the purposes of enforcing those terms.*

[6] On 21 January 2014, an application for compliance order was filed in the Authority by Ms Davidson claiming that despite requests, Mr Kelly had failed to pay the compensatory sum of \$20,000.00 due no later than 18 December 2013, in accordance with clause 6(a) of the Settlement.

[7] Further memoranda have been filed by Ms Davidson's advocate in relation to further breaches which have occurred after the filing of the statement of problem in the Authority. These relate to clause 6(b) and (c) of the Settlement. Mr Kelly has filed a statement in reply accepting that he is in breach of the Settlement. However, Mr Kelly claims one of the reasons for his non-compliance is due to difficulties he has had in securing funding. Mr Kelly claims the difficulties were as a result of negative publicity following Ms Davidson's approach to the news media. Mr Kelly sets out a number of other reasons for his non-compliance in his statement in reply.

[8] Mr Kelly signed the Settlement and in doing so accepted it was binding on him. I am satisfied Mr Kelly has not complied with the terms of the Settlement.

[9] Ms Davidson seeks the imposition of a \$20,000.00 fine in respect of each breach of the Settlement in accordance with s.149 of the Act and seeks that such penalties be paid to Ms Davidson. Costs are also sought.

Determination

[10] I make an order that Mr Kelly is to pay Ms Davidson within 21 days of the date of this determination, the sums owed under clause 6(a) (b) (c) of the Settlement. Mr Kelly was to pay Ms Davidson the sum of \$20,000.00 no later than 18 December 2013 (clause 6(a)), the sum of \$28,000 no later than 20 February 2013 (which I understand is to be 2014) (clause 6(b)) and the first two of six instalments of \$4000 each on the last day of January and February 2014. The total sum currently owing under the Settlement is \$56,000.00.

[11] I note that under clause 6(c) of the Settlement further payments of \$4000 each will become due and payable on the last day of March, April, May and June 2014.

[12] Ms Davidson seeks penalties of \$20,000.00 in respect of each breach by Mr Kelly of the Settlement. Under s.135(2)(a) of the Act as Mr Kelly is an individual, the penalty cannot exceed \$10,000.00.

[13] Mr Kelly opposes the imposition of a penalty. Mr Kelly considers one of the reasons for his failure to comply with the Settlement was because funding was adversely affected by Ms Davidson's approach to the media and the negative publicity as a result. Mr Kelly hopes to secure funding very soon which would enable him to comply with the Settlement.

[14] In all the circumstances, I conclude that a penalty of \$2000 is appropriate. Pursuant to s136 of the Act, \$1000 of the penalty is to be paid by Mr Kelly into the Authority, for subsequent payment to the Crown bank account. The balance of the penalty shall be paid by Mr Kelly directly to Ms Davidson.

Costs

[15] I order Mr Kelly to pay costs of \$500 and to reimburse Ms Davidson the Authority's \$71.56 filing fee.

[16] For the information of Mr Kelly, failure to comply with an order such as this one made by the Authority under s.137 of the Act, may provide a basis for an

application to be made by Ms Davidson to the Employment Court. Where the Court is satisfied that any person has failed to comply with a compliance order under s.137, the Court may, under s.140 of the Act, order remedies, including an order that the person in default be sentenced to imprisonment for a term not exceeding three months and/or a fine not exceeding \$40,000.00.

[17] I direct that pursuant to Regulation 26 of the Employment Relations Authority Regulations 2000, Ms Davidson be provided with a certificate of determination, sealed with the seal of the Authority, recording respectively that Mr Kelly is ordered to pay Ms Davidson within 21 days of the date of this determination the sum of \$56,000.00 pursuant to s.123(1)(c)(i) of the Act, costs of \$500, the filing fee of \$71.56 plus \$1000 of the penalty of \$2000. The balance of the penalty being \$1000 to be paid into the Authority within 21 days.

Anna Fitzgibbon
Member of the Employment Relations Authority