

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2017] NZERA Wellington 66
3000120

BETWEEN KLIO DERMONDY
 Applicant

AND DELECTABLE BAKERS (2010)
 LIMITED
 Respondent

Member of Authority: Trish MacKinnon

Representatives: Applicant in person
 Greg Bennett, for Respondent

Investigation Meeting: On the papers

Information Received: 23 March 2017 from the Applicant
 3 May 2017 from the Respondent

Determination: 28 July 2017

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Klio Dermondoy and her former employer Delectable Bakers (2010) Limited (DBL) entered into a record of settlement which was signed by a mediator of the Ministry of Business, Innovation and Employment (MBIE) on 4 April 2016. Ms Dermondoy says that DBL has failed to adhere to the terms of settlement by not paying all agreed sums.

[2] DBL acknowledges entering into a settlement agreement with Ms Dermondoy but says the company has ceased trading since it entered into that agreement. It says its ability to make any payments is highly unlikely. Through its representative, Mr Bennett, DBL says it has no assets but does have liabilities.

The Record of Settlement

[3] The terms of settlement of a record of settlement entered into under s. 149 of the Employment Relations Act 2000 (the Act) may be brought before the Authority for enforcement purposes only, pursuant to s. 149(3)(b). Ms Dermondy seeks enforcement of the financial aspects of the terms of settlement that have not been paid in full. As those are the only terms relevant to this determination, it is not necessary to disclose all agreed terms of the record of settlement in this determination.

[4] Those terms that Ms Dermondy seeks to enforce are contained in clauses 3 and 4 of the agreed terms of settlement. They provide as follows:

- (3) The Respondent will pay to the Applicant, without any admission of legal liability, pursuant to s.123(1)(c)(i) of the Employment Relations Act 2000 the sum of \$4,500, the amount to be paid by way of transfer to the Applicant's bank account by way of payment of the sum of \$2,000 within twenty working days from the date of settlement. The residual amount of \$2,500 to be paid in the same manner as the arrears as set out in clause 4 of this settlement document.
- (4) The parties recognize that there are arrears of wages and holiday pay due to the applicant along with an amount to be paid in respect of KiwiSaver. The parties have agreed that the total amount in respect of these items is \$9,689.93 and this amount (gross subject to taxation at the appropriate rate) is due to the applicant. The parties have therefore agreed that the net amount along with the residual amount as set out in clause 3, above will be paid by way of transfer to the applicant's bank account at the rate of \$300 (net) per week commencing by Friday 15 April 2016 and will continue at that amount until such a time as the amounts specified in the settlement agreement have been paid.

[5] Ms Dermondy provided evidence of payments being made up to and including 6 August 2016 in accordance with the agreed terms. In August 2016, Ms Dermondy agreed with Natasha de Silva, a shareholder in DBL and partner of the sole director, Thuiyadura Chulaka Priyananda de Silva, to allow a temporary stop in payments following the payment made on 6 August 2016 until 8 September 2016 when payments were to resume. Their agreement was made in writing, signed by Ms Dermondy and Ms de Silva, and sent to the Mediation Service of MBIE by letter dated 22 August 2016.

[6] The payment due on 8 September 2016 was made. However, payments were sporadic after that, with only four further payments of \$300 being made. Ms Dermondy informed the Authority on 26 July 2017 that the last payment was made on 29 October 2016, and was \$300.00.

The Authority's investigation

[7] I held a telephone conference with the parties on 13 March 2017, with Ms Dermondy representing herself, and Mr Bennett representing the respondent. It was agreed the Authority would determine this matter on the papers. Ms Dermondy was to file an accountant's statement by 17 March 2017. Mr Bennett would, within two weeks from the date of receiving her document, file a statement of financial position of DBL and any other relevant documentation.

[8] Ms Dermondy provided the further documentation as agreed. No documents were received from DBL and the last contact from Mr Bennett to an Authority Officer was on 3 May 2017. In an email of that date he informed the Authority Officer the company owed the money to Ms Dermondy but it had no assets or income and therefore could not pay. He conveyed his understanding that DBL would be removed from the Companies Office register in due course and that there was nothing he could write that would assist the Authority.

Should a compliance order be made?

[9] The Authority's power to issue compliance orders is derived from s. 137 of the Act and, in circumstances such as these involving a mediated settlement, specifically from s. 137(1)(a)(iii). Section 138(4A) provides that, if a compliance order relates in part or in whole to the payment to an employee of a sum of money, the Authority may order payment to the employee by instalments, but only if the financial position of the employer requires it.

[10] In this instance I have no evidence to support Mr Bennett's assertion of DBL's poor financial position. As of the date of this determination the company remains listed on the New Zealand Companies Office register. The only indication that the company may no longer be trading is a note on the register recording that DBL is now overdue in its obligation to file an annual return. The note also records that, if the annual return is not filed immediately, the Registrar will initiate action to remove the

company from the register. That merely provides evidence that DBL has not filed an annual return: it does not provide evidence of the company's financial position.

[11] The mediated record of settlement provides for weekly payments to be made to pay Ms Dermondy the residual amount of \$2,500 (with no deduction) from clause 3 and the wage and holiday payment of \$9,689.93 less tax provided for in clause 4. If those payments had continued to be made in accordance with the agreed terms of settlement, the amounts owing would have been paid in full by 20 January 2017. Even allowing for the hiatus in payments from 6 August to 8 September 2016 as agreed between Ms Dermondy and Ms de Silva, the amounts owing would have been paid by 24 February 2017.

[12] Ms Dermondy is entitled to the monies agreed and recorded in a mediated record of Settlement and it is appropriate that orders be made accordingly. By my calculation, using the accountant's information provided by Ms Dermondy, and her evidence of the 29 October 2016 payment, DBL owes her the sum of \$3,774.54 nett of tax.

Orders

[13] Delectable Bakers (2010) Limited is ordered to pay Ms Dermondy the sum of \$3,774.54 nett of tax within 28 days of the date of this determination.

[14] Failure by Delectable Bakers (2010) Limited to comply with this order may result in Ms Dermondy applying to the Employment Court. The court's powers under s.140(6) of the Act include ordering that the person in default be sentenced to a term of imprisonment not exceeding three months and/or a fine not exceeding \$40,000.

Costs

[15] As Ms Dermondy has not been legally represented, no issue arises as to costs other than in respect of the filing fee. Delectable Bakers (2010) Limited is further ordered to reimburse Ms Dermondy that fee in the sum of \$71.56.

Trish MacKinnon
Member of the Employment Relations Authority