

**Attention is drawn to the non-publication
order in paragraph [14]**

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 177/10
5289828

BETWEEN	LEWIS FOULKES Applicant
AND	GOOD START PROPERTY DEVELOPMENTS LIMITED Respondent

Member of Authority:	Yvonne Oldfield
Representatives:	Mr Foulkes in person. Mr M. Austin, director, for Respondent.
Investigation Meeting:	16 April 2010
Determination:	20 April 2010

**DETERMINATION OF THE AUTHORITY ON AN APPLICATION FOR
ORDERS FOR COMPLIANCE**

Employment Relationship Problem

[1] An employment relationship problem arose between Mr Foulkes and Good Start Property Developments Limited in August 2008 when he was made redundant. He lodged the problem in the Authority and the parties undertook mediation which resolved some of the issues between them. Their agreement was set out in terms of settlement signed on 5 May 2009 by a Labour Department mediator pursuant to section 149 of the Employment Relations Act 2000 (subsections (1) and (3).) The respondent undertook to pay to Mr Foulkes \$1,730.00 arrears of wages, \$2,565.00 holiday pay and \$472.89 reimbursement of expenses.

[2] It was recorded in the terms of settlement that there was an outstanding issue between the parties in relation to disputed bonus payments. This was investigated and disposed of in a determination of the Authority dated 10 September 2009. The

respondent was ordered to pay to Mr Foulkes the sum of \$1,287.96 in outstanding bonus payments. No order was made for interest on this sum.

[3] Mr Foulkes now asserts that he has not been paid what he is entitled to and seeks orders for compliance with both the mediated terms of settlement and with the orders of the Authority. In his reply Mr Austin acknowledged that the respondent had not paid what it owed Mr Foulkes and explained this by saying that the respondent last sold a property in August 2009 and has no earnings.

Issues

[4] Pursuant to the mediated terms of settlement payment of the settlement sum was to have been by instalments. The relevant arrangements included a proviso that if the respondent failed to *“make two payments any more than 5 days late the full amount owing will... become payable immediately.”* Interest was to be paid on any outstanding amount *“at the rate specified by the Inland Revenue.”*

[5] There is no dispute that in relation to the mediated terms of settlement Mr Foulkes received payments (each of \$400.00) in August and September 2009. Instalments due on 15 October and 15 November respectively were not paid with the effect that the balance owing became payable on 20 November 2009. There was no further part payment after the application for compliance was lodged in the Authority and there is no dispute that a balance of \$4,431.81 plus interest remains outstanding.

[6] After the Authority's determination was issued, Mr Austin and Mr Foulkes also agreed an instalment scheme for the payment of the order made there. There is no dispute that, notwithstanding this agreement, no payments were ever made in respect of the order contained in the determination of the Authority.

[7] When asked about the respondent's current position, Mr Austin told the Authority that it had assets which had not been liquidated. The assets were in the form of properties which had been on the market since late 2009. He did not know when they might sell and did not expect them to fetch their mortgaged value. Otherwise, the company was not trading. Mr Austin also told me that the respondent company owed money to the IRD. He said he understood that both the bank and the IRD would soon

move to recover what was owed to them and he was awaiting formal notice of this. The directors had previously injected personal capital into the business but have now stopped doing so.

[8] Against this background, both Mr Foulkes and Mr Austin told me they did not see any merit in the Authority putting in place any arrangement for the respondent to pay Mr Foulkes in instalments.

[9] There is no disagreement between the parties about the nature of the respondent's obligations or that those obligations have been breached. On the basis of the undisputed evidence the grounds for compliance orders as sought have clearly been made out. However, even where grounds have been made out the Authority has a discretion whether or not to order compliance and must exercise that discretion in a principled way. The remaining issue here is therefore whether that discretion should be exercised in Mr Foulkes's favour.

Determination

[10] The purpose of a compliance order is to do justice between the parties. It is inappropriate in situations where the obligations between the parties are unclear, where there has been notification of intention to comply, or where there has been insufficient opportunity to comply. None of these circumstances apply here. Mr Austin was candid in acknowledging that it is unlikely that the respondent will ever make the payments sought.

[11] A compliance order is also inappropriate where it will be of no practical benefit. This was of more relevance here given what Mr Austin had to say about the cash flow and liquidity problems of the respondent. Mr Austin anticipates that the company's assets, once liquidated, will not be of sufficient value to cover what it owes to its lender and to the Inland Revenue Department.

[12] If this indeed proves to be the case, any compliance order may prove to be unenforceable. Until the company's assets have been sold, however, its exact position cannot be known for certain, and in the meantime Mr Foulkes is entitled to secure his position as best he can. I accept that compliance orders are warranted.

[13] The respondent is therefore ordered to comply with the mediated terms of settlement attached as appendix 1. The time frame for compliance is a period of one calendar month from the date of this determination. For the avoidance of doubt, I record that the balance owed to Mr Foulkes pursuant to appendix 1 is \$4,431.81 plus interest accruing from 20 October 2009 at the rate specified by the Inland Revenue on that date.

[14] In keeping with the parties' original agreement that the terms of settlement be kept confidential to the parties, a non-publication order is put in place in respect of the terms attached as appendix 1.

[15] The respondent is also ordered to comply with the determination of the Authority attached as appendix 2. The time frame for compliance is a period of one calendar month from the date of this determination. For the avoidance of doubt, I record that the sum of \$1,287.96 is outstanding pursuant to that determination.

Yvonne Oldfield

Member of the Employment Relations Authority