

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

WA 32/10
File Number: 5291010

BETWEEN Sean Freeman
Applicant

AND Garage Inc Limited
Respondent

Member of Authority: Denis Asher

Representatives: Mr Freeman represented himself
No appearance by or for the Company

Investigation Meeting On the papers

Submissions Due By 19 February 2010

Determination: 23 February 2010

DETERMINATION OF THE AUTHORITY

The Problem

[1] Mr Freeman seeks compliance with a record of settlement signed off by himself and Mr Rob Claridge, the respondent company's director, on 7 October 2009.

The Investigation

[2] No statement in reply has been received from the Company. Efforts by Authority support staff to contact Mr Claridge in particular have met with only limited

success. The Authority's track and trace record records "Rob" signing for notice of the statement of problem on 15 January 2010. Staff spoke to Mr Claridge on 2 February 2010 and reminded him a statement in reply was due no later than 5 February and that the Authority would arrange a telephone conference call: there has been no response by the respondent to that advice.

[3] I arranged for a telephone conference on 15 February 2010: efforts to include the Company through Mr Claridge were unsuccessful. The Company and Mr Claridge had been advised of the conference call by letter dated 5 February: efforts to contact the latter on the business landline and his portable telephone were unsuccessful.

[4] As I was satisfied proper notice had been given the Company and Mr Claridge of the conference call I elected to proceed with it and to issue the following directions:

- a. Mr Freeman was to advise by close of business 16 February 2010 whether the Company had complied with the record of settlement and, if not, if he continued to seek the remedies set out in his statement of problem;
- b. The Company had until 19 February to respond to the statement of problem and Mr Freeman's advice per a. above.
- c. The Authority would issue a determination on the papers by or about Friday 26 February 2010.

[5] I also instructed support staff to serve notice on the Company of my directions and all further correspondence on both its address for service (which I understand to be Mr Claridge's domestic address also) and the address of the Company's garage.

[6] By email dated 15 February Mr Freeman confirmed he had received no money from the Company per the record of settlement and he continues to seek enforcement of that record plus, as originally set out in his statement of problem, interest, the application fee and liquidated damages, and "*penalties for Garage Inc Ltd's persistent non compliance in resolving this matter*" (above)

[7] The Authority's track and trace record records "Rob" signing for the directions of 15 February 2010. No communication has been received from the Company and/or Mr Claridge.

[8] Having regard to the above, I am satisfied it is appropriate for me to investigate and determine this matter.

Discussion and Findings

[9] The record of settlement signed off by the mediator on 7 October 2009 provided for:

- a. The Company paying Mr Freeman \$2,385.64 nett by way of three monthly payments of \$800 on 15 October 2009, \$800 on 15 November and \$785.64 by 16 December; and
- b. An additional \$50 per week "*for each and every breach ... until the breach is rectified*" (record of settlement attached to statement of problem).

[10] The Company has failed to make any payments to Mr Freeman and is thereby in breach of the three instalments due on 15 October, 15 November and 16 December 2009.

[11] No evidence has been provided by the Company of any trading difficulties.

[12] By 26 February 2010 the Company will have breached the first leg of its settlement on 19 weekly occasions, i.e. a total of \$950. By the same date, and in respect of the second and third legs of the settlement, the Company's breach – applying the settlement formula – will total \$700 (14 weeks) and \$500 (ten weeks), i.e. a total of \$2,150.

[13] As is made clear in *Ozturk v Gultekin t/a Halikarnas Restaurant* [2004] 1 ERNZ 572,

In general, any mediated settlement ... recorded by a mediator was enforceable. However, the jurisdiction under the ERA, ultimately being the Employment Court's jurisdiction, was one of equity and good conscience. Courts of equity and Courts of conscience had always turned their backs on any agreement that imposed a penalty If the agreed amount of damages payable in the event of a particular breach was a genuine estimate of the loss that the parties expected would be caused by that breach, then that estimate, called liquidated damages, was recoverable. However, if the amount was an attempt to compel performance by holding it as a threat over the head of one party, it became a penalty, and would not be recoverable. In equity it was unconscionable to recover a sum which was out of proportion to the loss which actually occurred.

(par 5)

Anyone who sought equity had to be prepared to do equity.

(par 7)

[14] No evidence has been provided by Mr Freeman that the formula of \$50 per week for each breach until rectified *was a genuine estimate of the loss that the parties expected would be caused by that breach* (above). The accumulated penalty will, if applied, shortly exceed the monies the Company agreed to pay Mr Freeman.

[15] However, it is clear that Mr Freeman has been significantly inconvenienced by the breach presumably entered into in good faith by Mr Claridge on behalf of the Company: Mr Freeman has not had the use of the money and has had to put much effort into seeking compliance, in the face of resolute silence and a complete lack of cooperation by the respondent.

[16] Consistent with *Ozturk* (above), in particular the Authority's obligation to apply equity and good conscience to compliance matters, while bearing in mind that I accept it is entirely fair and reasonable for the applicant to be granted interest and a penalty in respect of the Company's persistent breaching of its obligations, to direct that the penalty be paid to Mr Freeman in recognition of the distress clearly occasioned him by the respondent's conduct.

Determination

[17] Pursuant to s. 139 of the Employment Relations Act 2000 (the Act), the Company is to pay to Mr Freeman:

- a. Within 28 days of this determination, i.e. by 23 March 2010, the sum of \$2,385.64 (two thousand, three hundred and eighty five dollars and sixty-four cents) nett;
- b. Having regard to the recent and current 90-day bank bill rates, interest of 4% on \$800 from 15 October 2009, interest of 4% on \$1,600 from 15 November 2009 and interest of 4% on \$2,385.64 from 16 December 2009: leave is reserved to the parties to return this calculation to the Authority if they are unable to reach agreement on the same; and
- c. \$70 (seventy dollars) being Mr Freeman's filing fee.

[18] Pursuant to s. 133 of the Act, the Company is to pay a penalty of \$1,000 (one thousand dollars) for breaching the mediated settlement it entered into with Mr Freeman. The penalty in its entirety is to be paid to Mr Freeman; ss. 136 (2) of the Act applied.

[19] I draw now to the Company, and Mr Claridge's attention, the risk of ignoring this matter and this determination: the respondent faces the real risk of a steady accretion of the costs it faces in this matter. The courts can, and have ordered, fines, sequestration and imprisonment in respect of persistent breaches.

Denis Asher

Member of the Employment Relations Authority