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Gosalia v Stapleton & Co Accountants Limited [2011] NZERA 164; [2011] NZERA Auckland 120 (29 March 2011)

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Gosalia v Stapleton & Co Accountants Limited [2011] NZERA 164 (29 March 2011); [2011] NZERA Auckland 120

Last Updated: 3 June 2011

IN THE EMPLOYMENT RELATIONS AUTHORITY AUCKLAND

[2011] NZERA Auckland 120 5326166

BETWEEN

PIYUSH GOSALIA

AND

STAPLETON & CO
ACCOUNTANTS LIMITED

Member of Authority:

Yvonne Oldfield

Representatives:

Mark Donovan for applicant
No appearance for respondent

Investigation Meeting:

24 March 2011

Determination:

29 March 2011

Employment Relationship Problem

[1] This employment relationship problem was first lodged in November 2010 at which time Mr Gosalia was representing himself. He requested an order for compliance with mediated terms of settlement, saying that the respondent had failed to meet certain obligations under the settlement agreement despite being reminded to do so by him and by the mediator who had signed off on the settlement.

[2] The respondent did not supply a formal Statement in Reply however Beth Stapleton, director of the respondent, advised by email that the business had been sold and the proceeds:

"absorbed by the IRD and the Bank, which has left nothing for any further debts to be paid..."

I must inform you that I am not in a position to repay Piyush the full amount as settled in one lump sum. I will need to set up regular payments to him."

[3] Ms Stapleton also asked to be advised when Mr Gosalia would comply with his obligation (under the settlement agreement) to return secure information belonging to the respondent.

[4] I proceeded to convene a conference call between the parties. The respondent was represented at the call by Mr Rob Webber. He advised as follows:

- i. The respondent conceded that the settlement agreement had not been fully complied with and that the respondent's obligations pursuant to clauses 1, 2(a) and 2(b) remained outstanding;
- ii. the Company was not trading and had sold its business;
 - iii. the purchase price would not cover all the Company's obligations;
 - iv. the Company was facing a statutory demand from the Inland Revenue Department and was in discussions to avoid winding up proceedings;
 - v. it was the respondent's position that Mr Gosalia's obligations pursuant to clause 6 of the settlement agreement also remained outstanding, and
 - vi. the Company was unlikely to be represented at any investigation meeting.

[5] Mr Webber advised that he did not have instructions to continue to represent his client beyond the conference, but that should his instructions change, and the respondent choose to be represented at an investigation meeting, he was available on 24 March 2011. I advised Mr Webber and Mr Gosalia that I would proceed to have the matter set down for that date.

Issues

[6] There was no appearance for the Company on 24 March. In light of what Mr Webber had already told me about the likelihood of the Company attending the meeting I proceeded in the respondent's absence.

[7] Mr Donovan began by seeking to make additional applications for:

- i. interest on the payments due under clauses 1, 2(a) and 2 (b) from the payment date set out in the settlement agreement until the date payment is received;
- ii. penalty for breach of the settlement agreement, and
- iii. costs.

[8] Leave is granted for the applicant to make these applications. However, as I indicated to Mr Donovan during the investigation meeting, the Authority cannot proceed to determine the claims for penalties and costs until the respondent has been put on notice of them and has had an opportunity to respond. Those issues are therefore reserved. The applicant should now confirm those applications in writing with submissions in support.

[9] The claim for interest is a somewhat different matter since it is not necessary for a claim for interest to be pleaded specifically.^[1] The application for interest can therefore be disposed of in this determination.

[10] Mr Donovan also clarified that it was the applicant's position that the company had not complied with clause 5 (which made provision for a reference.) The issues for determination in this case are therefore whether orders for compliance should be made in respect of the following clauses of the settlement agreement: 1, 2(a) and 2(b), and 5 and what if anything should be done in relation to Mr Gosalia's failure to date to comply with clause 6.

Determination

[11] The relevant clauses of the mediated terms of settlement are as follows:

- "1. The respondent will pay to the applicant the sum of \$4,500.00 under section 123 (1) (c) (i) [Employment Relations Act 2000](#).*
- 2. The respondent will pay to the applicant the following net sums:*
 - (a) Any salary owing as at the Date of Termination; \$4,699.83*
 - (b) Any outstanding holiday pay as at the Date of Termination: \$1,614.89*
- 4. ...payments under paragraphs 1, 2(a) and 2 (b) will be paid in instalments as per schedule one, as attached. The timing of the instalments will depend on the date upon which the agreement is finalised.*
- 5. The respondent will provide the applicant with a basic written reference within 5 days of the finalisation of the agreement. The reference will consist exclusively of the following matters:*
 - (a) The role of the applicant; and*
 - (b) The duties that the applicant performed in the role; and*
 - (c) The dates that the applicant was employed from and until.*
- 6. This provision applies to any confidential information belonging to the respondent, which includes the reports emailed by the applicant from the respondent's premises on 17 August. The applicant undertakes not to use or disclose any such information for any purpose whatsoever, except for disclosure to the respondent under 6 (b) below. In relation to such information, within 5 days of the finalisation of the agreement, the applicant will:*
 - (a) Deliver all such information in his possession to the respondent; and*
 - (b) Delete and remove from his possession any such information.*
- 8. The agreement will be considered to be finalised once it has been signed by both parties, and signed by a mediator as a Record of Settlement under [section 149](#) of the [Employment Relations Act 2000](#)."*

[12] The terms of settlement were signed by Mr Gosalia on 8 October 2010, Ms Stapleton on 11 October 2010 and by the mediator on 21 October 2010. The date of finalisation in terms of clause 8 is therefore 21 October 2010. Schedule one to the terms of settlement provided that the final instalment was to be made 63 days after the date of finalisation, that is, on 23 December 2010.

[13] As well as the payment obligations set out in clauses 1, 2(a) and 2 (b) the respondent was also required, pursuant to clause 2 (c), to make credit card payments. These were expressed to be due on 12 October, irrespective of the date of finalisation. Mr Gosalia told the Authority that these payments were made but not until 12 November, after cheques from the respondent had bounced.

[14] In relation to the obligations set out in clause 6 Mr Gosalia told me the following. He said that some time before the settlement was reached the police had seized his hard drive in response to a complaint from the respondent. This was later returned to him after the police confirmed that it was clear of any material belonging to the respondent, and the complaint was not pursued. He said that after the settlement was finalised he had handed all other relevant material in his possession to his solicitor (upon whose instructions Mr Donovan is acting) but had not directed her to pass it to the respondent. In other words, clause 6(b) had been complied with (and in the absence of evidence to the contrary, this is accepted) but clause 6(a) had not.

[15] The payments due under clauses 1, 2(a) and 2 (b) are not expressed to be contingent on Mr Gosalia having complied with clause 6 (b). Nonetheless I do not consider it reasonable to require the respondent to comply with its obligations in circumstances where Mr Gosalia has not met his. I note also that [Section 137 \(2\) of the Employment Relations Act 2000](#) provides:

"Where this section applies, the Authority may ...by order require, in or in conjunction with any matter before the Authority under this Act to which that person is a party.that person to do any specified thing . for the purpose of preventing further... non-compliance with that provision."

[16] I conclude not only that orders should be made for compliance with 1, 2 (a) and 2 (b), but in addition (for the purpose of preventing further non-compliance with the mediated terms of settlement) that an order should be made for compliance with clause 6 (a).

[17] I therefore order that within a period of 7 days from the date of this determination Mr Gosalia shall deliver up the respondent's secure information as required by clause 6 (a).

[18] I also note that (pursuant to the payment schedule) payments due under clauses 1, 2 (a) and 2 (b) were to have been made by 23 December 2010. It is therefore appropriate to order compliance by means of orders that the monies owed be paid in full.

[19] In order to effect compliance with clauses 1, 2(a) and 2 (b) I therefore order the respondent to pay to the applicant, no later than 14 days from the date of this determination:

- i. the sum of \$4,500.00 pursuant to [section 123 \(1\) \(c\) \(i\) of the Employment Relations Act 2000](#);
- ii. salary of \$4,699.83 gross, and
- iii. holiday pay of \$1,614.89 gross.

[20] Clause 11 of the second schedule to the [Employment Relations Act](#) provides as follows:

". in any matter involving the recovery of money, the Authority may, if it thinks fit, order the inclusion, in the sum for which judgement is given, of interest at such rate not exceeding the 90-day bill rate (as at the date of the order), plus 2%, as the Authority thinks fit, on the whole or any part of the money for the whole or part of the period between the date when the cause of action arose and the date of payment in accordance with the determination of the Authority."

[21] Interest may be awarded on money payable under a mediated settlement,^[2] subject of course to a discretion which must be exercised as the justice of the case requires. Mr Donovan suggested that interest on the total amounts owed should run at least from the date by which the final instalment was due (23 December) to the date by which compliance is required by this order (which has now been set at 14 days from the date of this determination.)

[22] This is a case where there is no real dispute about the obligations between the parties. It is also one where the applicant has for several months been deprived of the use of significant sums of money. I am satisfied that interest should be awarded in order to put him back in the position he would have been had the terms of settlement been complied with.

[23] I therefore make a further order that the respondent pay interest on the sums set out in paragraph [19] above at the rate of 4% per annum for the period from 23 December 2010 until the date of payment.

Yvonne Oldfield

Member of the Employment Relations Authority

[1] There being no such requirement in Schedule 2 of the [Employment Relations Act 2000](#), unlike the [Employment Court Regulations 2000](#), Reg 11 (1) (f) of which requires a claim of interest to be specifically pleaded.

[2] House v Independent Power NZ Ltd AA 250/04, 10 August 2004.

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