

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

WA 116/10
File Number: 5299028

BETWEEN Leigh Greer
Applicant

AND Pro Parts Palmerston North
Limited
Respondent

Member of Authority: Denis Asher

Representatives: Michelle MacManus for Mr Greer
Mark Gapp for the Company

Investigation Meeting On the papers

Submissions Received Last submission received 1 June 2010

Determination: 28 June 2010

DETERMINATION OF THE AUTHORITY: Compliance Order

The Problem

[1] Mr Greer seeks to resubmit an application for a compliance order enforcing a mediated settlement signed on 12 February 2009.

The Investigation

[2] During a telephone conference on 12 May 2010 the parties agreed to the Authority making a determination on the papers and timelines for filing evidence and submissions.

Background

[3] The background to this employment relationship problem is set out in my determination involving the same parties dated 27 August 2009 (WA 119/09).

[4] As that determination records, by way of a mediated settlement pursuant to s. 149 of the Employment Relations Act 2000 (the Act), the Company agreed to pay Mr Greer the sum of \$4,500 under s. 123 (1) (c) (i) of the Act within 7-days of the agreement, i.e. by 19 February 2009.

[5] Payment was not made by the agreed date. During a number of communications between the parties and with the Authority the Company's representative, Mr Gapp, advised of its cash flow problems and inability to make the payment in full at the time. Mr Gapp advised the Company could only afford weekly payments of \$50. Payments at that rate were initiated from 27 May 2009.

[6] Notwithstanding the Company's acknowledged failure to comply with the mediated settlement, but (in light of limited financial information provided and in the face of Mr Greer's objection) I accepted the respondent's claim that it was not in a financial position to comply. I also found that it made no sense to oblige the respondent to make a payment it could not meet but which might jeopardise its ability to continue trading and pay Mr Greer the monies owed him over a longer period.

[7] With considerable reluctance, I therefore declined the compliance application but reserved leave to Mr Greer to resubmit the same in the event of the Company ceasing making regular, weekly payments of \$50 or in the light of the respondent's demonstrably improved economic circumstances.

[8] In his statement of problem filed on 15 March 2010 Mr Greer advises that, on 20 December 2009, the Company unilaterally reduced the weekly payment to \$30.00. An explanation was sought and the respondent advised that, "*Times are tough and my current staff will be paid first*" (email attachment to statement of problem).

[9] The applicant sought proof of financial difficulties and warned of further Authority action. The Company refused to provide the information sought.

[10] Mr Greer points out that the reduction means it will take an extra 36 weeks for the remaining monies to be paid and fears if he does not take action then at some point in the future payments will cease entirely.

[11] As set out in its statement in reply received on 12 April, the respondent's view is that "*Payments have continued better some than none!*" The respondent also claimed it was downsizing to smaller premises, "*on the edge of our overdraft & can't afford it*" (above).

[12] In submissions dated 18 May Mr Greer challenges the claim of downsizing by producing photographic and city council aerial property search images to illustrate his disbelief.

[13] Mr Gapp responded by email dated 28 May apologising for not meeting the agreed timeline for submission, while also stating that the benefits of the change include the Company's rent remaining unchanged while access and parking have improved, and a proposed sub-leasing will result in a 2/3rds reduction of floor area. He reiterated the respondent's intention to pay the outstanding monies, but says the respondent operates "*with a fairly serious overdraft that was increased about a year ago when the NZ/US dollar dropped and we are still struggling with cash flow, including a time payment agreement with our biggest NZ supplier which is nearly paid off*".

[14] In his final submission emailed on 1 June, Mr Greer acknowledges he is "*not in a position to properly judge the financial position of the respondent ... (and) ... we are prepared to accept the respondent's claim that they intend to rent part of the property*". However, Mr Greer believes the unilateral reduction of the money the respondent undertook to pay of \$20 does little to change its overall bottom line, regardless of its

overall financial position, and no independently verifiable financial records have been provided by the Company. The burden of the loss therefore weighs more on the applicant than the respondent.

[15] Additional costs have been incurred by Mr Greer in seeking compliance a second time. The applicant therefore seeks an order that the remaining sum be paid in full, estimated to be \$2,360 as at 1 June 2010, interest on the arrears totalling \$4570, reimbursement of the \$70 filing fee and costs.

[16] In the alternative Mr Greer believes it is fair and reasonable to seek the reinstatement of the weekly instalments of \$50 (and no less), payment of the arrears of \$570 as at 1 June, interest on that sum, reimbursement of the \$70 filing fee and costs.

Discussion and Findings

[17] I accept Mr Greer's submission, that the burden of loss weighs more on the applicant than the respondent. In the absence of any financial records to support the Company's unilateral reduction of its earlier undertakings, and because of the failure to in any way communicate in advance in respect of its claimed deeper financial difficulties, I am satisfied that it is unreasonable for Mr Greer to face the ongoing uncertainty of this situation given the real possibility of further unilateral reductions by the respondent. This is an issue of good faith: having breached the mediated agreement it entered into, and now the second undertaking it gave regarding payments to the applicant, I am satisfied it is unreasonable to allow the Company any further discretion in this matter. It is time it paid all of the money it owes to Mr Greer and to do so in the near future.

[18] Mr Greer succeeds with his application for a compliance order in respect of the original mediated settlement. The Company is to pay to the applicant within 28 days from the date of this determination the following monies:

- a. \$2,360.00 less any payments made to Mr Greer since 1 June 2010;

- b. Based on the current 90 day bill rate, interest on the outstanding balance as at 30 December 2009 (i.e. the date of the unilateral reduction) to the date of payment of 4.5%;
- c. Reimbursement of the filing fee of \$70.00; and
- d. Costs.

[19] Leave is reserved to the parties to submit the figures in respect of the above in the event agreement is not forthcoming on the same. Subject to parties' submissions, I can indicate that, as this matter was dealt with on the papers, and bearing in mind that costs in respect of WA 119/09 were reserved, costs of \$500.00 would appear appropriate.

Determination

[20] The Company is to pay to the applicant within 28 days from the date of this determination the following monies:

- e. \$2,360.00 less any payments made to Mr Greer since 1 June 2010;
- f. Interest on the outstanding balance as at 1 June 2010 to the date of payment of 4.5%;
- g. Reimbursement of the filing fee of \$70.00; and
- h. Costs.

Denis Asher

Member of the Employment Relations Authority