

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 338/09
5164811

BETWEEN BRIAN HENDRICKSON
 Applicant

AND PROMSCAPE LIMITED
 Respondent

Member of Authority: Yvonne Oldfield

Representatives: Applicant in person
 Jason Gordon, Director, for Respondent

Investigation Meeting: 1 September 2009

Determination: 16 September 2009

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] This employment relationship problem concerns an application for an order for compliance with mediated terms of settlement. My Minute of 1 September (attached) refers.

[2] There is no dispute that the respondent has failed to meet the following term of the settlement agreement dated 15 May 2009:

“(3) The Respondent shall pay to the Applicant \$15000 [sic] gross (fifteen thousand dollars) within (7) days of the date of this agreement, being a compensatory payment under section 123(c) (i) and (ii) of the Employment Relations Act 2000.”

[3] Mr Gordon says that respondent refuses to meet its obligations under the terms of settlement because the applicant had failed to do what the same agreement required

of him. He says that company property returned to the respondent is not in working order.

[4] Mr Gordon has twice undertaken to supply evidence to prove his assertion that the property (source code and computer files) was not in working order. He advised first that he would present this at the investigation meeting on 1 September. When he failed to do so, he was given a further opportunity, pursuant to directions set out in the Minute of 1 September 2009. However the directions have not been complied with and the respondent has made no contact with the Authority since 1 September 2009.

[5] Since Mr Gordon has supplied no further evidence to the Authority, and has failed to communicate further with the Authority, I must now proceed to make a determination on the evidence I have.

[6] The terms of settlement required Mr Hendrickson to supply to the Respondent:

“...Promscape Limited source code including all functionality up until and including the 19th of September 2008. This includes but is not limited to, daily accruals, accruals balances and claims functionality.”

[7] Mr Gordon told me that the purpose of the clause was not just to recover property but to salvage something of use to the respondent. Both parties agree that Mr Hendrickson returned the material to the respondent as he was required to do, however Mr Gordon says that it turned out to be unusable and that a subsequent contractor could do nothing with it.

[8] Mr Hendrickson noted that the material which had been returned was a work in progress and should not be expected to be fully functional. However he told me he tested the material before handing it over and it was fine. He also said that back-up records of slightly earlier versions (which were also returned) should also have worked. He said that Mr Gordon had never told him that the material did not work and that if he were given an opportunity to talk to the new contractor, he was confident that he could assist in fixing any problem that existed. For example he said that the respondent or the contractor might not be using the correct software with the material.

[9] Mr Gordon did not know personally what was wrong with the material and had advised that he would provide a statement from the current contractor to explain this. It is this statement (which he has referred to as a technical report) which has not been forthcoming.

[10] On the evidence I have I cannot be satisfied that Mr Hendrickson has failed to do what was required of him by the terms of settlement. There is no basis for me to set aside the terms of settlement. Mr Hendrickson is entitled to his compliance order.

[11] I therefore order that the respondent complies with clause (3) of the terms of settlement, by payment to the applicant of the sum of \$15,000.00, and further that it does so within a period of seven days from the date of this determination.

Yvonne Oldfield

Member of the Employment Relations Authority

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AND PROMSCAPE LIMITED

Member of Authority: Yvonne Oldfield

Representatives: Applicant in person
 Jason Gordon, director, for respondent

Date: 1 September 2009

MEMBER'S MINUTE

This employment relationship problem concerns an application for compliance with mediated terms of settlement.

Mr Gordon has declined to pay the settlement sum because he says Mr Hendrickson has failed to return certain company property in working order. Mr Hendrickson denies this assertion and maintains that he supplied source code and files, on CD, to the respondent as required by the Terms of Settlement. He says this material was a work in progress which may have required some further development, but was usable.

Mr Gordon had advised, in his statement in reply, that he planned to table a technical report from the contractor who had attempted (unsuccessfully) to work with the

materials Mr Hendrickson supplied. He said this report would detail what was wrong with them.

The report has not eventuated. I require it before completing my investigation into the application for compliance. As previously advised to the parties I therefore make the following directions:

1. The respondent has a period of 14 days in which to supply, to the Authority and to Mr Hendrickson, a statement setting out a summary of the technical issues it has with the material provided pursuant to the Terms of Settlement;
2. Upon receipt of that, Mr Hendrickson has a further 14 days in which to respond;
3. If the issues between the parties have not thus been able to be resolved, the Authority will convene a further investigation meeting and will, as necessary, take evidence by telephone conference from the author of the technical report.

Yvonne Oldfield

Member of the Employment Relations Authority