

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Cameron Jones (Applicant)
AND James McGlone (Respondent)
REPRESENTATIVES Christine Jones for applicant
James McGlone in person for Respondent
MEMBER OF AUTHORITY Janet Scott
INVESTIGATION MEETING 6 September 2005
DATE OF DETERMINATION 23 September 2005

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

The applicant seeks an order from the Authority requiring the respondent to comply with the terms of a s. 150 Decision by Authority of the Parties. He also seeks interest and costs in the matter.

Background

On 2 April 2003 Cameron Jones filed an application to recover arrears of wages alleged to be owed to him.

On 29 October the Authority directed the matter to mediation and on 9 March 2004 the problem between the parties was resolved by decision of a mediator pursuant to s.150 of the Employment Relations Act 2000. That decision provided that Mr McGlone was to pay the applicant the sum of \$800 net within 14 days of the date of the decision (14 March 2004).

On 18 May Mr Jones advised the Authority that his problem had been resolved and he was withdrawing his application in the Authority.

However, the respondent has not complied with the decision of the mediator.

On 4 April the applicant filed in the Authority seeking an order directing the respondent to comply with the mediator's decision.

There have been numerous attempts by members of the Mediation Service and the Authority to encourage voluntary compliance with the mediator's decision. All attempts have been unsuccessful. Eventually the matter was set down for a hearing in Keri Keri on 6 September 2005.

Matters going to and Order for Compliance

Section 150 of the Act provides that the parties to a problem may agree in writing to confer on a mediator the power to decide the matters in issue.

Before making and signing a decision pursuant to this section the mediator must explain the provisions of s.150 (3) and be satisfied that knowing the effect of that subsection, the parties affirm their decision. The effect of a s.150 decision is that it is final and binding and enforceable by the parties and except for enforcement purposes no party may seek to bring that decision before the Authority or Court whether by action, appeal, application for review or otherwise.

Clearly, the provisions of s.150 allow the matter to be brought before the Authority for enforcement purposes.

In the process of considering this application I have turned my mind to the question as to whether or not the mediator's decision complied with the provisions of s.150 under which it was made. I have therefore enquired if the agreement to empower the mediator to decide the matter was given in writing in accordance with s.150 of the Act. I have also enquired as to the mediator's compliance with the provisions of s.150 (2) of the Act i.e. that before making and signing the decision she explained the effect of s.150 (3) and that the parties knowing the effect of that subsection affirmed their request that she make a decision in the matter.

My investigation into these matters revealed that the signed consent of the parties to a mediator's decision has been lost.

I therefore requested that the mediator in question swear an affidavit addressing the matters set out as above. I also asked that the mediator address a concern raised by the respondent that he had signed the consent to a mediator's decision under duress. That affidavit was signed by the mediator on 1 September and forwarded to the Authority. The Authority forwarded it to the parties prior to the Investigation Meeting held on 6 September.

Mediator's Affidavit

In her affidavit the mediator stated:

- She had held separate telephone conversations with the parties.
- She asked both parties if they would like her to decide the matter. She advised them that they needed to agree in writing to confer on her the power to make a decision in the matter.
- She advised that the Mediation Service has a standard consent form it uses in such situations which sets out the effect of s. 150 (2)&(3) and it is her practice to go through the effect of those subsections with the parties before they sign the form. She stated specifically that she explained the effect of s.150 (3) of the Act to the parties and they both affirmed their agreement to have her decide the matter. Accordingly she sent them the consent forms which were signed and returned by the parties. She confirmed she had been unable to locate the forms.

- After she received the written consent forms from the parties she proceeded to make a decision pursuant to s.150 of the Act.
- She was satisfied there was nothing about her conduct (all discussions with the parties were by telephone) which could be interpreted as applying inappropriate influence on the parties to obtain their consent to a s.150 decision.

Investigation Meeting

The meeting took place on the morning of 6 September 2005 in Keri Keri.

Mr McGlone was under the mistaken impression the meeting was convened to address the substantive question as to whether wages were owed to Mr Jones and if so how much. It was explained that the meeting was to address the compliance application filed by the applicant and that all the correspondence and discussions between the parties and the Authority leading up to the meeting had proceeded on that basis. After referring to the Notice of Investigation Meeting in his possession Mr McGlone accepted the purpose of the meeting was to address the compliance application.

The applicant was represented at the hearing by his mother Christine Jones. She confirmed that the sum specified in the mediator's decision has not been paid to the applicant. This is not disputed by the respondent.

Both parties were provided with the opportunity to address the mediator's affidavit. Neither party took issue with that affidavit. To his credit Mr McGlone explained his reference to "duress" meant "economic duress" i.e. that attendance at mediation would have put him at an economic disadvantage in terms of lost earnings. He was not submitting that unreasonable pressure had been put on him to secure his consent to the s.150 decision.

Mrs Jones for the applicant now seeks to have the s.150 decision enforced. She also seeks interest and costs in the matter.

Mr McGlone says he will pay \$422 net he accepts he owes the applicant but he will go to jail rather than pay the \$800 directed by the mediator in her decision.

Note: Because the respondent is implacably opposed to complying with the mediator's decision I referred the matter back to mediation in an attempt to have the matter resolved by agreement. The Chief Mediator has now informed me that he has been unable to achieve a resolution in the matter.

Determination

The matter must now be determined. I am satisfied that all the requirements of s.150 were met by the mediator prior to making and signing the decision made. The respondent has given no reason for not complying with the mediator's decision other than the fact he does not agree with it as being unfair. He submits the applicant is not owed \$800 in arrears of wages. Having agreed to the mediator's making a decision in the matter this is not an acceptable basis for non compliance

The decision is enforceable pursuant s. 137 (c) and s151 of the Act and I now direct the respondent pursuant to those sections to make *immediate* payment to the applicant in the sum of \$800 net. Further, pursuant to Cl. 11 of the Second Schedule to the Act Power to Award Interest I order that

interest at the rate of 9% per annum is payable on this sum from the date of this determination until the date the order is satisfied.

The respondent is also directed to pay to the applicant the sum of \$70 to reimburse him for the cost of his filing fee in bringing the application to the Authority.

Janet Scott
Member of Employment Relations Authority