

Determination Number: WA 100/05

File Number: WEA 404/04

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON OFFICE**

BETWEEN	Mark Keatch & Phillip Sanders (applicants)
AND	Wellington Demolition Limited (respondent)
REPRESENTATIVES	Ian Hard for the applicants No appearance by or for the respondent
MEMBER OF THE AUTHORITY	Denis Asher
INVESTIGATION MEETING	Wellington, 14 June 2005
DATE OF DETERMINATION	14 June 2005

ORAL DETERMINATION OF AUTHORITY: Compliance

Employment Relationship Problem: Background

1. In an earlier determination (WA 127/03 dated 5 September 2003) I found in favour of the applicants' claims that they had been unjustifiably constructively dismissed by the Company and that it had unlawfully withheld wages and holiday pay owed to them. The Company was directed to pay compensation for humiliation, etc to the

applicants, the wages owed to them and to pay the sum illegally deducted from their final wage calculation. Costs were reserved.

2. In a subsequent determination (WA 23/04 dated 27 February 2004) I found against the Company's application to reopen the original investigation.

Compliance Application

3. In an application filed on 5 November 2004 the applicants asked the Authority to direct the respondent to place funds in the name of the Company and pay to them the amounts specified in determination WA 127/03 and costs.
4. The Company has never filed a statement in reply.
5. The parties have never undertaken mediation in respect of this latest employment relationship problem: I elected not to direct them to mediation on the ground it would not contribute constructively to resolving the matter – s. 159(1) (b) (i) of the Act applied.
6. In an affidavit filed in the Authority on 11 May 2005 the applicants confirmed that a copy of their application for a compliance order had been served on the Company by personally handing to one of its directors, Mr Brian Gray, a copy of the same.

Investigation Set Down

7. I directed that an investigation into this matter be set down for Tuesday 14 June 2005: s. 173(2) of the Act applied. Appropriate notice of the investigation dated 17 May was forwarded to the Company.

Company's Response

8. By way of a telephone call on 25 May Mr Gray advised an Authority support officer that he would not be attending the investigation as he had had a stroke. Mr Gray was asked to provide a medical certificate. By way of a fax received on the same day another Company director, Marlene Gray, advised that neither she nor Brian Gray

could attend the investigation as a result of Mr Gray's "*debilitating stroke*". Attached to the fax was a copy of a medical certificate confirming the detail of Mr Gray's stroke. It said he was confined to home with constant family support required. For those reasons Mr Gray was physically unable to attend (an investigation).

9. On 10 June, and in separate proceedings, my colleague, Gregory Wood, issued an oral determination in respect of an applicant and, as respondent, Wellington Demolition (2002) Limited. Brian and Marlene Gray are registered directors of that second Company. While represented by counsel, no witnesses attended on that Company's behalf. No explanation was made available despite its counsel confirming his expectation that the two directors would attend. Mr Wood noted that the non-attendance of the directors appeared consistent with the fact that the respondent had failed to attend mediation twice and did not provide a statement in reply until the day before the investigation.
10. By way of a search undertaken on 13 June I confirmed that Wellington Demolition Limited was still listed in the NZ Companies Office as a registered entity. At my direction an Authority support officer telephoned Mr Gray to confirm the investigation was still proceeding: he confirmed he would not be attending and that the applicants were "*not going to get*" the monies awarded them in the earlier determination.
11. By fax on the same day Marlene Gray advised that neither she nor Brian Gray would be attending the investigation. Another copy of the 25 May medical certificate was provided. Ms Gray also advised that "*our lawyer is in Christchurch on another case*".

Decision to Proceed

12. Notwithstanding the advice from Brian and Marlene Gray I elected to proceed to investigate this matter for the following reasons:
13. There has been a sustained pattern of failure to co-operate by the Company throughout the history of this employment relationship problem (refer to WA 23/04).
14. While reliance is placed on Mr Gray's medical certificate for his non-attendance in today's investigation, his counsel advised in respect of a separate investigation

convened as recently as 10 June that he was expected to be present (but in fact did not do so). No reason was advanced to account for this apparent inconsistency. No reasons have ever been advanced for Ms Gray's failure to participate. No explanation has been offered for its failure to provide a statement in reply. Finally, notwithstanding the considerable notice it enjoyed, the Company did not advise until the day before the investigation that it was legally represented but its counsel was committed elsewhere on the day of the investigation: s 173 and Clause 12 of Schedule 2 of the Act applied.

Discussion and Findings

15. There is no evidence or argument before the Authority with which to withstand the applicants' legitimate application for compliance with the original determination.
16. I draw to the respondent's attention that its failure to comply with this direction can result in the matter being referred to the Employment Court and that it faces fines and sequestration of property should it continue to fail to meet its obligations.

Determination

17. For the reason set out above I find in favour of the application by Mark Keatch and Phillip Sanders that the respondent, Wellington Demolition Limited, be directed to comply with the decisions set out in the Authority's determination WA 127/03 dated 5 September 2003, and direct that they do so no later than close of business on Tuesday 28 June 2005.
18. Costs are reserved.

Denis Asher
Member of Employment Relations Authority