

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 135/09
5150475

BETWEEN JESSICA OLIVER
 Applicant

AND LEAMINGTON
 HOSPITALITY LIMITED
 Respondent

Member of Authority: R A Monaghan

Representatives: M Swarbrick, counsel for applicant
 R Murray, advocate for respondent

Investigation Meeting: 27 March 2009 at Hamilton

Determination: 30 April 2009

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Jessica Oliver seeks an order under s 151 and 137 of the Employment Relations Act 2000 that Leamington Hospitality Limited (“LHL”) comply with the terms of a settlement recorded under s 149 of the Act.

[2] She also seeks a penalty under s 149(4) for the failure to comply with the terms of settlement.

The terms of settlement

[3] Although the settlement contained a provision regarding confidentiality, it is necessary for the purposes of this determination to refer in detail to one of the other provisions. The terms of settlement provided at clause 2:

“The employer will pay, within 21 days of the terms of settlement being approved by a mediator, the compensatory sum of \$5,000 in terms of s 123(1)(c)(i) of the Employment Relations Act 2000.

[4] The parties signed the settlement on 19 November 2008. The mediator signed the settlement, and accompanying certification of the matters required under s 149, on 24 November 2008. Accordingly payment was to be made on or before 15 December 2008. No payment was received.

[5] When Ms Oliver’s solicitors enquired about the matter with LHL’s solicitors in a message dated 16 December 2008, the response was that the company was insolvent. Mr Murray, the company’s director and a shareholder as trustee for a family trust, was offering to make a payment of \$2,500 to settle the matter.

[6] Ms Oliver rejected that offer and no payment has been made. Accordingly Ms Oliver seeks an order for payment for the agreed sum in full.

Order for compliance

[7] No statement in reply was filed. In response to several approaches from the Authority the company’s solicitors simply advised they were seeking instructions. They provided no other information and no other response. If they were unable to obtain instructions, and were not proposing to file a statement in reply or attend the investigation meeting on behalf of their client, the Authority should have been advised of this. It would then have contacted Mr Murray directly regarding these matters.

[8] Mr Murray attended the meeting but was unprepared. However he explained that, although he believed at the time of entry into the settlement that funds would be available to make the agreed payment, it subsequently transpired that was not the case.

[9] For the purposes of the request for a compliance order, there is no doubt that an agreed term of the settlement has been breached.

[10] LHL is therefore ordered to comply with the terms of the mediated settlement by paying to Ms Oliver the sum of \$5,000. Payment is to be made within 5 working days of the date of this determination.

Interest

[11] Interest is to be paid on the above sum at the rate of 3.2% calculated from 15 December 2008 to the date of payment.

Penalty

[12] Further to the request for a penalty for the failure to comply with the terms of settlement Mr Murray explained further that, at the time, the funds were to be released from the value of the stock on hand. A stock take was conducted in November 2008, revealing that there was less stock than Mr Murray had believed. Some of the stock was sold to a wholesaler, and some was sold at a discount during the company's own closing-down sale. A small amount of stock remains but the company is not trading, has minimal funds, and has yet to clear its creditors.

[13] Mr Murray produced no evidence in support of these assertions beyond bank statements for one account for the period December 2008 – February 2009. He has since provided further information. I have asked the applicant whether she wishes to make any further comment on the material, and have received no reply. If the answer was 'no', then a prompt indication of that would have assisted the earlier issuing of this determination.

[14] I comment in general that the Employment Relations Act includes provisions encouraging the parties to employment relationship problems to resolve them between themselves. The failure of a party to honour the terms of any resulting settlement is a serious matter.

[15] The additional information Mr Murray provided indicates: there have been wider difficulties with the accounts for his business interests and in turn in identifying the true financial position; that either he personally or his business interests have tax liabilities and unpaid accounts including solicitors' accounts; that he has advanced a

reasonably significant sum as shareholder's capital to LHL (although he says he is no longer able to do so); there is a minimal amount of stock remaining; cash flow for the year April 2007 – March 2008 is negative and there are not sufficient funds in the bank account to meet the payment.

[16] The failure to pay was not deliberate or wilful. However there was a failure to comply with the terms of settlement, and it is appropriate to impose a penalty. I take the company's circumstances into account and order it to pay a penalty of \$1,000. Penalties are payable to the crown in the absence of any order to different effect, and should be paid into the Authority.

Summary of orders

[17] LHL is ordered to pay to Ms Oliver:

- a. \$5,000 in compliance with the terms of settlement; and
- b. Interest on the above at the rate of 3.2% calculated from 15 December 2008 to the date of payment.

[18] LHL is ordered to pay a penalty of \$1,000.

Costs

[19] The company is ordered to pay costs of \$70 in respect of the filing fee in the Authority.

[20] In all other respects costs are reserved. If any further order is sought a memorandum is to be filed in respect of the matter within 28 days of the date of this determination. The other party shall have another 14 days in which to respond. If no memorandum is received within this time there will be no further order for costs.

R A Monaghan

Member of the Employment Relations Authority