IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

CA 224/10
5281302

	BETWEEN	GEOFFREY PECK Applicant
	A N D	SYFT TECHNOLOGIES LIMITED Respondent

Member of Authority:	James Crichton
Representatives:	Paul Cowey, Counsel for applicant Glen Ryan, Counsel for respondent
Investigation Meeting:	18 November 2010 at Christchurch
Date of Determination:	6 December 2010

INTERIM DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] By statement of problem dated 10 September 2010, the applicant (Mr Peck) complains about the process used by the respondent (Syft) to make him redundant. Compensation, penalties, interest and costs are sought but in addition, Mr Peck seeks other payments which derive from his understanding of his redundancy entitlement.

[2] Syft resists the bulk of Mr Peck's claims but does acknowledge some of his contentions.

[3] The substantive matters have been set down for hearing in January 2011.

[4] For present purposes, this determination is concerned exclusively with an aspect of the substantive claim. As I noted above, Syft accepts some of Mr Peck's contentions. In particular, Syft acknowledged in its statement in reply filed in the Authority on 28 September 2010 that it did not dispute that a redundancy payment

equivalent to one month's salary for each year or part year of service was due and owing to Mr Peck. The total amount of that claim is $116,667.

[5] It is apparent on the evidence before the Authority that that sum has been reduced by part payments each of $3,000 per week such that to date approximately 50% of that sum has been paid.

[6] In the course of the wider proceedings, by memorandum dated 8 November 2010, Mr Peck applied to the Authority for a compliance order under s.137 of the Employment Relations Act 2000 (the Act) requiring Syft to pay the balance of the undisputed redundancy entitlement to Mr Peck within 14 days and that interest also be paid on that overdue sum.

[7] On that same date, 8 November 2010, I convened a telephone conference with counsel and, amongst other things, agreed to deal on an urgent basis with the 8 November 2010 memorandum and its appropriate response from Syft. An investigation meeting was set down for 18 November 2010 at which counsel argued the matter before the Authority.

The application

[8] Mr Peck says quite simply that he was owed redundancy compensation on and from 26 May 2009 but that for various specious reasons, no payment at all was made until August 2010 when Syft commenced making payments of $3,000 per week.

[9] Mr Peck alleges that Syft's behaviour throughout has been unilateral and that the practical reality is that it can stop making the payments as readily as it started them.

Syft's response

[10] Broadly, Syft acknowledges the factual matrix advanced by Mr Peck, although it denies that its behaviour has been unilateral and/or arbitrary. Its position is that the parties' counsel have been in negotiation over outstanding matters for some little time and that all of the steps that Syft has taken in the matter have been signalled counsel-to-counsel. In any event, the short point is that Syft acknowledges there is a sum certain which is owed, acknowledges that it is being paid at the rate of $3,000 per

week, acknowledges that those payments commenced in August 2010 but indicates its intention to persevere with those payments until the debt is extinguished.

[11] In response to Mr Peck's specific application for compliance, Syft resists that application principally on the footing that its existing cashflow does not allow of any better resolution of this part of the employment relationship problem than is presently being offered.

[12] Syft says that even if the Authority was minded to grant the compliance order, it is in no better position to make payment in full after the granting of the compliance order than it would have been before the compliance order was granted. Its position, essentially, is that it is doing its best to fulfil its commercial obligations and no amount of pressure, whether legal or otherwise, from Mr Peck will improve the financial position of the company.

[13] Furthermore, Syft says that the effect of the granting of a compliance order will be to further sour relations between the parties and that as both a mediation and an investigation meeting on all the issues have been scheduled, the relief sought, which is discretionary, ought not to be granted.

Discussion

[14] There is argument between the parties as to whether Syft is in fact unable to do better than it currently is with the payments to Mr Peck. Syft put into evidence a copy of the last company annual report. This is for the period to 31 March 2010. It discloses an improvement in Syft's trading position from a $4.8m loss in the previous financial year to a $2.9m loss in the year under review. The annual report refers to a reduction in staff of around 20% and continuing cashflow problems. None of the directors have received fees for their contribution during the year under review save for a payment made to one of the directors who effectively took over the role formally occupied by Mr Peck, but in an acting capacity.

[15] Counsel for Mr Peck urged on me the proposition that the accounts actually disclose quite adequate financial reserves which, it is suggested, would justify the conclusion that the balance of Mr Peck's entitlement could be met in full without placing undue strain on the company's cashflow.

[16] It is clear law that a compliance order, once made, must be adhered to strictly. It is an order of the Authority and must be followed absolutely as to its terms: *New Zealand Railways Corporation v. New Zealand Seamen's Union IUW* [1989] 2 NZILR 613 per Chief Judge Goddard.

[17] Furthermore, the Courts have traditionally been cautious about the granting of compliance orders in circumstances where alternative remedies exist. In *Wellington District Hotels etc IUW v. Byfield Stud Ltd* [1988] NZILR 487, the Labour Court stated the general principle that: *Compliance orders should not be used to determine an issue that should be subject to or is subject to other proceedings*. This of course is precisely the situation in the present case where there is a personal grievance on foot, a substantive hearing set down in the short future, and mediation on all issues to take place prior to that substantive hearing.

[18] In *New Zealand Distribution etc Union v. Mildon* [1989] 3 NZILR 20, Chief Judge Goddard dealt inter alia with an application by the Union to recover membership fees from Mr Mildon, a person covered by the membership rule of the Union. His Honour rejected the Union's application for a compliance order against Mr Mildon on the footing that Mr Mildon had not resigned or indeed threatened to resign from the Union, and that in effect the Union was simply using the Court as a debt collector. His Honour had this to say:

> *In these circumstances, it is quite clear that the claim for … the application for a compliance order (does) not even get off the ground. This is no more than a debt collecting action which has no place in this Court. Other Courts have jurisdiction to deal with matters such as this … It is an improper use of the procedure of this Court to employ it for the purpose of recovering … unpaid subscriptions. That is not to say that such subscriptions may not be payable and recoverable elsewhere. I hope that I have explained the position clearly and that I do not have to explain it ever again. This Court is not to be used as a vehicle for debt collecting.*

[19] More contemporaneously, the present Chief Judge, His Honour Chief Judge Colgan, noted in *Tawhiwhirangi v. The Chief Executive of the Department of Corrections* (WC22/07, 14 September 2007):

> *Employment relationship problems should be solved by following good faith provisions of communication, exchanges of information, and fair dealing for and by both employer and employee. The Act assumes that good ongoing employment relationships will be enhanced by the application of these principles and that philosophy should guide any future dealings between the parties in this case.*

[20] In essence, His Honour's observations point up the difference in employment relationships that the imposition of the statutory obligation of good faith brings to the mix. Clearly, in the particular circumstances of this case, as I have already noted, a substantive hearing is imminent and mediation on all issues, including the one dealt with in this determination, is in prospect.

[21] Again, it is clear law that an application for a compliance order may be refused in the Authority's discretion as being *premature* (see for instance *New Zealand Airline Pilots' Association IUOW v. Labour Court and Air New Zealand Ltd* [1986] NZILR 16, 78) and it is equally clear from the decision of Nicholson J in *Auckland Dental Technicians' IUOW v. Dr L Fergus Taylor* [1988] NZILR 867 that the compliance order procedure is not to be used as a substitute for the procedure contained in s.131 of the Act.

[22] Having reflected on the factual position in the present case and studied the relevant case law, I conclude that in this case, the Authority ought to be cautious about exercising its discretion to grant a compliance order and ought to be similarly cautious about any attempt to go further than is absolutely necessary to protect the parties' relative positions given the forthcoming mediation and investigation meeting.

[23] As to the first of those two issues, I am satisfied that, in the particular circumstances of the case, the Authority ought not to grant a compliance order at all. The remedies for breach are potentially draconian and there is a strong line of authority suggesting that where an alternative statutory remedy is available, it should be preferred. Furthermore, the emphasis placed on the good faith obligation by Chief Judge Colgan in *Tawhiwhirangi* properly highlights the need for the parties to continue to deal respectfully with each other and in particular to place trust and confidence in information provided by one to the other.

[24] Having determined that a compliance order with its potentially draconian remedies is not an appropriate exercise of the Authority's discretion, I do observe that were a compliance order to be contemplated by the Authority in the present circumstances, it would have been a compliance order relying upon the powers in the Act at s.138(4A) conferring the power to grant compliance orders in instalments.

[25] Having said that, I am satisfied the proper course of action for the Authority is to grant an alternative order under s.131 of the Act, again in like terms to the section

just referred to, making reliance on the power to order payment of wages by instalments. In all the circumstances, while not prepared to use the Authority's discretion to grant a compliance order, it seems to me appropriate to grant the applicant an order under s.131(1A) that Syft does indeed owe Mr Peck the redundancy compensation sum previously identified but that having accepted Syft's evidence that it is experiencing financial difficulty, repayment of the redundancy compensation due and owing is to continue at the rate of $3,000 per week pending the disposition of this whole matter by the Authority.

Determination

[26] For reasons which I have just made clear, I decline to order a compliance order but I do accept Mr Peck's claim that arrears of wages by way of redundancy compensation are due and owing to him and have been due and owing to him since 26 May 2009, that only a portion of his entitlement has been paid and that to facilitate the maintenance of the instalment payments currently being undertaken by Syft, Mr Peck is to continue to receive payments of $3,000 per week from Syft pending the disposition of the whole employment relationship problem by the Authority.

[27] For the avoidance of doubt, I am satisfied that Syft has cash-flow problems. Despite efforts to persuade me other wise, I accept the evidence of Syft's annual report at face value.

[28] A compliance order remedy would in my judgement go further to protect the applicant's legitimate interests than is absolutely necessary. It is a discretionary remedy. There is ample authority for the view that a compliance order should not be granted when other remedies are available, that it should not be granted in a debt collection situation, or where an arrears order can be made under Section 131 of the Act. Most importantly, the imminent mediation and Authority hearing on the whole employment relationship problem should be able to proceed without a portion of the dispute in effect "sealed off".

[29] I am satisfied the proper course is for the Authority to protect the relative positions of the parties such that the status quo is maintained while the dispute resolution system provided by law, is engaged.

Costs

[30] Costs are reserved.

James Crichton
Member of the Employment Relations Authority