

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON OFFICE**

BETWEEN	Richard Rewaita (applicant)
AND	Lyn Walkinshaw t/a Tobias Contracting Limited (respondent)
REPRESENTATIVES	The parties represented themselves
MEMBER OF THE AUTHORITY	Denis Asher
INVESTIGATION	Wellington, 6 March 2007
DATE OF DETERMINATION	13 April 2007

DETERMINATION OF AUTHORITY: Compliance

Employment Relationship Problem

1. In his statement of problem filed on 27 September 2006 Mr Rewaita said he was owed unpaid wages and reimbursement of work expenses. He subsequently claimed the \$70 filing fee.
2. In his statement of reply filed on 2 November Mr Walkinshaw said the applicant resigned his employment, took a work van and said he would not return it until he was paid. The respondent also claimed he was charging the applicant with theft and attempted fraud.
3. The parties were directed to mediation but in fact did not attend.

4. During a telephone conference call on 26 February 2007 the parties agreed to a one day investigation on 6 March. I was satisfied from that conference call that there was no merit in attempting to enforce the direction that the parties undertake mediation: s. 159 (b) (i) of the Act applied.

Settlement Reached

5. During the investigation on 6 March the parties advised they had arrived at a settlement and asked that the Authority record their settlement as a consent determination: I agreed to that request. The agreed terms of settlement are:
 1. *This is a full and final settlement of all employment related claims the parties have or in the future may have against each other.*
 2. On Wednesday 21 March 2007, at 10.30 a.m. at the Employment Relations Authority, level 9 Vogel Building, 8 Aitken Street, Wellington, the respondent will pay to the applicant wages of \$400 (four hundred dollars) nett, and the applicant will – at the same time – sign off papers confirming his employment on a Work & Income work scheme.
 3. The parties ask that the Authority record this agreed terms of settlement as a consent determination.

Signed by

(signature)

Richard Rewaita (applicant)

(signature)

Lyn Walkinshaw (respondent)

Dated at Wellington this 6th day of March 2007

6. As is apparent from the above, Mr Walkinshaw accepted personal liability for the payment to Mr Rewaita.
7. The parties left with copies of their signed, agreed settlement.
8. As it happened, the parties did not meet in Wellington on 21 March: that was as a direct result of Mr Walkinshaw's non-attendance. He did, however, advise Authority support

staff he would attend the following day, 22 March, and drop off a cheque for Mr Rewaita. As it happened, he did neither.

9. Authority support staff then forwarded to Mr Walkinshaw a fax on 22 March. It confirmed his assurance that he would drop off a cheque for the applicant on that day. It also recorded that three voicemail messages had been left in an attempt to contact the respondent, but that he had not replied despite his telephoned promise he would ring that morning and that he would also be in between 12 and 1.00 p.m. that day, 22 March. The fax communication warned Mr Walkinshaw his failure to make payment could result in compliance action and penalties against him.
10. An email was received the next day from "tobias [walkser@clear.net.nz]", signed off by "Rachael". At the investigation meeting on 6 March a Rachael was introduced to the Authority as Mr Walkinshaw's wife or partner. The email reads verbatim as follows: "Lyn had minor surgery 22 March and this was an over sight he will be abl to drive on Monday 26 march and will be in your office at 10.30 With Richards money. Sorry about this."
11. Mr Walkinshaw did not attend the Authority's office on Monday 26 March, whereas Mr Rewaita was present. No explanation was received then or subsequently for these repeated broken undertakings or for the respondent's failure to comply with the agreed settlement.
12. On that day, Monday 26 March Mr Rewaita asked the Authority to proceed to enforce compliance of the settlement by application of s. 138 (1) (a) of the Act.
13. By email on the same day, the following advice was forwarded to Mr Walkinshaw:

Good morning Lyn,

Denis Asher, Authority member, has asked me to forward the following to you: as per Rachel's (sic) email of Friday 23 March 2007, both Denis and Richard were expecting you this morning at 10.30 a.m., so as to settle the matter you entered into with Richard on 6 March (I attach a copy of the consent determination and the agreed terms of settlement, signed copies of which you already have). You did not appear. No explanation has been provided for your absence. The money you agreed to pay to Richard has not, he says, been paid. My effort to contact you on your mobile phone was unsuccessful; I did leave a message asking you to call me.

Denis has therefore agreed to Richard's request that he, Denis, apply s. 138 (1) (a) of the Act. That section allows the Authority, on its own motion, to apply the provisions of s. 137 (2) of the Act, i.e. that part of the Act that requires parties to comply with – in this case – your settlement agreement.

Consistent with that initiative and natural justice you have until Thursday 4 April 2007 to appear or be represented before the Authority or provide submissions to the Authority in respect of Richard's application that you be required to comply with the settlement agreement.

Should these proceedings result in a compliance order and should you ignore the same, I draw your attention to s. 140 (6) of the Act which permits the Employment Court to order a person in default to be sentenced to up to 3 months, fined up to \$40,000 and sequester (take) their property. In other words, serious penalties can be applied to those who, having entered into an agreement, then refuse to honour that agreement.

Please advise me as soon as possible if you wish to appear before the Authority or provide written submissions to it in respect of this compliance matter.

I am copying this advice to Richard.

Carla Marsden
(Authority Senior Support Officer)

14. No reply has been received to that advice.

Discussion and Findings

15. I have no doubt that Mr Walkinshaw is well aware of not only the terms of the agreed settlement, but also of his own persistent failure to comply with the settlement. I reach these conclusions because I am satisfied that Mr Walkinshaw participated fully and intelligently in the process leading up to the agreed settlement and that he then gave Authority support staff clear advice of his intention to comply with the settlement (i.e. his telephoned assurance), but which he failed to deliver on.
16. I am similarly confident Mr Walkinshaw is well aware of the Authority's advice of Monday 26 March. I reach this conclusion because I am satisfied that the respondent's "tobias" email address is a reliable method of communicating with Mr Walkinshaw, it having been used from shortly after Mr Rewaita's statement of problem was filed, and by or on behalf of the respondent to the Authority, on a number of occasions.
17. Regrettably, I am obliged to conclude that Mr Walkinshaw's non-compliance is consistent with his overall non-cooperative conduct, including his apparent reluctance to undertake mediation, his repeated failures to respond to telephone messages from Authority support staff, his delay in filing a statement in reply and his broken promises following his initial non-compliance in paying Mr Rewaita, as agreed, \$400 on 21 March 2007.

18. Section 138 (1) (a) allows the Authority to issue a compliance order on its own motion and, consistent with the above, I now take that step in respect of the record of settlement entered into between the parties dated 6 March 2007.

Order

19. I order Mr Walkinshaw to pay to Mr Rewaita \$400 (four hundred dollars) by close of business on Monday 30 April 2007.
20. I repeat here the earlier advice to Mr Walkinshaw, that refusal to comply with this order can result in imprisonment for a term not exceeding 3 months, a fine not exceeding \$40,000 and an order for the sequestration of his property.
21. Costs are reserved.

Denis Asher
Member of Employment Relations Authority