

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2016] NZERA Christchurch 140
5629244

BETWEEN ALIVIA SHERWOOD
Applicant
A N D MUMBLES CAFE (2014)
LIMITED
Respondent

Member of Authority: Helen Doyle
Representatives: Alivia Sherwood in person
Cheryl Murray, Advocate for Respondent
Investigation Meeting: Telephone conference on 10 August 2016 and further
information received from the applicant on 11 August
2016
Date of Determination: 22 August 2016

**COMPLIANCE DETERMINATION OF
THE EMPLOYMENT RELATIONS AUTHORITY**

- A I order that Mumbles Cafe (2014) Limited comply with the record of settlement it entered into with Alivia Sherwood and pay to her in terms of clause 3 the sum of \$380.00 being the balance due and payable of the sum set out in clause 2 within 14 days of the date of this determination.**
- B If payment of the sum of \$380.00 is made then Alivia Sherwood does not seek reimbursement of her filing fee. In the event payment is not made leave is reserved for her to return to the Authority about reimbursement of the filing fee in addition to the outstanding sum of \$380.00.**

Employment relationship problem

[1] Alivia Sherwood has applied to the Authority for an order requiring Mumbles Cafe (2014) Limited (Mumbles Cafe) to comply with a record of settlement under s 149 of the Employment Relations Act 2000 (the Act) dated on or about 5 May 2016.

[2] The record of settlement was signed by a mediator employed to provide mediation services by the Ministry of Business, Innovation and Employment (MBIE) pursuant to s 149(1) and (3) of the Act in May 2016.

[3] The mediator certified that the parties understood and accepted that the settlement agreement was binding and enforceable and that the parties had advised that no minimum statutory entitlements had been foregone in reaching the settlement.

[4] Two of the agreed terms of settlement are relevant for this matter. The first is set out in clause 2 and provides:

Mumbles will pay Alivia the compensatory sum of \$500.00 in terms of section 123(1) (c) (i) of the Employment Relations Act 2000. This amount will be paid to Alivia by way of direct credit of 25 weekly payments of \$20.00 to Alivia's nominated bank account at WBC. The first such payment being due and payable on the 12 May 2016 and weekly on a Thursday thereafter.

[5] The second is set out in clause 3 and provides as follows:

If any payment shall not be made on due date or within 2 working days thereof the balance of the sum then due and owing will immediately become due and payable.

[6] Ms Sherwood resides in Australia. She signed and dated her statement of problem on 26 May 2016. It was received by the Authority on 9 June 2016. At the date of signing the statement of problem Ms Sherwood had not been paid any of the weekly instalments under clause 2 and she wished to be paid the full \$500.00 under clause 3.

[7] Ms Sherwood had attached to the statement of problem an email she had sent to the sole director of Mumbles Cafe, Cheryl Murray, advising that two payments due on 12 and 19 May 2016 under the record of settlement had not been paid and if payment was not made immediately then she would be applying for a compliance order.

[8] Since the application was lodged with the Authority, Ms Murray on behalf of Mumbles Cafe has paid further amounts of \$20.00 per week. Ms Sherwood remained concerned that payments are sporadic and she still wishes to proceed with her application.

[9] A telephone conference was duly held with the Authority and Ms Sherwood and Ms Murray on 10 August 2016.

[10] One of the matters discussed was that the name of the respondent in the statement of problem, Mumbles Cafe/Cheryl Murray, did not reflect that in the settlement agreement. It was agreed by consent during the telephone conference that the name of the respondent could be amended to that in the settlement agreement. In the companies register there is a bracket around the 2014 for Mumbles Cafe.

[11] Ms Sherwood said that she wanted a compliance order in terms of clause 3 that the full balance at that time being \$380.00 become payable in one lump sum.

[12] Ms Murray advised the Authority that she was doing her best and could not afford to pay the full amount.

[13] The Authority advised that it was considering determining the matter on the papers and there was no objection to that. I asked for Ms Sherwood to forward to me details from her bank account showing all payments made by Mumbles Cafe. I advised Ms Murray she would have a further opportunity to put anything to the Authority that she wished regarding the matter before it was determined.

[14] On 10 August 2016, the Authority received bank statements from Ms Sherwood showing payments from Mumbles Cafe. I had also asked Ms Sherwood to confirm whether she was seeking reimbursement of her filing fee and there had been some suggestion in the application that Ms Sherwood was aware that there was a possibility of a penalty if there was a breach of the agreement.

[15] In the email dated 10 August 2016 to the Authority, Ms Sherwood advised that if the \$380.00 was paid in full immediately, then she was prepared to leave it at that and not seek reimbursement of the filing fee of \$71.56 or a penalty.

[16] The Authority asked for any further information from Ms Murray to be provided by close of business 19 August 2016 in response to the bank statements but nothing further was provided within that time frame.

[17] I will now proceed to determine whether or not an order for compliance should be made in terms of clause 3 of the settlement agreement.

The Issues

[18] The Authority needs to determine the following issues:

(a) Has there been a failure on the part of Mumbles Cafe to make payments under clause 2 of the settlement agreement on the due date or within 2 working days thereof in terms of clause 3 of the settlement agreement?

(b) If there has been such a failure then should the Authority order compliance with clause 3 that the balance of the sum then due and owing immediately becomes due and payable.

Has there been a failure on the part of Mumbles Cafe to make payments under clause 2 of the settlement agreement on the due date or within 2 working days thereof?

[19] The bank account statements into which payments under clause 2 of the settlement agreement were made by Mumbles Cafe confirm that the first payment was not made on 12 May 2016 as required by clause 2 or within 2 working days thereof but was deposited into Mrs Sherwood's account on 26 May 2016. That is two weeks outside of the date for the first payment agreed in the settlement agreement.

[20] After that time the payments were somewhat sporadic. For example there was no weekly payment between 2 and 16 June as there should have been on 9 June and then no payment between 16 June and 7 July 2016. There were more consistent payments made in July by Mumbles Cafe but there was no payment made as at 10 August at all for that month. There have been as at 10 August 2016, six payments made of \$20.00, bringing the total sum of \$120.00 being paid by Mumbles Cafe. This is over a 14 week period from 12 May 2016. There is a balance due and owing to Ms Sherwood of \$380.00.

[21] I find there has been non-compliance on several occasions by Mumbles Cafe to make payments under clause 2 of the settlement agreement of \$20.00 per week from 12 May or within 2 working days thereof.

If there has been such a failure then should the Authority order compliance with clause 3 that the balance of the sum then due and owing immediately becomes due and payable.

[22] The Authority may enforce clause 3 of the s 149 record of settlement by a compliance order under s 137 of the Act.

[20] Mrs Murray says that there would be difficulty paying the balance owing to Ms Sherwood in one lump sum. In exercising of my discretion on whether to make a compliance order I have had regard to the amount outstanding; the clear agreement the parties made as to what would happen if a payment was not made on time or made within 2 working days in clause 3; and the fact that there have been more than one occasion where payments have been late.

[21] It is appropriate I find that the Authority make an order for compliance in terms of clause 3 of the settlement agreement that Mumbles Cafe pay within a period of 14 days the balance on the sum of \$500.00 due and owing to Mrs Sherwood. As at the date of this determination that is the sum of \$380.00.

[22] I order that Mumbles Cafe (2014) Limited comply with the record of settlement it entered into with Alivia Sherwood and pay to her in terms of clause 3 the sum of \$380.00 being the balance due and payable of the sum set out in clause 2 within 14 days of the date of this determination.

[23] Ms Sherwood seeks no further order if such payment is made. If payment is not made in terms of [22] above I reserve leave for Ms Sherwood to return to the Authority for an order that Mumbles Cafe reimburse her the filing fee for lodging her application with the Authority.

Helen Doyle
Member of the Employment Relations Authority