

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

CA 180/08
5133230

BETWEEN

CORY TOMULI
Applicant

AND

HAGLEY VIEWS LIMITED
Respondent

Member of Authority: Helen Doyle

Representatives: David Beck, Counsel for Applicant
Gordon Hurrell, Advocate for Respondent

Investigation Meeting: 27 November 2008

Determination: 1 December 2008

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Cory Tomuli has applied to the Authority for an order that Hagley Views Limited (Hagley Views) comply with the terms of settlement that he entered into with Hagley Views under s.149 of the Employment Relations Act 2000 on 3 September 2008. Mr Tomuli also seeks a penalty under s.149(4) of the Employment Relations Act 2000 for a breach of the terms of the settlement agreement, an order for interest, costs and reimbursement of his filing fee.

[2] The director of Hagley Views, Gordon Hurrell said that there were two reasons why the settlement had not been complied with. The first, and the more significant matter for Mr Hurrell, was that he believed there had been a misrepresentation made at mediation, and the second reason was the actions of Mr Tomuli's mother in terms of her interaction with three of his staff members.

The issues

- Should there be an order for compliance by Hagley Views with the terms of the settlement agreement;
- Should there be an order for a penalty;
- Should interest be awarded?

Should there be an order for compliance by Hagley Views Limited with the terms of settlement

[3] The record of settlement provided as set out below:

1. *These terms of settlement and all matters discussed at mediation shall remain confidential to the parties.*
2. *Hagley Views Ltd will pay Cory Tomuli within 14 days of the date of hereof, on a without prejudice and denial of liability basis, the compensatory sum of \$7,000 in terms of the provisions of section 123(1)(c)(i) of the Employment Relations Act 2000. This amount will be paid to the Applicant by way of direct credit.*
3. *Hagley Views Ltd will pay legal costs of \$1500.00 plus GST on receipt of a tax invoice from SB Law Solicitors.*
4. *Both parties agree that neither party will make any disparaging comments about the other party.*
5. *Gordon Hurrell, Director, Hagley Views Ltd will provide Cory Tomuli with a written reference as set out and attached. Gordon Hurrell agrees to limit any future comments about Cory Tomuli to those in the written reference.*
6. *This is a full and final settlement of all matters between the parties arising out of the employment relationship between the applicant and the respondent.*

[4] I have considered the confidentiality obligations under clause 1 of the agreed terms of settlement. Mr Tomuli said when questioned at the investigation meeting, that he did not advise his mother of the terms of settlement aside from saying that he was happy with the outcome.

[5] Mr Hurrell said at the investigation meeting that he *did not disbelieve that Mr Tomuli did not tell his mother about the settlement*. There was no evidence that supported that Mr Tomuli had disclosed the terms of the settlement to his mother.

[6] Mr Hurrell made the decision not to ask two staff members who had provided the statements attached to the statement in reply to attend at the investigation meeting.

He said that this was because he did not wish to involve staff in the matters that were before the Authority. Mrs Tomuli provided an affidavit and gave evidence denying the accusations by the staff members and the comments that it was alleged she made.

[7] Whilst Mrs Tomuli may well have put two and two together from her conversation with her son and concluded that part of the agreement involved a payment by Hagley Views of some money, I am not satisfied that Mr Tomuli said anything to his mother about the terms of the settlement. The evidence does not satisfy me that there was a breach by Mr Tomuli of clause 1 and the obligations thereunder.

[8] In terms of the alleged misrepresentation, I explained to Mr Hurrell that the Employment Relations Act 2000 provides under s.149(3) that the terms of settlement may not be cancelled under s.7 of the Contractual Remedies Act 1979. What this means is that if Mr Hurrell believes that there was a misrepresentation that he relied on, he is not entitled to treat the terms of settlement entered into as discharged or at an end and the agreement still stands and should be complied with.

[9] I am satisfied that Hagley Views has failed to comply with clauses 2, 3 and 5 of the record of settlement. I am not satisfied that Mr Hurrell or Mr Tomuli have made disparaging comments about the other in terms of clause 4.

[10] It is appropriate that a compliance order be made that Hagley Views comply with the agreed terms of settlement as set out below:

- In terms of clause 2 of the agreed terms of settlement, Hagley Views is to pay to Cory Tomuli the compensatory sum of \$7,000 without deduction within seven days of the date of this determination;
- In terms of clause 3 of the agreed terms of settlement, Hagley Views is to pay legal costs of \$1,500 plus GST to SB Law Solicitors within seven days of the date of this determination;
- In terms of clause 5 of the agreed terms of settlement, Hagley Views is to provide to Cory Tomuli the written reference in the terms set out and attached to the record of settlement within seven days of the date of this determination.

Should there be an order for a penalty?

[11] Mr Hurrell has failed to comply with and therefore has breached the settlement agreement which he entered into on behalf of Hagley Views with Mr Tomuli. Mr Tomuli has been put to the trouble of enforcing the settlement agreement following what he considered was a concluded matter. In the ordinary course of events, such a failure would justify a significant penalty.

[12] Mr Hurrell's reasons for not paying, whilst misguided, were because of matters I find he felt strongly about and was genuinely concerned about. Mr Hurrell should have communicated with Mr Beck about these matters and concerns before the date for payment of the monetary amounts of the settlement and provision of the reference. If that had occurred then I am reasonably confident matters would not have progressed to the point that they have.

[13] In all the circumstances, I order Hagley Views Limited to pay the sum of \$300 as a penalty under s.149(4) of the Employment Relations Act 2000. Under s.136 (2) of the Employment Relations Act 2000 Hagley Views Limited is to pay the sum awarded as a penalty to Cory Tomuli.

Should interest be awarded?

[14] If the payments are made to Cory Tomuli in accordance with clauses 2 and 3 of the record of settlement within seven days from the date of this determination, there will be no interest payable. After the expiration of the period of seven days from the date of this determination if the moneys are not paid, Hagley Views Limited is to pay interest under clause 11 of Schedule 2 of the Employment Relations Act 2000 until payment is made at the rate of 8% which rate does not exceed the 90 day bill rate plus 2%.

Costs

[15] Mr Beck provided a schedule of his unbilled time at the conclusion of the investigation meeting. The schedule provided that Mr Beck had spent 4.30 hours at the rate of \$215 per hour on this matter. The total sum for unbilled time was \$924.50.

[16] I am of the view that a reasonable contribution to costs in this matter would be a sum which did not exceed the equivalent of 3 hours work. A reasonable

contribution would be the sum of \$645 together with a disbursement of \$70 for the filing fee.

[17] I order Hagley Views Limited to pay the sum of \$715 to Cory Tomuli being costs and disbursements.

Summary of orders made

- Hagley Views Limited is to comply with clauses 2, 3 and 5 of the record of settlement within seven days of the date of this determination.
- I have ordered Hagley Views Limited to pay the sum of \$300 as a penalty under s.149(4) of the Employment Relations Act 2000 to Cory Tomuli.
- If the payments in clauses 2 and 3 of the record of settlement are made within seven days of the date of this determination there will be no interest payable, but if the payments are not made within that time then interest will be payable at the rate of 8%.
- I have ordered Hagley Views Limited to pay the sum of \$715 to Cory Tomuli being costs and disbursements.

Helen Doyle
Member of the Employment Relations Authority