

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2016] NZERA Auckland 245
5629907

BETWEEN SAM WHITEHEAD
 Applicant

AND LOADSCAN LIMITED
 Respondent

Member of Authority: Vicki Campbell

Representatives: Applicant in Person
 Toby Braun for Respondent

Investigation Meeting: On the papers currently before the Authority

Determination: 21 July 2016

**DETERMINATION OF THE
EMPLOYMENT RELATIONS AUTHORITY**

- A. Mr Whitehead’s application for a compliance order and
 imposition of penalties is declined.**
- B. Costs are reserved.**

Employment relationship problem

[1] On 16 June 2016 Mr Whitehead lodged an application in the Authority claiming Loadscan Limited (Loadscan) had breached a Record of Settlement (ROS) entered into between himself and Loadscan on 27 May 2016. To remedy the alleged breach Mr Whitehead seeks a compliance order, the imposition of penalties and costs.

Background

[2] Mr Whitehead and Loadscan attended mediation on 27 May 2016 and entered into a final, binding and enforceable ROS which was signed by a Mediator employed by the Ministry of Business, Innovation and Employment on 30 May 2016.

[3] Clause 9 of the ROS required payment of a sum of \$20,000 to be made by direct credit within seven days of Mr Whitehead's final date following the hand over process. It was anticipated that the final date would be 3 June 2016 unless the hand over process finished before that date. This means payment was required to be made by 10 June 2016. This date was changed by agreement to 14 June 2016.

[4] Six days after lodging the statement of problem, on 22 June 2016, Loadscan deposited \$20,000 into Mr Whitehead's bank account. This followed an agreement entered into between the parties on 21 June 2016 that if the money was paid to Mr Whitehead by 22 June 2016, Mr Whitehead would withdraw his application from the Authority. At the time of this agreement Mr Whitehead was represented by Counsel.

[5] Loadscan lodged its statement in reply on 1 July 2016 confirming it had complied with the ROS. Following receipt of the statement in reply, the Authority contacted Mr Whitehead's representative who advised that he no longer had instructions to act on behalf of Mr Whitehead.

[6] In light of the agreement between the parties that Mr Whitehead would not pursue this matter if the money was deposited by 22 June, and the correspondence proof of payment received by the Authority, the Authority Officer requested Mr Whitehead to confirm that he wished to proceed with his application.

[7] By email on 5 July 2016 Mr Whitehead advised the Authority that he wished pursue the matter. Despite this notification and in response to correspondence from the Authority seeking a suitable date and time for a case management call, Mr Whitehead advised the Authority that he did not think he would be available at any time.

[8] The Authority confirmed by email to Mr Whitehead that a call would take place on 15 July 2016 and that he would be contacted on a mobile number. Mr Whitehead was requested to advise if there was an alternative number on which he should be contacted. Mr Whitehead advised the Authority that there was no point in attempting to contact him as he would be unavailable.

[9] Given Mr Whitehead's response he was again requested to confirm that he wished to pursue his application. The email response received by the Authority Officer was objectionable and intemperate.

[10] Despite Mr Whitehead's insistence that he would not be available, the call proceeded as scheduled. Mr Whitehead did not answer his mobile as it was switched off. A voice mail message was left for him advising him that the matter would be determined on the papers currently before the Authority and he should contact the Authority urgently. Loadscan consented to the Authority dealing with the matter on the papers currently before it.

Issues

[11] The issues requiring determination are whether a compliance order should be made and whether penalties should be imposed.

Determination

[12] Mr Whitehead received full payment under the ROS six days after he lodged his statement of problem in the Authority. On 21 June 2016 Mr Whitehead, through his lawyer, made an offer to forego his claim in the Authority in the event that the compensatory sum payable to him under the ROS was deposited into his bank account the following day. This was agreed to by Loadscan and \$20,000 was deposited in accordance with that agreement on 22 June 2016.

[13] Compliance is a discretionary remedy. Any intervention by the Authority should be no more than is necessary to ensure compliance in the future.¹ I am satisfied Loadscan has met its obligations to pay the agreed sum under the ROS and there is no continuing breach. In these circumstances a compliance order is unnecessary.

[14] Mr Whitehead also seeks the imposition of penalties. This is not a case in which penalties are appropriate and Mr Whitehead's application for the imposition of penalties is declined.

¹ *NZ Seamens Union v Gearbulk Shipping (NZ) Ltd* [1989] 2 NZILR 270.

Costs

[15] Costs are reserved. Loadscan has been successful in opposing Mr Whitehead's application. It will be understandable if Loadscan wish to pursue an order for costs associated with completing and lodging its statement in reply especially in light of Mr Whitehead's offer on 21 June to withdraw his application if payment was made on 22 June 2016.

[16] If the Authority is requested to make an order for costs it will take into account Mr Whitehead's failure to withdraw his application as promised, and also that the Authority has required only one attendance from Loadscan and that was for the case management call on 15 July 2016.

[17] The parties are encouraged to resolve any issue as to costs between them. If they are unable to resolve the matter, Loadscan should lodge and serve any submissions on costs within 28 days of the date of this determination. Mr Whitehead will have 14 days from the date of service to lodge and serve any submissions in response.

Vicki Campbell

Member of the Employment Relations Authority