

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 261/10
5300845

BETWEEN STEPHEN ADAM
 Applicant

AND MAINTENANCE NO 2
 LIMITED
 Respondent

Member of Authority: Vicki Campbell

Representatives: Margaret Penny for Applicant
 Don Stanway for Respondent

Investigation Meeting: On the papers

Submissions Received: 6 and 26 May 2010 from Applicant
 19 May 2010 from Respondent

Determination: 31 May 2010

DETERMINATION OF THE AUTHORITY

[1] The Applicant, Mr Stephen Adam was employed by Excell Corporation Limited which was trading as McFall Enterprises Limited. McFall Enterprises Limited became known as Maintenance No 2 Limited (“MN2L”) when Excell Corporation was sold in 2008.

[2] During a telephone conference call with the parties it was agreed that the respondent should be changed from Excell Corporation Limited to Maintenance No 2 Limited.

[3] In August 2006 Mr Adam made a claim against Excell Corporation Limited which then made a counter-claim against Mr Adam. The parties attended mediation on 14 December 2006 which resulted in a Record of Settlement being signed by both parties. The Record of Settlement required, among other things, that Mr Adam would receive a payment of \$3,000 within 7 days of the execution of the agreement. In order

to be paid, Mr Adam was required to provide his bank details to enable the money to be direct credited to his bank account.

[4] No payment was received by Mr Adam until 3 November 2009. MN2L says it did not receive Mr Adam's bank details until November 2009 and it paid immediately those details were received.

[5] Mr Adam says he provided MN2L with his bank details during the mediation meeting and when payment was not received within the seven days the matter was followed up by Mr Adam's representative at that time.

Interest

[6] In his statement of problem Mr Adam seeks the payment of interest on the \$3,000 for the period 21 December 2006 until payment was made on 3 November 2009, together with the costs associated with its recovery.

[7] The Authority is satisfied that in the circumstances the Authority has no power to make an award of interest. Under clause 11 of Schedule 2 of the Employment Relations Act 2000 there must first have been a determination and "*judgment*" in relation to the recovery of any monies. The Authority has not made a determination or given any judgment in respect of the recovery of any monies.

Costs

[8] Mr Adam seeks costs associated with the recovery of the money. Clause 15 of Schedule 2 allows the Authority the discretion to award costs and expenses as it sees fit. The Authority is satisfied Mr Adam incurred costs associated with the recovery of the \$3,000. However, the amount being sought has not been quantified in either the statement or problem, or the submissions from Ms Penny. Neither has any documentation been forthcoming to support such a claim. On that basis the Authority declines to exercise its discretion to order costs against Maintenance No 2 Limited.

Penalty

[9] In submissions received on behalf of Mr Adams, a claim is made for payment of a penalty for breach of the Record of Settlement. There was no claim for a penalty in the Statement of Problem and submissions are not the proper place for raising new claims.

[10] However, the Authority has considered whether, if the claim for a penalty been properly before the Authority, this was an appropriate case for such an order. A penalty is appropriate only where there has been a wilful breach or default¹.

[11] The Authority is satisfied that as soon as Ms Penny became involved in the recovery of Mr Adam's settlement money and the bank account details were provided to MN2L the money was paid. The Authority is not persuaded that the failure to pay the money earlier was wilful or deliberate. In these circumstances the Authority would decline to award a penalty.

Costs

[12] Costs are reserved. I am inclined to let costs lie where they fall, however, in the event that costs are sought, the parties are encouraged to resolve that question between them. If the parties fail to reach agreement on the matter of costs, Maintenance No 2 Limited may file and serve a memorandum as to costs within 28 days of the date of this determination with any submissions in reply being lodged within 14 days of receipt. I will not consider any application outside that timeframe.

Vicki Campbell
Member of Employment Relations Authority

¹ *Ruapehu District Council v Northern Local Government Officers Union*, unreported, 16 November 1992, WEC54/92, Castle J.