

Those payment arrangements were honoured for a time but then ceased. Mr Amey has been undertaking enforcement action since then through the District Court.

[5] Mr Amey now brings these proceedings in the Authority against Mr and Mrs Komene alleging amongst other things that the Komenes misrepresented themselves as a limited liability company during the course of the previous dealings. I return to that point again shortly. Mr Amey's proceedings allege that there is an amount of \$1,777.84 outstanding from the monies due in terms of the original mediated settlement. In addition, Mr Amey wants the Authority to reopen his original personal grievance so that he can have awards made against the Komenes for compensation under s.123(1)(c)(i) of the Employment Relations Act 2000 and for wages that he lost as a consequence of allegedly being unjustifiably dismissed.

Process

[6] The Komenes were not represented at the hearing and have played no part whatever in the Authority's process leading up to the investigation meeting.

[7] Notwithstanding that, I determined that it was appropriate for the matter to proceed and for a decision to issue.

[8] I was satisfied at the time of the investigation meeting that all proper steps had been taken to advise the Komenes of the time and place of the hearing and that they were well aware of the nature and extent of the claim against them. It did not seem to me to be in the interests of justice for Mr Amey to be denied the opportunity of pursuing the matters before the Authority simply because the Komenes had chosen not to engage with the Authority's process.

Who is the respondent

[9] Mr Amey alleged in his statement of problem that the Komenes had misrepresented themselves as a limited liability company Sharvai in the earlier mediated agreement and that in fact they traded as a partnership.

[10] Mr Amey has been very careful and efficient in retaining evidence and particularly documentary records of his various attempts to obtain payment from his former employer. Amongst those records which are available to the Authority is a

paper trail between Mr Amey himself and the accounting practice which looked after the work of Mr Amey's former employer Sharvai.

[11] That material from the accounting firm is quite unequivocal that Mr Amey was employed by Sharvai. That view is reiterated by the Wellington mediator who presided over the mediation in February and recorded the name of the employer of Mr Amey as Sharvai.

[12] However it appears that the information which suggests that Mr Amey's employer was Sharvai, is erroneous. Indeed, it appears that there was never a company incorporated as Sharvai and that, insofar as the operators of the entity represented they had the benefits of limited liability, they were in breach of the Companies Act 1993.

[13] It may be that Sharvai was a trading name but that does not entitle the respondents to the benefit of the word "limited".

[14] I am satisfied then that, Mr Amey's employer was, in fact, Mr and Mrs Komene and that this present application is properly brought against these persons. I am also satisfied that, in seeking to enforce the mediated settlement as between himself and Sharvai, Mr Amey has standing for enforcement purposes because the mediation agreement incorrectly identifies the employer as Sharvai Enterprises Limited.

Is Mr Amey owed wages?

[15] There is no doubt that Mr Amey is still owed the sum of \$1,777.84 being unpaid wages and other legitimate employment payments due and owing pursuant to the mediated settlement arrived at between the parties on 26 February 2008.

[16] Mr Amey has an entitlement to that money and I will make orders accordingly.

Can Mr Amey reopen the personal grievance?

[17] It will be remembered that Mr Amey claims to have been dismissed from his employment on 24 January 2008, that on that same day he gave the employer a letter claiming a personal grievance, identifying the basis of that grievance and the monies owed by way of unpaid wages

[18] The matter then proceeded promptly to a mediated settlement which I have already noted, included the usual clause about “full and final settlement”.

[19] Mr Amey seeks to set aside the settlement agreement, given that it has been breached by the Komenes, and reintroduce his personal grievance claim with appropriate remedies.

[20] I am satisfied that Mr Amey cannot do as he wishes in this regard. Mr Amey’s proposed course of action is caught by s.149(3) of the Employment Relations Act 2000 the effect of which is to preclude the bringing of a mediated settlement back to the Authority except for the purposes of enforcement, even where there has been a breach by the other party. Mr Amey may not think that fair but it is none the less the law.

Is this an appropriate case for penalties to apply?

[21] I am satisfied that this is an appropriate case where penalties ought to apply and where those penalties ought to be directed to be paid to the applicant Mr Amey rather than to the Crown. I am satisfied this is an appropriate exercise of the Authority’s jurisdiction as conveyed by sub-section 4 of s.149 of the Act.

[22] The total amount of a penalty where the employer is not a company is \$5,000 and I am satisfied that in the present case, a sum of \$4,000 is an appropriate penalty to award against the Komenes for their flagrant breach of the settlement agreement reached with Mr Amey. This was a situation where the parties had come to terms and in consideration of getting the matter resolved promptly, Mr Amey effectively reduced his claim to simply one of unpaid wages. The Komenes then failed to pay all of the outstanding wages and despite that Mr Amey cannot revisit the decision to reduce his claim.

Determination

[23] I have found that Mr Amey was actually employed by Mr and Mrs Komene.

[24] I have directed that Mr and Mrs Komene are to pay to Mr Amey the outstanding wages sum of \$1,777.84.

[25] Although I have decided that the law precludes Mr Amey reopening his personal grievance claim, I have directed that a penalty should apply in the present

case and accordingly I direct that Mr and Mrs Komene are to pay to Mr Amey the sum of \$4,000 as a penalty pursuant to s.149(4) of the Employment Relations Act 2000.

Costs

[26] Costs are to lie where they fall.

James Crichton
Member of the Employment Relations Authority