

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2013] NZERA Auckland 119
5407615

BETWEEN

MONIQUE ATKINSON
Applicant

A N D

COVERALL CLEANING
CONCEPTS NEW ZEALAND
LIMITED
Respondent

Member of Authority: James Crichton
Representatives: Danny Gelb, Adocate for Applicant
Tony Kullin, Advocate for Respondent
Investigation Meeting: On the papers
Date of Determination: 9 April 2013

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant (Ms Atkinson) seeks a compliance order in respect of an alleged breach of an earlier determination of the Authority, together with the imposition of penalties. The earlier determination of the Authority between these parties issued on 10 December 2012 as [2012] NZERA Auckland 447.

[2] In that determination, the Authority ordered the respondent (Coverall) to pay to Ms Atkinson a portion of a penalty levied by the Authority, a contribution to costs and a reimbursement of the filing fee. Those payments were not made within time and the present proceeding was initiated as a consequence.

[3] Coverall filed no statement in reply but did participate in the Authority's conference call on the matter and agreed with Ms Atkinson's representative that the

matter should be dealt with on the papers. In respect of Coverall's position, it is sufficient to say that it resists Ms Atkinson's claim.

[4] In its 10 December 2012 decision, the Authority determined that Coverall had breached the record of settlement it entered into with Ms Atkinson and awards were made in respect of penalty and the reimbursement of the Authority's filing fee.

[5] Those orders by the Authority were themselves breached by Coverall which resulted in the present application filed on 14 January 2013. Ms Atkinson seeks compliance with the Authority's 10 December 2012 decision, a penalty of \$20,000, an indemnity on costs, and interest.

[6] The submissions received from Coverall in relation to the present application seem to proceed, as Ms Atkinson's advocate contends, on the basis of an explanation of why the original breaches investigated by the Authority for its 10 December 2012 decision happened.

[7] In effect, as Ms Atkinson's advocate makes clear, that horse has already bolted and the question before the Authority now is not why there was a breach up to and including the Authority's first decision of 10 December 2012, but why there was a breach in fulfilling the orders made by the Authority in that determination.

[8] Coverall's submissions maintain that there was a delay in satisfying the mediated settlement reached between the parties because of communication difficulties between New Zealand and the Australian director of Coverall, because Coverall did not have a bank account to pay the settlement proceeds into and because Coverall was uncertain of the taxation position in New Zealand with the treatment of payments of this kind and so sought accounting advice on the matter.

[9] But as the advocate for Ms Atkinson makes plain, those matters were all dealt with in the balance of the Authority's 10 December 2012 decision. None of them explain why there was a further delay in addressing the Authority's decision of 10 December 2012. That decision imposed penalties on Coverall for failing to fulfil its obligations in respect of the record of settlement and it is those penalties and other payments, which Coverall has also failed to pay within time, that are in dispute in the present matter.

[10] For Ms Atkinson, it is alleged that Coverall has advanced a variety of explanations for its apparent inability to comply with the terms of the record of settlement, or the terms of the Authority's determination. It is suggested that Coverall advanced the proposition in January 2013 that there was a stay being applied for in the Employment Court and it was also alleged that a challenge to the Authority's 2012 determination was in prospect. The possibility of those proceedings still being on foot has long since evaporated because of the usual time limits and it is contended for Ms Atkinson that Coverall is now advancing another set of propositions to explain its dilatory behaviour.

[11] It is possible that Coverall is simply confused as to the position but either way, its history in this matter does it little credit. It failed to comply with its obligations in respect of a record of settlement it entered into and notwithstanding promising performance within a certain timeframe, it failed to fulfil its obligations in that regard. Clearly, if there had been questions in Coverall's mind about what account to pay the settlement proceeds into, or what accounting treatment was appropriate for tax purposes, those were matters which ought to have been dealt with in advance of making commitments to a timeline rather than simply ignoring the timeline completely.

[12] What is more, having been brought before the Authority on 10 December 2012 for those very breaches, one would have thought that Coverall would have learned its lesson and paid up quickly.

[13] Instead of attending to the matter on that basis, it would seem that the matter has simply been ignored and the implication anyway from Coverall's submissions, notwithstanding its apparent focus on its failures to satisfy the terms of the mediated settlement, is that the Authority ought not to penalise it because it has finally paid up the settlement proceeds of the mediated settlement.

[14] But that submission completely overlooks the fact that there is now a judgment against it in the Authority for its failure to fulfil its obligations within due time and it is that decision of the Authority which is currently in play and with which Ms Atkinson is understandably seeking compliance.

Determination

[15] The Authority sees the matter in straightforward terms. Coverall failed to meet its obligations within time in respect of a record of settlement with Ms Atkinson and while it is acknowledged that it eventually paid up, the payment was overdue and Ms Atkinson incurred costs in having to chase the payment and was embarrassed by not having the payment when she was entitled to have it. The Authority's decision of 10 December 2012 accepted that Ms Atkinson ought to have been paid the settlement proceeds when the parties agreed that they would be paid and as a consequence of Coverall's failure to meet those payments on time, modest penalties were awarded and a modest contribution to costs was determined by the Authority.

[16] Those payments have not been made by Coverall and it is those payments that are in contention now together with the claim from Ms Atkinson for further penalties, because of the breach of the Authority determination, and for further costs because of her having to continue to pursue the matter in order to get it finalised.

[17] The Authority considers that the proper disposition of this matter is to first require Coverall to pay the sums already awarded against it by the Authority and then to consider what, if any, other penalties and awards should apply.

[18] On that basis then, the Authority directs that Coverall is required to comply with the determination of the Authority dated 10 December 2012 filed as [2012] NZERA Auckland 447 by the payment of a penalty of \$2,000, a contribution of \$750 to Ms Atkinson's then costs and the filing fee for the initial investigation meeting of the Authority at \$71.56. Of the \$2,000 penalty imposed by the Authority in its original decision, \$1,000 was to be paid to Ms Atkinson and \$1,000 was to be paid to the Authority for payment into the Crown bank account. These payments on which compliance is required pursuant to s.137(1)(b) of the Employment Relations Act 2000 (the Act), are to be paid within 14 days of the date of this determination: s.137(3) of the Act applied.

[19] For the avoidance of doubt, and less the matter be still the subject of a misunderstanding by Coverall, the payments just referred to are net amounts and are not subject to the deduction of tax under New Zealand law. The \$2,000 is a penalty imposed by the Authority for wrongdoing by Coverall and as such is free of tax. The

balance of the moneys due to Ms Atkinson are of a reimbursing nature and therefore do not attract tax either.

[20] Ms Atkinson seeks a significant penalty for this, in effect, subsequent breach, namely the breach of the Authority's determination of 10 December 2012. She also seeks an indemnity on costs and interest calculated until the date of payment.

[21] Clearly, Ms Atkinson ought not to have had to incur any costs at all since the disposal of this matter in mediation and the Authority is satisfied that she is entitled to an indemnity on her costs for the attendances of her advocate since the failure of Coverall to meet its obligations in terms of the 10 December 2012 determination of the Authority. However, the Authority is not persuaded that it should vary that original determination of the Authority which clearly provided that a contribution to costs of \$750 be made available to Ms Atkinson against total invoiced costs of \$2,025. That was the Authority's decision at the time and it should remain. If Coverall had fulfilled its obligations then in accordance with the Authority's determination, that would have been where matters rested.

[22] The position is otherwise, however, since Coverall failed to fulfil its obligations at that time and from that point on Ms Atkinson is entitled to an indemnity for costs until the matter resolves. Clearly it is in Coverall's interests to settle matters promptly so that costs cease to run. If there are difficulties in fixing costs, leave is reserved for either party to revert to the Authority for orders.

[23] Ms Atkinson is entitled to a further penalty but the claimed amount puts the matter unreasonably in the Authority's opinion. Coverall is directed to pay Ms Atkinson a further \$3,000 in relation to its further default, that is, \$3,000 on top of the sum already due and owing by way of penalty as a consequence of the Authority's original decision of 10 December 2012.

[24] Ms Atkinson also seeks interest on the outstanding amounts. The Authority is not minded to grant interest at this point but if Coverall does not fulfil its obligations within time in respect of this continuing issue, then the Authority reserves to itself, on the application of Ms Atkinson, a consideration of imposing interest on any sums due to Ms Atkinson that remain unpaid.

Summary

[25] Coverall is to pay to Ms Atkinson the net sum of \$1,821.56 in respect of the determination of the Authority dated 10 December 2012 together with a further payment of \$1,000 to be made payable to the Authority for lodging to the Crown account, those two payments to be made within 14 days of the date of this determination.

[26] Further, Coverall is to pay to Ms Atkinson a further amount of \$3,000 as a penalty paid pursuant to s.135 of the Act together with indemnity costs for the period from the date that Coverall became defaulting in respect of the 10 December 2012 determination of the Authority down to the date that all sums owing to Ms Atkinson are paid.

James Crichton
Member of the Employment Relations Authority