IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON

WA 174/09
File Number: 5157183

	BETWEEN	Dennis Body Applicant
	AND	PCT No 1 Limited Respondent
	AND	Jason Clark Second Respondent
Member of Authority:	Denis Asher	
Representatives:	Ross Jamieson for Mr Body No appearance by or for the first respondent John Tannahill for the second respondent	
Investigation Meeting	Wellington, 10 November 2009	
Submissions Received	On the day of the investigation	
Determination:	11 November 2009	

DETERMINATION OF THE AUTHORITY

The Problem

[1] Should the Authority direct the first respondent, the Company, to comply with a record of settlement and apply a penalty against it for non-compliance?

[2] Should the second respondent, Mr Clark, be joined to these proceedings, i.e. should he also be directed to comply with the record of settlement and be liable for a penalty? If not, is he entitled to costs?

[1] Is Mr Body entitled to any of the penalty, if awarded?

The Investigation

[2] In an amended statement filed on 13 July 2009 Mr Body asked the Authority to issue a compliance order against both the Company and Mr Clark, i.e. that the latter be joined to the proceedings, and award a penalty of $5,000 against the respondents with half to be paid to him and order interest since 11 May 2009 on the monies owing.

[3] Counsel for the second respondent, Mr Tannahill, by correspondence to the Authority and to the applicant's representative, Mr Jamieson, dated 29 July, 4 October and 6 November, advised that, amongst other things, that his client – the second respondent – had been incorrectly cited as a party to these proceedings. The request was made that the Authority immediately amend its records and findings and *"issue an Amended Statement of Problem (and Finding)"* (fax dated 29 July).

[4] In his correspondence Mr Tannahill also confirmed that the party to the mediation agreement was the first respondent and that the addition of Mr Clark's name as second respondent was improper and he should be removed. He also advised that, on 20 June 2009, Porirua City Towing Limited changed its name to PCT No.1 Limited, after the business was sold: it did not have sufficient funds to pay and that costs would be pursued on Mr Clark's behalf if the applicant persisted with involving him in these proceedings.

[5] During a telephone conference on 9 October Mr Tannahill put Mr Jamieson – and I confirmed it was appropriate to do so – on notice of the costs implications in respect of adding Mr Clark as the second respondent in the event the applicant's initiative did not succeed.

[6] By email received on 27 October Mr Jamieson advised that he sought to amend the first respondent's name to that of *"PCT No 1 Limited"* and that *"The rest remains as previously filed"*.

[7] There was no appearance by or for the Company at today's investigation. No explanation was offered by the first respondent for its failure to attend.

[8] Toward the close of today's investigation Mr Jamieson confirmed his client was withdrawing the application to join Mr Clark to the proceedings.

Background

[9] By way of a mediated record of settlement dated 11 May 2009, and amongst other matters agreed by the parties, Porirua City Towing Limited, now known as PCT No 1 Limited, agreed – within 7 days of the settlement – to pay $2,250 on a without prejudice and denial of liability basis, under s. 123 (1) (c) (i) of the Employment Relations Act 2000 (the Act) to Mr Body. It also agreed to pay legal costs of $750 plus GST within 7 days of receipt of invoice.

[10] As is clear from the above, payment has not been effected. By way of an unsworn or unaffirmed statement from its director and principle share holder (4,979 shares out of 5,000), and received on 23 September, Jason Clark said:

a. Shortly after reaching the agreement set out in the mediated settlement the business was sold.

b. The Company had problems obtaining what was owed to it and therefore has lists of outstanding debtors.

c. Because of this it has not been able to pay all of its bills.

d. The Company has not been approached at any time to make alternative payment arrangements. It may be able to afford $10-12 a week, or sign over some of its debtors to the applicant.

Discussion and Findings

Second Respondent

[11] Should Mr Clark be joined to these proceedings and if not what costs is he entitled to?

[12] No formal application was before the Authority under s. 221 of the Act to join Mr Clark to these proceedings.

[13] Mr Clark has, albeit perhaps too late from a costs perspective, properly been withdrawn as a party to the current proceedings. That is because, while a signatory to the

record of settlement as a director of Porirua City Towing Limited now known as PCT No 1 Limited, Mr Clark was not a party to the mediated settlement.

[14] As previously suggested to the applicant via his advocate, there were also no apparent grounds to lift the corporate veil and add him as a party to these proceedings: no evidence emerged today to support such an action. There is no evidence of sham such as transferring assets from one company to another so as to escape a liability, or anything else to support the Authority, in equity and good conscience, lifting the corporate veil.

[15] In respect of these findings, see, for example, *Square 1 Service Group Ltd* v *Butler* [1994] 1 ERNZ 667 and *Heritage Expeditions Ltd* v *Fraser*, unreported, Couch J, 26 Aug 2009, CC 11/09.

[16] In all the circumstances I am satisfied costs should be reserved.

Compliance

[17] Should the Authority direct the first respondent, the Company, to comply with a record of settlement and apply a penalty against it? If awarded, should half of the penalty be paid to Mr Body?

[18] The Company clearly has not complied with the mediated settlement. No sworn or affirmed evidence has been provided in support of its claims it cannot afford to pay. No information from an accountant or any other documentary evidence such as IRD and/or ACC claim notices have been given in support of Mr Clark's claims on behalf of the Company. No details of trading difficulties have been put forward.

[19] No explanation has been provided of the proximity of the date of the settlement (11 May) to the Company changing its name (14 May) or the claimed sale *"very soon after"* the mediated settlement (Mr Clark's *"To Whom it May Concern"* received 23 September) of the first respondent's assets, or of the value of monies derived from the sale and reasons given why some of which could not be paid to Mr Body at that time.

[20] In other words, in respect of the claim against the Company, no good evidence and/or reasons have been provided the Authority not to direct compliance.

Penalty

[21] Mr Body seeks a penalty of $5,000 against the first respondent, half to be paid to himself.

[22] The basis of the claim was not set out in the amended statement of problem. However, it was clear during the Authority's investigation that Mr Body was much frustrated by the Company's failure to comply with its agreed settlement, particularly as Mr Body had intended by entering into a mediated settlement to effect a speedy resolution of his employment relationship problem: he has been denied that benefit.

[23] As set out in *Xu* v *McIntosh* [2004] 2 ERNZ 448:

> a. *A penalty is imposed for the purpose of punishment of a wrongdoing which will consist of breaching the Act or another Act or an employment agreement. Not all such breaches will be equally reprehensible. The first question ought to be, how much harm has the breach occasioned?*
>
> [24] (par 47)

[25] The next question:

> *a. … focuses on the perpetrator's culpability. Was the breach technical and inadvertent or was it flagrant and deliberate? In deciding whether any part of the penalty should be paid to the victim of the breach, regard must be had to the degree of harm that the victim suffered as a result of the breach.*
>
> [26] (par 48)

[27] Despite the Company's claims as to its financial position, its failure to appear today and provide evidence in support of that claim, and (notwithstanding Mr Tannahill's advice today that he had or had recently forwarded $40 for Mr Body) its failure to act to date and pay monies it says it can afford to Mr Body on 'a drip feed' or other basis, satisfy me that there are grounds to apply a penalty. In other words, its breach is more than technical and inadvertent and has the appearance instead of being deliberate.

[28] In all the circumstances as set out above, I am satisfied a penalty of $500 is appropriate and that all of the sum should be paid to the applicant.

Determination

[29] The Company is to comply with its mediated settlement agreement and pay to Mr Body the sums of $2,250.00 (two thousand, two hundred and fifty dollars) under s. 123 (1) (c) (i) of the Act and $750 (seven hundred and fifty dollars) plus GST towards his costs.

[30] Payment is to be made no later than close of business on the 14th day following the date of this determination, i.e. by 5.00 p.m. on Tuesday 24 November 2009.

[31] Interest at the rate of 6% is to accumulate on those monies for each day after 24 November that they remain unpaid.

[32] The Company is also to pay a penalty of $500, which is to be paid in its entirety to the applicant.

[33] Costs are reserved.

Denis Asher
Member of the Employment Relations Authority