

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2017] NZERA Auckland 111
3000079

BETWEEN BLACK INTERIORS
 LIMITED
 Applicant

AND SCOTT BIRNIE
 Respondent

Member of Authority: Vicki Campbell

Representatives: Anthony Burnet for Applicant
 No appearance for Respondent

Investigation Meeting: 11 April 2017

Determination: 12 April 2017

**RECORD OF ORAL DETERMINATION OF THE
EMPLOYMENT RELATIONS AUTHORITY**

- A. Mr Birnie is ordered to comply with clauses 6(e) and 6(h) of the employment agreement within 14 days of the date of this determination.**
- B. Mr Birnie is ordered to pay to Black Interiors Limited a contribution to its costs of \$571.56 within 14 days of the date of this determination.**

Employment Relationship Problem

[1] Black Interiors Limited (BIL) has applied to the Authority for an order that Mr Scott Birnie comply with the express terms of the employment agreement entered into by BIL and Mr Birnie.

[2] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has not recorded all the evidence and submissions received from BIL but has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter, and specified orders made as a result pursuant to section 174B of the Act.

[3] This determination records and confirms the oral indication of preliminary findings made at the end of the investigation meeting.

Procedural background

[4] When this matter was first lodged with the Authority, BIL advised the Authority it only had an email address which they had used to correspond with Mr Birnie previously.

[5] Attempts were made to serve the statement of problem on Mr Birnie by email but this elicited no response from him. BIL was advised that personal service would need to be effected.

[6] On 28 December 2016 Mr Birnie was located at his residential address and was served with the statement of problem and associated documents. No statement in reply was received.

[7] On 15 February 2017 I issued a Notice of Direction setting out a proposal to progress the investigation of this matter. The Notice of Direction was emailed to both parties and I directed that BIL arrange personal service on Mr Birnie. Attempts to serve the Notice of Direction on 4, 6, 8, 10, and 14 March 2017 were not successful.

[8] The Notice of Investigation Meeting was emailed to the parties on 13 March 2017 and BIL was directed to arrange personal service of both the Notice of Investigation Meeting and the Notice of Direction on Mr Birnie's last known residential address in accordance with clause 16(3)(a)(ii) of the Employment Relations Authority Regulations 2000.

[9] I am satisfied Mr Birnie has been served with both the Notice of Direction and the Notice of Investigation Meeting. Prior to the commencement of the investigation meeting the Authority Officer managing this matter emailed Mr Birnie and reminded

him of the investigation meeting and the consequences of his non-attendance. At the commencement time for the hearing I allowed a further 15 minutes to allow Mr Birnie to attend in case he was stuck in traffic or otherwise running late. Mr Birnie did not appear at the investigation meeting.

[10] Mr Birnie has not engaged in the Authority's process and as provided in clause 12 of Schedule 2 of the Employment Relations Act 2000 I have proceeded to act fully in the matter as if Mr Birnie had engaged in the process or was represented.

Background

[11] Mr Birnie was employed by BIL as a Project Manager from 21 March 2016 until the relationship was terminated by BIL on 15 April 2016.

[12] The terms and conditions of Mr Birnie's employment were set out in a written employment agreement signed by the parties on 21 March 2016. The relevant terms of the employment agreement were:

Clause 6(e) - Sign-on Bonus

Black Interiors will pay the employee a sign-on bonus of \$10,000 gross, upon commencement of employment with the company. This payment will be subject to PAYE deductions.

Where the employee fails to remain employed by the Company (for whatever reasons) for a period of not less than twelve months from the date of commencement of employment, the employee agrees to reimburse the Company the full amount of the sign-on bonus.

...

The employee acknowledges and agrees that the Company may deduct all or part of the sign-on bonus due to the Company in accordance with the provisions of this clause, from the employee's final pay and/or holiday pay. Should such deduction not cover all such monies owing, the employee agrees to enter into an arrangement for the outstanding amount to be paid within 3 months of the date of the employee's termination.

Clause 6(h) Mobile Phone/Smartphone

The employer shall provide the employee with a Mobile phone and/or Smartphone for business purposes. The employer shall pay the monthly plan charges relevant to the employee's phone, and all additional business related costs. The employee acknowledges and agrees that he/she may be required to reimburse the employer for all costs in addition to the monthly plan charges associated with personal use including, but not limited to voice calls, email messaging and data usage.

In the event of termination of employment for whatever reason the Mobile phone/Smartphone and mobile number shall remain the property of the Company and the employee agrees to return such mobile phone/Smart phone to the employer.

[13] Mr Birnie raised a personal grievance on 10 June 2016 claiming one or more conditions of his employment had been affected to his disadvantage by the unjustifiable actions of BIL, that he had been unjustifiably dismissed and that BIL had breached his statutory obligations of good faith toward him. After discussions between BIL and Mr Birnie's then representative the personal grievance was withdrawn and Mr Birnie agreed to repay the sign-on bonus in accordance with the terms of the employment agreement.

[14] On 21 June 2016 Mr Birnie's then representative emailed Mr Edward Sundstrum and advised him that the mobile phone had been posted earlier and Mr Birnie was no longer in possession of it. By response dated 14 July 2016 Mr Sundstrum requested the details of where the phone was posted and to which address. This is because the mobile phone had not been received by BIL. Mr Sundstrum reminded Mr Birnie of the agreement they had reached that the sign-on bonus of \$10,000 was due to be repaid the following day.

[15] The mobile phone has never been received by BIL.

[16] Mr Birnie responded by email personally on 15 July 2016 advising Mr Sundstrum that he had a contract to sell his house and once the sale had become unconditional he would advise Mr Sundstrum when the money would be deposited. He did not respond to the request for details of the posting of the mobile phone.

[17] Mr Birnie reiterated his position by email on 26 July 2016. By 12 August 2016 the money had not been deposited and Mr Sundstrum made further enquiries about when the money could be expected. By response dated 30 August 2016 Mr Birnie advised that the date of settlement of the house was 22 September 2016 and the money would be paid at that time.

[18] No money had been received by 28 October 2016 so BIL wrote to Mr Birnie making demand for the payment to be made no later than 3 November 2016. On 3 November 2016 Mr Birnie emailed BIL and advised that he had made a transfer of \$5,000 that day to BIL but needed more time to settle the balance. The deadline for payment was extended to 7 November 2016. No response was received and the funds have never been receipted into BIL's bank account.

[19] On 4 November 2016 BIL notified Mr Birnie that the funds had not appeared in its bank account and requested details of the account into which Mr Birnie had deposited the funds.

Determination

[20] Documentary evidence from BIL shows that Mr Birnie was paid the sign-on bonus of \$10,000 with his first pay on 23 March 2016. BIL has established to my satisfaction that Mr Birnie has failed to comply with the terms of the employment agreement which required him to repay the sign-on bonus and return the company mobile phone. Mr Birnie is therefore ordered to comply with clauses 6(e) and 6(h) of the employment agreement within 14 days of the date of this determination.

[21] The Authority's order may be the subject of a further application for compliance in the Employment Court which is empowered to impose penalties for continuing non-compliance which include imprisonment, fines and the sequestration of property.

[22] BIL is ordered to arrange for a copy of this determination to be personally served on Mr Birnie.

Costs

[23] BIL is entitled to be reimbursed a contribution of its costs and the filing fee for this matter. During the investigation meeting I discussed with BIL the daily tariff basis on which the Authority normally awards costs. Given that this matter took less than an hour it is appropriate to award a small contribution to costs.

[24] Mr Birnie is ordered to reimburse Black Interiors Limited its filing fee of \$71.56 and pay a contribution to its costs of \$500 within 14 days of the date of this determination.

Vicki Campbell
Member of the Employment Relations Authority