

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2013] NZERA Christchurch 195
5383629

BETWEEN MICHAEL BOSHOFF
 Applicant

A N D BROSNAN GOLF (NZ) PTY
 LIMITED
 Respondent

Member of Authority: M B Loftus

Representatives: Phil Butler, Advocate for Applicant
 Anne Milner, Counsel for Respondent

Investigation meeting: On the papers

Submissions Received: 31 July 2013 for Applicant (with further information on
 12 September 2013)
 2 August 2013 for Respondent

Date of Determination: 17 September 2013

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant, Mr Michael Boshoff seeks an order the respondent, Brosnan Golf (NZ) Pty Limited, pay interest and incur penalties for having breached the terms of an agreed settlement. Mr Boshoff asks the penalties be paid to him.

[2] Brosnan denies it breached the terms of settlement.

Conduct of the investigation

[3] Both parties expressed a view the investigation could be completed without a meeting. As a result it was agreed the determination be made on the basis of simultaneously exchanged submission, accompanied by affidavits evidence. That said, the following chronology is largely based on e-mail traffic between the parties.

Furthermore the exchange of submissions was not simultaneous but as the parties have not taken issue, neither shall I.

Background

[4] Brosnan advised Mr Boshoff he was redundant on 31 January 2012. Mr Boshoff challenged the decision by way of a personal grievance which the parties resolved on the eve of a scheduled Authority investigation. The settlement was later signed by a Ministry of Business, Innovation and Employment (MBIE) mediator pursuant to s.149 of the Employment Relations Act 2000.

[5] Amidst other things the settlement required Brosnan pay Mr Boshoff a compensatory sum and a contribution toward his costs. The compensatory sum was to be paid to Mr Boshoff's *nominated bank account* within seven days of settlement and the costs within seven days of receipt of an invoice from Mr Butler.

[6] The settlement also provides:

5. Should Brosnan Golf fail to make payments ... by the due dates then they will be liable for interest on the sums calculated at the rate of 8% and shall indemnify Michael fully for any legal costs and expenses incurred in recovering the money owing.

[7] It also provides:

8. This agreement may be executed in any number of counterparts including facsimile or PDF copies, and provided both the parties have executed one of such counterparts, each counterpart shall be deemed to have been executed by both the parties.

[8] In its intitulation the settlement records a date 15 March 2013. That was the date Brosnan's Brisbane (Australia) based representative signed. Mr Boshoff signed on 19 March and the document was forwarded to MBIE the following day.

[9] The phrase *Dated at Christchurch this ... day of... 2013* in the signature block was not completed by the mediator but MBIE tell me she signed on 22 March 2013.

[10] MBIE sent the signed settlement to Mr Butler by e-mail the following working day (25 March) and he forwarded it to Brosnan the same day. 16 minutes later Brosnan responded with an e-mail saying that while he may already have provided the information, could Mr Butler forward Mr Boshoff's account details. Mr Boshoff sent

the information to Mr Butler within 8 minutes of Brosnan's request but it was 5 April before this was forwarded to Brosnan. An e-mail appending the invoice for costs followed minutes later though Mr Butler says he posted one on 26 March.

[11] On 9 April Mr Butler e-mailed Brosnan advising they were in breach of the settlement and both interest and costs were now payable. A sum owing was specified for each with that pertaining to compensation calculated on an assumption the money was payable no later than 22 March 2013. The e-mail closed with advice Brosnan *should note that it is liable for penalties for the breach.*

[12] Mr Butler says Brosnan's counsel told him the original amounts (no additional interest or costs) had been paid on 11 April but as the money was not received recovery action commenced the following day, 12 April. That was the date the application was received by the Authority but when the claim was actually prepared is unclear as it contains two dates - 23 May 2012 on the cover and 12 March 2013 below Mr Butler's signature.

[13] Two amended statements of problem followed. They contained amendments resulting from the fact the compensatory sum was received by Mr Boshoff on 15 April and costs, minus GST, were also paid that day. The GST followed on 29 April 2013.

Determination

[14] This claim evolves from Mr Boshoff's belief the date of settlement was 15 March 2013. That on which the mediator signed is irrelevant – it is simply the date on which the mediator was asked to confirm an existing settlement and not the date of settlement itself.

[15] These are not propositions with which I agree. The settlement is not, in my view, concluded until it is complete. That only occurred when the mediator signed on 22 March.

[16] The attempt to overcome this by referring to clause 8 of the settlement (see paragraph 7 above) fails to persuade me. It requires the settlement be executed by both parties. Mr Boshoff did not sign till 19 March and that fact was not communicated to Brosnan until 25 March. Until then they had no knowledge the settlement had been concluded in accordance with its terms.

[17] Similarly, this is an application I enforce clause 5 of the settlement (paragraph 6 above) and penalise Brosnan for breaching two other provisions.

[18] Section 151 of the Act provides the Authority's power to enforce settlements is limited to those enforceable under s.149. Section 149(3) limits such agreements to those signed by a person authorised under s.149(1). Till such a person signs the agreement is not complete and enforceable in the manner Mr Boshoff seeks. That did not occur until 22 March and the agreement cannot have been enforceable earlier.

[19] While 22 March is the earliest date upon which the seven days can be said to have commenced but I conclude even that is too early. The concluded settlement was not forwarded to Brosnan until 25 March and it had no knowledge it had an enforceable document upon which it had to act till then. It did act and sought information to enable it to honour the agreement. A response was not provided till 5 April and Brosnan could not make payment in the prescribed way till it had the information.

[20] The suggestion in Ms Milner's e-mail (paragraph 10 above) that Mr Butler may already have provided the information is irrelevant. It was a *may have* and there is no evidence Brosnan actually had the required information.

[21] For the above reasons I conclude 5 April is the day upon which the seven days commenced. Brosnan then had a week to make the compensatory payment. I conclude it did. The money was in Mr Boshoff's account on 15 April. Money is placed in an account as a result of processing which occurs the night before. To be processed overnight the money must be deposited the prior working day which was 12 April but here I note documentary evidence it was actually paid, as claimed by Ms Milner, on the 11th. The additional delay is explained by the fact payment was arranged overseas and that often incurs further delay. Both the 11th and 12th are within the week Brosnan had to make payment.

[22] Turning to the costs contribution. I cannot rely on Mr Butler's claim a copy of the invoice was sent on the 26 March given a lack of supporting documentation. The documents I have available show the invoice (or at least a copy thereof) as being sent on 5 April. That, minus GST, was also received on 15 April which, applying the above rational, means it was paid on or before the 12th.

[23] The failure to pay GST I disregard as an excusable oversight. First the payments were arranged in Australia so there is an argument Brosnan thought it was excused an internal New Zealand tax. Second, and more importantly, while the applicable provision in the terms of settlement state GST was payable, documents recording the original agreement specify a total settlement sum which excludes GST (see e-mail exchange Butler / Milner of 8 March 2013). There is scope for confusion.

[24] Finally, and notwithstanding the above conclusion there was no breach, I note I would not be interested in granting the bulk of the remedies sought. These primarily comprise penalties payable to Mr Boshoff. Penalties are for deliberate and wilful breaches. There is no evidence of a deliberate or wilful breach by Brosnan – indeed, and when given confirmation of a complete and enforceable settlement, it acted with alacrity.

[25] For the above reasons the application is dismissed.

[26] Costs are reserved.

M B Loftus
Member of the Employment Relations Authority