

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH OFFICE**

CA 128/08
5099148

BETWEEN BULLET FREIGHT SYSTEMS
LTD
Applicant

AND JASON FRASER
Respondent

Member of Authority: Helen Doyle

Representatives: Dean Ruscoe, Advocate for Applicant
No appearance for Respondent

Investigation Meeting: 31 July 2008

Determination: 26 August 2008

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant, Bullet Freight Systems Limited (Bullet Freight) lodged an employment relationship problem with the Authority on 19 October 2007, that the respondent, Jason Fraser, had failed to comply with agreed terms of settlement under s.149(3) of the Employment Relations Act 2000.

[2] Bullet Freight said that it wanted the employment problem resolved by having the compensatory sum of \$4,200 that it had paid to Mr Fraser repaid to it on the basis that Mr Fraser had not complied with the terms of settlement.

[3] Bullet Freight experienced difficulty locating and serving Mr Fraser and it was not until 17 April 2008 when Mr Fraser was finally served with the statement of problem.

[4] A Support Officer at the Employment Relations Authority then wrote to Mr Fraser and advised that the Authority would hold a telephone conference on 20 May 2008.

[5] A telephone conference was duly held with the Authority, Dean Ruscoe, who is the Chief Executive Officer of Bullet Freight and Mr Fraser on 20 May 2008.

[6] During the directions conference the Authority advised Mr Fraser that he had not lodged a statement in reply to the employment relationship problem. The Authority gave leave for Mr Fraser to lodge a statement in reply by 30 June 2008.

[7] The Authority also referred to s.149 of the Employment Relations Act 2000 and in particular s.149(4) with respect to a person who is alleged to have breached an agreed term of settlement being liable for a penalty. The Authority advised Mr Ruscoe that it was a matter for the applicant whether it wished to claim a penalty in the alternative as a remedy and that if it did so it would have to advise Mr Fraser of any amendment to the claim in this respect.

[8] A date for an investigation meeting was also discussed during the telephone conference and there was agreement to have an investigation meeting on 31 July 2008. The parties were asked to bring along to that investigation meeting any documentation that had not already been provided to the Authority with the statement of problem. The parties were also advised that it would be an opportunity for them to give evidence in terms of the problem lodged before the Authority.

[9] I am satisfied that the parties were served with a copy of the notice of direction following the telephone conference which set out matters discussed during the telephone conference. I am further satisfied that Mr Fraser were served with a notice of investigation meeting.

[10] Bullet Freight lodged a further statement of problem in which it sought a penalty against Mr Fraser for failing to comply with the terms of the settlement agreement under s149(4). Bullet Freight asked that if a penalty was awarded, that the whole of the penalty be paid to the company.

[11] This further statement of problem was provided to Mr Fraser under cover of letter dated 3 July 2008 from the Senior Support Officer at the Authority. In that letter the Senior Support Officer reminded Mr Fraser that the Authority had not had a

statement in reply from him, referred again to the investigation meeting time and place and emphasised the importance of the Authority hearing from him as part of its investigation.

[12] On the morning of 31 July 2008 there was no attendance by Mr Fraser at the investigation meeting, which was scheduled to commence at 9.30am. I delayed the start of the meeting and asked the Senior Support Officer to telephone Mr Fraser to advise him that there was an investigation meeting that morning. An unsuccessful attempt to telephone Mr Fraser was made at 9.50am that morning. The telephone call was not answered.

[13] I then decided to proceed. I heard evidence from Mr Ruscoe for the company.

[14] After the investigation meeting had concluded the Senior Support Officer advised me that he had a message to telephone Mr Fraser. The Senior Support Officer duly telephoned Mr Fraser who advised that he had been in hospital having returned home at 7am. The Senior Support Officer advised Mr Fraser that there had been an attempt to telephone him that morning and Mr Fraser said he was asleep.

[15] The Senior Support Officer advised Mr Fraser to provide the Authority with some information as to why he had not attended and Mr Fraser's response was that he was reluctant to do so. Eventually Mr Fraser advised that he would have his wife write a letter to the Authority explaining why he was not at the hearing and the Support Officer confirmed that Mr Fraser had the address to do so. Mr Fraser indicated that that letter would be provided within a week of 31 July 2008.

[16] There was no communication received from Mr Fraser and I have therefore proceeded to determine the matter.

The Settlement Agreement

[17] The agreed terms of settlement between Jason Fraser and Bullet Freight Systems Limited are recorded in a record of settlement dated 8 October 2007. The relevant terms are set out below:

2. *Bullet Freight Systems Ltd will reinstate Jason Fraser with effect from 7am on Wednesday 10 October 2007 contingent on the following sub agreements:*

- (i) *Jason provides a full medical clearance and specifically in relation to his back and the work requirements and*
 - (ii) *Performance reviews on a monthly basis for three months will be carried out by Darren Wilson and*
 - (iii) *Willingness of Jason to attend courses to obtain Class 4 licence which the company will pay for and*
 - (iv) *If Jason resigns within twelve (12) months of starting and/or completing the course, he will repay the course fees in full from any calculation of final pay.*
3. *Bullet Freight Systems Ltd will pay Jason Fraser within 7 days of the date hereof, on a without prejudice basis and denial of liability basis, the compensatory sum of \$4,200.00 in terms of the provisions of s 123(1)(c)(i) of the Employment Relations Act 2000. This amount will be paid to the Applicant by way of direct credit.*

[18] Bullet Freight say that Mr Fraser breached clause 2 of the settlement agreement because he did not attend work on the agreed date or as subsequently agreed and he did not provide medical clearance.

[19] Mr Fraser was to attend work on 10 October 2007 but the Branch Manager agreed to extend the start to 15 October 2007 after Mr Fraser advised that some personal issues prevented his early return.

[20] Mr Fraser came into work briefly on 12 October 2007 to sign a new employment agreement and advised he would be starting on Monday 15 October 2007.

[21] On 15 October 2007 a text message was received by Bullet Freight advising that Mr Fraser would not be in to work that day because he was sick. The local Branch Manager was able to contact Mr Fraser's partner who advised that Mr Fraser would attend at work on 16 October 2007.

[22] On 16 October 2007 Mr Fraser did not arrive at work as agreed and there were several unsuccessful attempts to contact him on numbers that he had provided.

[23] By this time Bullet Freight had made the payment of \$4,200 to Mr Fraser as agreed in clause 3.

Determination

[24] I have treated the second statement of problem lodged by Bullet Freight as seeking an additional and/or alternative remedy to that in the first statement of problem.

The claim for reimbursement of the compensatory payment of \$4,200

[25] Mr Ruscoe said that as far as he was concerned, the provisions in the settlement agreement were part of a whole and not capable of being separated. He was of the view that clauses 2 and 3 in the settlement agreement were conditional on the other and could not be read separately.

[26] On the face of the record of settlement, the compensatory sum paid to Mr Fraser of \$4,200 was not conditional on, or related to, Mr Fraser's reinstatement.

[27] The obligation on Bullet Freight to reinstate Mr Fraser was contingent on four sub agreements including Mr Fraser providing a full medical clearance. There was always a possibility therefore that Mr Fraser may have been unable to provide that medical clearance and then Bullet Freight was not obliged to reinstate him. The settlement agreement did not provide that payment of the sum in clause 3 was conditional on medical clearance or that the sum in clause 3 would be repaid if medical clearance was not obtained.

[28] I find that clauses 2 and 3 of the settlement agreement are stand alone clauses and the obligations in each clause are not related to the other.

[29] I do not find that the claim for reimbursement to Bullet Freight of the sum of \$4,200 is made out and accordingly I dismiss that claim.

The claim for a penalty

[30] Mr Ruscoe explained that Bullet Freight had entered into the settlement agreement in good faith and on the understanding that it was binding. He said that there were efforts made for Mr Fraser's expected return to work in terms of rosters so that training could commence. It is clear from Mr Ruscoe's evidence and from an email that he sent to the Mediation Service on 16 October 2007 that he feels particularly strongly about this matter.

[31] I turn firstly to the standard of proof required to be discharged in terms of establishing a breach for a penalty claim. There are many employment cases where the Court has held that there must be proof beyond reasonable doubt of a breach when a penalty is sought. In *Xu v McIntosh* [2004] 2 ERNZ 448 at p 459 Goddard CJ stated, being clearly aware of judicial expressions to the contrary, that:

In all instances, that is to say in both the personal grievance and the penalty action, the standard of proof required to be attained to discharge the relevant burden of proof is the standard applying in all civil cases: proof on a balance of probabilities...

[32] I intend to follow *Xu* and consider whether there is proof of evidence of a breach on the balance of probabilities. In doing so there still needs to be clear evidence that there was a breach for a penalty claim.

[33] I have had regard to the words in the settlement agreement. In penalty proceedings documents should be construed narrowly – *Wellington etc Clerical etc IUOW v Northern –United Building Soc* [1981] ACJ 447.

[34] Mr Ruscoe says that Mr Fraser breached clause 2 of the settlement agreement. I have considered what obligations Mr Fraser had in terms of that clause.

[35] Reinstatement by Bullet Freight was contingent on four sub agreements. The first sub agreement was that Mr Fraser provide a full medical clearance and specifically in relation to his back and the work requirements. It can be implied in terms of clause 2 (i) of the settlement agreement that Mr Fraser was to attend a doctor about his back and the work requirements to see if he could obtain a full medical clearance.

[36] That is where the matter becomes difficult in terms of clear evidence on the balance of probabilities that there was a breach of the obligation for which a penalty should be awarded. The only breach on Mr Fraser's part that there could be in terms of the settlement agreement is in terms of the failure to attend a doctor. He could not on the face of the agreement be obliged to obtain a medical clearance because the doctor may not have cleared him to return.

[37] There is no evidence before me as to whether Mr Fraser attended a doctor and whether he was medically cleared to work for Bullet Freight. The only evidence is that he did not turn up to work as agreed on 16 October 2007 and did not provide a

medical clearance. Understandably no-one from Bullet Freight was in a position to give evidence about what Mr Fraser did in terms of seeing a doctor. There is a possibility that Mr Fraser did attend a doctor but was not able to obtain a full medical clearance and failed to advise Bullet Freight of that. There is a possibility that Mr Fraser simply strung Bullet Freight along until he received payment of the compensatory sum and did nothing.

[38] Bullet Freight was discharged from its obligations to reinstate Mr Fraser because there was no medical clearance. Mr Fraser's actions in failing to turn up to Bullet Freight on the agreed date with or without a medical clearance was discourteous because it left Bullet Freight not knowing what was happening. In short Mr Fraser did not deal with Bullet Freight in good faith about that matter. That however is a different conclusion from one that Mr Fraser breached his obligations under the settlement agreement and there is a breach for which a penalty should be awarded. In that regard I am limited to what the words in the record of settlement provided.

[39] In the end and, not without some regret, I am simply unable to find that the standard of proof for a penalty for a breach of the settlement agreement by Mr Fraser has been attained in this case. I therefore dismiss the claim for a penalty.

Costs

[40] Mr Ruscoe was not represented for the purposes of the investigation meeting. I do not find in the circumstances that Mr Ruscoe is entitled to costs. I do find that Mr Ruscoe is entitled to reimbursement of his expenses in the unusual circumstances of this claim. Mr Fraser took no part in this matter aside from participating in a telephone conference where he expressed strong and negative views of Bullet Freight. In the absence of any proper response from Mr Fraser in terms of his view of the claim against which Bullet Freight could weigh and consider its claim, I find that Mr Ruscoe had little option but to carry on to an investigation meeting. Bullet Freight had no other way of knowing why Mr Fraser did not return to work.

[32] Mr Ruscoe had to travel from Auckland for the purpose of attending the investigation meeting in Christchurch on 31 July 2008. He said that he had flown from Auckland specifically for the investigation meeting and his flights, which I verified, certainly supported that he flew back to Auckland that same day as the

meeting. The cost of his flights, which I also verified at the time of the meeting, was \$313. I also verified the accommodation expenses at the Holiday Inn for 30 July 2008 in the sum of \$121. In the circumstances of this case I find that Bullet Freight is also entitled to reimbursement of its filing fee in the sum of \$70.

[33] I order Jason Fraser to pay to Bullet Freight Systems Limited the sum of \$504 being expenses incurred by Bullet Freight in pursuing this matter as set out above.

Helen Doyle
Member of the Employment Relations Authority