

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2015] NZERA Wellington 5
5535226

BETWEEN ARTI LATA CHAND
 Applicant

AND THE WHYTE GROUP LIMITED
 Respondent

Member of Authority: Trish MacKinnon

Representatives: Matt Harrop, Counsel for Applicant
 Brett Whyte, for the Respondent

Investigation Meeting: 20 January 2015 at Wellington

Determination: 21 January 2015

DETERMINATION OF THE AUTHORITY

1. Arti Chand seeks an order for compliance and costs in relation to payments due under terms of settlement agreed with her former employer, The Whyte Group Limited (TWGL). The agreement was reached in the course of an Authority investigation meeting on 25 November 2014 under file 5514695. Its terms were incorporated into orders made by the Authority that day.
2. Ms Chand's application was filed on 18 December 2014. She requested urgency on the basis of the proximity to the end of the year citing the necessity and justice of an investigation as soon as possible into the respondent's non-payment of money due. A telephone conference was convened by the Authority on 22 December 2014 for the purpose of discussing the request for urgency and scheduling an investigation meeting.
3. TWGL chose not to participate in the telephone conference and any views it may have had on the request for urgency were not made known to the Authority.

I accorded urgency and set the matter down for an investigation meeting as soon as it was practicable.

4. Brett Whyte, the Managing Director of TWGL, did not file a statement in reply as required by the Authority but did participate in the investigation meeting on 20 January 2015 and provided oral evidence.
5. Ms Chand affirmed that she received the first of two scheduled instalments from TWGL as provided for in clause 2 of the terms of settlement. She had not received the second instalment due under that clause. Nor had she or her legal representatives received from TWGL the contribution to legal fees that were provided for under clause 3 of the terms of settlement.
6. Mr Whyte confirmed that his company, the respondent, had not fully complied with the agreed terms of settlement. He said it had not done so because he entered into the agreement on the basis of misrepresentations from Ms Chand.
7. He said the representations he relied on were included in the witness statement Ms Chand filed before the investigation meeting of 25 November 2014. Mr Whyte said he had ascertained, after agreeing the terms of settlement, that certain of Ms Chand's statements were inaccurate and he had information indicating she published a website in September 2014 stating her availability to practise in all areas of work she had worked in during her employment with TWGL. This included areas that were covered by the restraint of trade provisions of her employment agreement with the respondent.
8. Mr Whyte also disagreed with the quantum of legal fees he had agreed to pay as part of the terms of settlement.
9. He said he was intending to take legal advice over this situation. He claimed he had been unable to do so to date because lawyers were currently unavailable due to the time of year. Mr Whyte confirmed he had made only one payment to Ms Chand and that he relied on the reasons given above for the failure of his company to comply fully with the terms of the terms of settlement.

Compliance

10. The Authority has the power to order compliance under s. 137(1)(b) of the Employment Relations Act 2000 (the Act) in a number of specified situations. Relevant to the current situation is s. 137(1)(b) which provides that the Authority may order compliance where any person has not observed or complied with the order, determination, direction, or requirement made or given under this Act by the Authority or a Member or officer of the Authority.
11. The respondent has confirmed it did not comply fully with the terms of settlement which were also orders of the Authority by the consent of the parties. It did not notify Ms Chand or her legal representatives of its purported reasons for non-payment and has taken no steps, other than non-compliance, to overturn the terms of settlement which it agreed in November 2014.
12. Ms Chand's legal representatives wrote to Mr Whyte on 12 December and again on 15 December 2014 notifying TWGL's failure to meet the requirements of the settlement agreement. They requested advice as to the respondent's intention to make the payments and noted they would have no choice other than to commence proceedings should payment not be made.
13. Mr Whyte responded on the morning of 16 December 2014 stating that the payments would be made and that he would confirm the date of payment later that day. No further payments were made.
14. I do not accept the purported reason given by Mr Whyte for the respondent's failure to comply fully with the terms of settlement. I note that, by the time he responded to Ms Chand's legal representatives on 16 December 2014, confirming the respondent's intention to make the agreed payments, TWGL was already in breach of the terms of settlement by failing to make the further payments specified in clauses 2 and 3 of that agreement.
15. I am unconvinced by Mr Whyte's assertion to have entered the terms of settlement agreement on the basis of Ms Chand's witness statement. He had the opportunity to test and challenge her witness statement in the November 2014 investigation meeting but chose not to do so. Instead he elected, with the

agreement of Ms Chand, to enter into private discussions with her and her legal representative before any of the evidence was sworn or affirmed.

16. I am also unconvinced by Mr Whyte's reliance for not making all agreed payments on the basis of Ms Chand's purported publishing of a website citing her ability to practise in all areas she worked in for the respondent. By the time Mr Whyte claims to have become aware of the website he had agreed, as one of the terms of settlement, that the restraint of trade contained in her employment agreement was no longer effective and was not enforceable. This indicates that Ms Chand's adherence to the restraint of trade provisions was not a priority issue for the respondent. I find this undermines Mr Whyte's reliance on that factor for non-payment of the agreed sums.
17. Mr Whyte's dispute of the quantum of the legal fees agreed as a term of settlement is difficult to understand. I can only assume, on the basis of the signed agreement presented to me by the parties following their private discussions in the course of the November 2014 investigation meeting, that Mr Whyte voluntarily agreed to all the terms of settlement. As Managing Director of TWGL he had the authority to enter into that agreement and it is unacceptable for him to fail to comply with its terms in full.
18. The terms of settlement agreement were, by the consent of the parties, made into orders of the Authority. TWGL has failed to comply with those orders in full and I find there to be no extenuating circumstances to justify that failure.
19. In the circumstances it is appropriate to order the respondent to comply in full with the terms of settlement agreement it entered into on 25 November 2014. I order TWGL to do so by 29 January 2015.

Costs

20. Clause 5 of the terms of settlement agreed by the parties in November 2014 provide that, in the event of any proven breach of any term of the agreement, the party responsible for the breach "will fully indemnify the other for all costs incurred in pursuing enforcement action".
21. Counsel for Ms Chand has provided the Authority with an invoice showing the cost of its services, including payment of the Authority's filing fee. I find the

respondent's breach of the terms of settlement to be proven and an order will be made accordingly.

Orders

22. The Whyte Group Limited is ordered to comply with the orders made by the Authority on 25 November 2014. Those orders comprised the Terms of Settlement agreed by the respondent and Ms Chand that day. Payment of the outstanding monetary amounts due under clauses 2 and 3 of the terms of settlement is to be completed by 29 January 2015.
23. The Whyte Group is further ordered to pay Ms Chand's costs in respect of the current application before the Authority in the sum of \$2,152.29. Such payment is also to be made by 29 January 2015.

Trish MacKinnon
Member of the Employment Relations Authority