

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

5098657
AA 378/07

BETWEEN JACQUILINE CLARK
 Applicant

AND SAL'S TRADING COMPANY LTD
 Respondent

Member of Authority: Vicki Campbell

Representatives: David Ure for Applicant
 Sallie Hobbs for Respondent

Determination on the 3 December 2007
papers:

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] On 8 May 2007, with the assistance of an Employment Relations Service mediator, the parties entered into a Record of Settlement. As required by s.149 of the Employment Relations Act 2000 the settlement was signed by the mediator and endorsed to the effect that the mediator had explained to the parties that the settlement was final, binding and enforceable. The Record of Settlement was signed by the parties and acknowledged as a full and final settlement of all matters between the parties arising out of the employment relationship between them.

[2] The financial terms (clauses 2) of the Record of Settlement states:

The Respondent will pay the Applicant on a denial of liability basis the compensatory sum of \$3,000 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 50 weekly instalments of \$60.00 commencing 24 May 2007.

Application for compliance

[3] On 3 September 2007 the Authority received an application from Ms Clark seeking a compliance order from the Authority requiring Sal's Trading Company Ltd ("Sal's Trading") to pay the settlement figure in full together with the costs of this application, interest and all relevant penalties to the Applicant.

[4] In its statement in reply Sal's Trading says the Record of Settlement was signed under duress and Ms Hobbs, who signed the settlement agreement on behalf of the company, was unwell and under a lot of stress and the company has struggled to cope financially. The Respondent has asked for the matter to be referred back to mediation. Attached to the statement in reply were a number of letters written in support of Ms Hobbs.

[5] I concur with the comments of my colleague in *McRae v The \$2 Shop Limited*, unreported, 2 July 2007, AA132A/07 that section 149(3) of the Act makes clear that the Record of Settlement cannot be cancelled. As stated by Member Robinson, the legislative amendment establishing this provision is founded on clear policy to give greater certainty of outcomes in mediated settlements. Section 149(3) is uncompromising not only so as to discourage an aggrieved party for seeking perceived better resolution on enforcement but also because the prospect of cancellation would render such settlements largely redundant. I am satisfied a compliance order would be appropriate in these circumstances.

Sal's Trading Company Ltd is ordered to comply with clause 2 of the Record of Settlement dated 8 May 2007 forthwith.

[6] The weekly payments of \$60.00 which were due to be paid each week from 24 May 2007 up to and including the date of this determination are to be paid to Ms Clark within 7 days of the date of this determination. That equates to 28 weeks at \$60.00 per week being \$1,680.00.

Sal's Trading Company Ltd is ordered to pay Ms Clark the sum of \$1,680 without deduction within 7 days of the date of this determination.

[7] Schedule 2, clause 11 of the Act provides a discretionary power for the Authority to award interest where judgment is made for the recovery of money. I am not satisfied it would be just to award interest in this case.

[8] Section 149(4) of the Act provides for the imposition of a penalty where there is a breach of the terms of an agreed settlement. An award of a penalty requires a finding of wilful or deliberate conduct.

[9] Ms Hobbs, a director of Sal's Trading says that the failure to pay Ms Clark the agreed payments under the settlement agreement was due to her not being in a financial position to do so.

[10] I am satisfied that the standard required to award a penalty has been reached. The respondent entered a Record of Settlement with a term that required payments of a specified sum over a specified period of time commencing on 24 May 2007. That did not happen. The respondent knew it was not able to make the payments as agreed, but has taken no steps to communicate with Ms Clark that the payments would not be made and the reasons why.

[11] The availability or otherwise of funds is not relevant to whether the respondent's breach of an agreement, voluntarily entered into, amounts to a wilful breach. What is relevant are the steps the respondent took to comply with the terms of the Record of Settlement. There is no evidence the respondent took any steps to pay or to explain to Ms Clark why the agreed sums could not be paid on the agreed dates. Those failures amount to a wilful breach of the agreed terms.

Sal's Trading Company Ltd is ordered to pay directly to Ms Clark a penalty of \$500 pursuant to section 149(3) of the Employment Relations Act 2000 within 28 days of the date of this determination.

Costs

[12] Ms Clark has had to incur expenses, which would not have been necessary had Sal's Trading honoured the mediated settlement agreement to which it had agreed.

Sal's Trading Company Ltd is ordered to pay Ms Clark \$320.00 as a contribution to her costs (this being inclusive of the \$70.00 filing fee) within 28 days of the date of this determination.

Vicki Campbell
Member of Employment Relations Authority