

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH OFFICE**

BETWEEN Linda Clarke (Applicant)

AND Occidental Hotel 1998 Limited (First Respondent)
AND Paul Dumelow (Second Respondent)

REPRESENTATIVES Keith Owen, Advocate for Applicant
Jacque Cameron for First Respondent
Paul Dumelow, Second Respondent

MEMBER OF AUTHORITY James Crichton

TELEPHONE CONFERENCES 16 May 2005
1 June 2005

DATE OF DETERMINATION 1 June 2005

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] This is an application for a compliance order wherein the applicant (Ms Clarke) seeks to enforce a mediated settlement with her former employer Occidental Hotel 1998 Limited (Occidental Hotel), which settlement was guaranteed by the second respondent Paul Dumelow (Mr Dumelow). Mr Dumelow was at the relevant time a director and shareholder of the Occidental Hotel.

[2] The terms of the mediated settlement were not performed on due date either by the Occidental Hotel or Paul Dumelow and accordingly Ms Clarke seeks compliance with the mediated settlement agreement.

Process

[3] I have had the benefit of two helpful telephone conferences with the parties and as a consequence have reached certain conclusions in the matter which I now record in this determination.

[4] The first conclusion that I have reached which has the agreement of all three parties involved is that no good purpose would be served by my conducting a formal hearing. Accordingly I do not propose to.

[5] Next, I have reached the conclusion that the only practical basis on which Ms Clarke can obtain payment of the mediated settlement is by looking to the guarantor Mr Dumelow as it seems to be common ground (and I accept) that the Occidental Hotel is neither trading nor indeed in possession of any assets which could realistically realise the sum required.

[6] Further, Mr Dumelow has confirmed that he accepts the debt and, so far as he is able, has give the Authority a verbal assurance that the debt will be paid when funds from the sale of a property that he owns become available. Mr Dumelow has told me that he expects to settle that transaction during June 2005 and that one of the debts that he wishes to satisfy from the net proceeds of that transaction is the debt to Ms Clarke thereby discharging his guarantee in making the payment and also satisfying the debt against his former company the Occidental Hotel.

[7] In all the circumstances then, I think it appropriate for me to make an order of compliance in favour of Ms Clarke and against Mr Dumelow as the second respondent (in effect the guarantor of the first respondent the Occidental Hotel).

[8] Before doing that however, I need to deal with one aspect of the settlement agreement namely clause 5 of the record of settlement.

Clause 5

[9] Clause 5 of the record of settlement prepared by the Mediation Service of the Department of Labour reads as follows:

‘5. it is agreed that if payment is not made by the 31/5/04 a penalty payment of \$25 for each day not paid after the 31/5/04 will be paid by Paul Dumelow to Linda Clarke’.

[10] I am invited by the applicant to enforce that provision as well as the others and I decline to do so.

[11] In my opinion this provision offends the law in that it seeks to make a penalty out of a delay of this kind. The appropriate remedy, if any remedy at all is required, is the provision of an appropriate payment of interest for the late payment. In striking down this provision, I am applying Chief Judge Goddard’s decision in *Ozturk v Gultekin* WC 6/04 11 June 2004.

[12] For the avoidance of doubt I also make clear that I do not award penalty interest as an alternative to the provisions of clause 5 and I make that decision because I am satisfied that Mr Dumelow is in no position to pay anything more than the bare amount. To require him to pay more than that in all the circumstances would be unjust and unreasonable.

Determination

[13] I now issue the compliance order in the following terms:

- a) Clause 3 of the agreed terms of settlement is enforced by which Mr Dumelow is to pay to Ms Clarke the sum of \$2,500.00 pursuant to Section 123 (c) (i) of the Employment Relations Act 2000 such payment to be made by way of cheque made payable to Employment Dispute Services P O Box 22038 Christchurch; and
- b) Mr Dumelow is also to pay costs of \$400.00 plus GST in respect to the applicant’s costs in bringing this matter to the Authority; and
- c) The filing fee of \$70.00 is also to be met by Mr Dumelow.
- d) The order shall be obeyed by 30 June 2005.

[14] It follows that if Mr Dumelow is to make a payment to Employment Disputes Services Limited on account of Linda Clarke in the sum of \$3,020.00 that will conclude matters in their entirety and discharge the obligation that Mr Dumelow and the Occidental Hotel have in respect to Ms Clarke.

James Crichton
Member of Employment Relations Authority