

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI
TE WHANGANUI-Ā-TARA ROHE**

[2019] NZERA 58
3050052

BETWEEN	CORY DAVIS Applicant
AND	MATTHEW THOMSON First Respondent
AND	STRESS FREE CONSTRUCTION LIMITED Second Respondent

Member of Authority: Michael Loftus

Representatives: Applicant in person assisted by Kim Good
Nil for the Respondent

Investigation Meeting: On the papers and by telephone on 8 February 2019

Date of Determination: 8 February 2019

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant, Cory Davis, seeks an order the respondents comply with provisions of a mediated settlement the parties concluded on 15 November 2018. The settlement was signed by a mediator in accordance with s 149 of the Employment Relations Act 2000 (the Act).

[2] There is also an application for penalties which, if awarded, Mr Davis asks be payable to him as opposed to the Crown.

[3] The respondent's position is unknown as both have failed to participate in the Authority's process. There is no statement(s) in reply nor any has there been any other response from either.

Investigatory process and non-participation of the respondent's

[4] The application cites, as respondents, both Stress Free Construction Limited and Matthew Thomson, Stress Free's sole director and shareholder. Copies of applicable documents were sent to the address recorded for each on the Companies Register. All have been returned though that is not perhaps surprising given evidence both premises have been vacated and then sold by the respondent's.

[5] That said the addresses to which the documents were served remain, even today, these recorded on the Companies Register. That means, in respect to Stress Free and notwithstanding evidence the address is no longer suitable or appropriate, it remains valid and the documents have been properly served.¹ The same can be said for Mr Thomson given his appointment as a director.²

[6] In addition to the above there is also Regulation 16(3)(a)(vi) of the Employment Relations Authority Regulations 2000. As Stress Free advised an e-mail address to the Companies Office I directed notices also be sent to that electronic address. In doing so I further note the e-mail address is recorded on, and linked to, Stress Free's website which also refers to Mr Thomson by name and cites him personally as the *Contact details*.

[7] Contained in the documents so served is advice that in the absence of a Statement in Reply the claim can only be defended with leave of the Authority.³ Leave has not been sought. Also contained therein was advice the matter could be determined during today's telephone conference which, given the respondent's failures, had to be ordered. While telephoned Stress free failed to answer the phone number advised on their website.

[8] The above leads to a conclusion the requisite documents have been properly served on both Mr Thomson and Stress Free. Neither can avoid their obligations by simply ignoring the claim especially as both have now been advised about the process to be used and the consequences of avoidance.

Discussion

[9] As already said the parties attended mediation on 15 November 2018.

¹ Section 192(3) of the Companies Act 1993

[10] That process ended with a Record of Settlement signed by the mediator pursuant to s 149 of the Act which, amidst other things, required the respondents pay Mr Davis a total of \$8,000 as compensation pursuant to s 123(1)(c)(i). Payment was to be made in six instalments with the first due on 22 November 2018 and the last on 24 January 2019.

[11] Here comment should be made about the fact there are two respondents. While that may be unusual in an employment setting it must be remembered this is a compliance/enforcement action. The settlement about which the compliance order is sought cited both and placed responsibility for payment upon both. Therefore they must, for the purposes of this action, be considered jointly and severally liable.

[12] Having perused the file and had an opportunity to discuss the claim with the applicant I am satisfied he has only received one thousand dollars from the respondents. It follows given the shortfall and the passing of the last payment date the respondents are now in breach of their obligations pursuant to the settlement.

[13] It further follows the order sought will be made.

[14] Turning to the penalty application. Given the foregoing I am satisfied there has been a breach. It is a breach to which a penalty may apply.⁴

[15] Having considered the matters I must when determining a penalty, the lack of explanation or defence, undisputed claims Mr Thomson is trying to avoid his liabilities by transferring assets into the name of others and those awarded in similar situations I conclude \$5,000 appropriate.⁵

[16] I have also considered the request the penalty be payable to Mr Davis. In doing so I note the Court's comments about to whom a penalty should be payable, the fact it was over to Mr Davis to bring the case and evidence about the nature and extent of related losses suffered by Mr Davis.⁶ Having done so I conclude 75% should be payable to Mr Davis and the remainder to the Crown.

² Section 387A(1)(b) of the Companies Act 1993

³ Regulation 8(3) of the Employment Relations Authority 2000

⁴ Sections 149(4) of the Employment Relations Act 2000

⁵ *Borsboom v Preet PVT Ltd* [2016] NZEmpC 143

⁶ *Nicholson v Ford* [2018] NZEmpC 132 and s 133A(d) of the Employment Relations Act 2000

[17] Finally costs. Mr Davis is, albeit assisted by Ms Good, effectively self-represented. This means his recoverable costs are limited to the Authority's filing fee which is, I conclude, reimbursable.

Conclusion

[18] I therefore order the respondents, Matthew Thomson and Stress Free Construction Limited:

- a. comply with the terms of the s149 settlement they entered into on 15 November 2018 and pay Cory Davis the sum of \$7,000.00 (seven thousand dollars) being the residual amount payable thereunder; and
- b. pay Mr Davis a further \$71.56 (seventy one dollars and fifty six cents) being reimbursement of the filing fee he paid.

[19] Both respondents are jointly and severally liable for the above payments which are to be made to Mr Davis no later than 4.00pm on Friday 22 February 2019.

[20] Mr Thomas and Stress Free Construction Limited are also jointly and severally responsible for paying a penalty of \$5,000 (five thousand dollars). Payment is also to be made no later than 4.00pm on Friday 22 February 2019 with \$3,750 payable to Mr Davis and \$1,250 to the Crown via the Authority.

[21] In closing I caution the respondents that failure to comply with the above orders may result in further consequences. Should such a failure be pursued in the Employment Court⁷ they potentially include the imposition of fines, the sequestration of property and/or imprisonment in Mr Thomson's case. Conversely a certificate of determination may be obtained and the matter pursued in the District Court which might ultimately lead to liquidation of the company and/or bankruptcy for Mr Thomson.⁸

Michael Loftus
Member of the Employment Relations Authority

⁷ Sections 139 and 140 of the Employment Relations Act 2000

⁸ *Denyer v Peter Reynolds Mechanical Ltd t/a The Italian Job Service Centre* [2015] NZEmpC41 at [42] and *Broeks v Ross EmpC* Auckland AC36A/09, 11 November 2009 at [5]