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Douglas v Hames Sharley International Limited (Auckland) [2007] NZERA 23 (1 February 2007)

Determination Number: AA 24/07 File Number: 5039421

Under the [Employment Relations Act 2000](#)

BEFORE THE EMPLOYMENT RELATIONS AUTHORITY AUCKLAND OFFICE

BETWEEN Margaret Douglas (Applicant)

AND Hames Sharley International Limited (Respondent)

REPRESENTATIVES Nikki Dines and Phillipa Muir, Counsel for Applicant

Aaron Kashyap, Counsel for Respondent

MEMBER OF AUTHORITY Leon Robinson

SUBMISSIONS RECIEVED 17 December 2006

22 December 2006

DATE OF DETERMINATION 1 February 2007

DETERMINATION OF THE AUTHORITY

The Authority determines that this employment relationship problem shall be resolved by the following orders:-

A Hames Sharley International Limited is ordered to comply with clause 4 of the Record of Settlement and is ordered to do so within 14 days of the date of this Determination.

B Hames Sharley International Limited is ordered to comply with clause 5 of the Record of Settlement and is ordered to do so within 14 days of the date of this Determination.

C Hames Sharley International Limited is ordered to comply with clause 6 of the Record of Settlement and is ordered to do so within 14 days of the date of this Determination. The payment of \$4,722.50 to Ms Douglas will constitute compliance with clause 6.

D Hames Sharley International Limited is ordered to pay to Margaret Douglas interest on the sum of \$4,722.50 at the rate of 9% per annum from 31 May 2006 until the date of payment.

E Hames Sharley International Limited is ordered to pay the sum of \$3,000.00 as a penalty. \$2,000.00 of that penalty is to be paid to Margaret Douglas and the remaining \$1,000.00 into the Authority, to be paid by the Authority into the Crown Bank Account.

The problem

[1] The applicant Ms Margaret Douglas ("Ms Douglas") applies to the Authority for an investigation of her claim that her former employer Hames Sharley International Limited ("Hames Sharley") has failed to comply with a record of settlement between them. She also seeks to recover arrears of wages. Ms Douglas asks the Authority to resolve the problem by formal orders in her favour for compliance, penalties, arrears of wages, damages and costs.

[2] Hames Sharley denies Ms Douglas' various claims. It says it has complied in all respects with the Record of Settlement and that the claim for wage arrears should be referred to a Labour Inspector.

[3] The parties were unable to resolve the problem informally between them. They have agreed that the Authority should determine the matter on the papers.

The facts

[4] Ms Douglas commenced employment with Hames Sharley in April 2001 as a graduate architect. That employment terminated on 9 May 2006.

[5] Ms Douglas raised an employment relationship problem with Hames Sharley. That employment relationship problem was the subject of a Record of Settlement the parties entered into pursuant to [section 149](#) of the [Employment Relations Act 2000](#) and dated 16 May 2006 ("the Record of Settlement").

[6] The Record of Settlement contained these terms:-

2. *Without either party making any admission as to liability, Hames Sharley Intl Ltd will pay Margaret Douglas within 7 days of the date hereof the compensatory sum of \$4,500.00 in terms of the provisions of [S. 123 1](#) © (i) of the [Employment Relations Act 2000](#), and a further of (sic) \$4,500.00 in terms of the provisions of [S. 123 1](#) © (i) of the [Employment Relations Act 2000](#) within 21 days of the date hereof. This money shall be paid by way of direct credit*
3. *Without making any admission as to liability, Hames Sharley Intl Ltd will also pay \$800.00 towards Medical expenses incurred by Margaret Douglas, and \$2,500.00 (GS T Inclusive) towards legal expenses.*
4. *Hames Sharley Intl Ltd will provide Margaret Douglas with 6 projects for case study purposes towards her Registration. Margaret Douglas will attend the offices of Hames Sharley Intl Ltd to take copies of those 6 projects. This will include drawings and all related project correspondence.*
5. *Hames Sharley Intl Ltd shall provide Margaret Douglas with a positive reference in their letter head as signed of (sic) by her previous manager (subject to his agreement), and validated by Bill Hames.*
6. *All outstanding and contractual or statutory entitlements shall be calculated within 14 days of the date hereof, and paid by direct credit forthwith. Should there be any disagreement about the outstanding entitlements at the end of this time frame, an Inspector from the Department of Labour can be contacted by Margaret Douglas for an independent calculation.*

[7] Clause 4 was endorsed with a hand written addition by both parties "photocopy of paper only".

[8] Ms Douglas says Hames Sharley has failed to comply with clauses 4 - 6 of the Record of Settlement. She asks the Authority to order Hames Sharley comply with those clauses.

The merits *Clause 4*

[9] The Authority finds that Hames Sharley has failed to provide Ms Douglas with 6 projects for case study purposes towards registration. It is noted that the provision in the Record of Settlement does not specify a period for compliance. However, the Authority considers that having regard to the obvious and known purpose of this provision, the delay since the execution of the Record of Settlement is unacceptable. That delay together with Hames Sharley's documented resistance suggests to the Authority there has been wilful delay. Accordingly, it is appropriate to grant compliance.

[10] To assist the parties, the provision of the said "projects" is to be construed as inclusive of *drawings and related project correspondence* and is **not limited** to only that documentation. As well, Hames Sharley being the lawful owner of such intellectual property, it is not constrained from complying with the contractual obligation it entered into voluntarily with Ms Douglas. The Authority further notes the contractual obligation is unqualified and Hames Sharley is not permitted to impose any qualifications or conditions.

[11] The Authority is satisfied that Hames Sharley has failed to comply with Clause 4 of the Record of Settlement and that the situation of non-compliance continues today. **Hames Sharley is ordered to comply with clause 4 of the Record of Settlement and is ordered to do so within 14 days of the date of this Determination.**

Clause 5

[12] The Authority finds that Hames Sharley has failed to provide Ms Douglas with a positive reference on its letterhead signed off by Mr Kent Fabian and validated by Mr Bill Hames. Again, it is noted that no period for compliance is specified. However, the delay since execution is unacceptable and it is appropriate to grant compliance to procure performance.

[13] I am satisfied that Hames Sharley has failed to comply with Clause 5 of the Record of Settlement and the situation of non-compliance continues today. **Hames Sharley is ordered to comply with clause 5 of the Record of Settlement and is ordered to do so within 14 days of the date of this Determination.**

Clause 6

[14] The Authority finds that the obligations under clause 6 of the Record of Settlement were to be discharged within 14 days or shortly thereafter. That time has obviously long since passed. Hames Sharley is not entitled to resist payment to Ms Douglas because it suggests a labour inspector could assist. That prerogative was solely Ms Douglas' and nor was there any dispute in the period specified for satisfaction. Hames Sharley has no justification for its failure to pay Ms Douglas the sums due to her under the Record of Settlement. It is appropriate that compliance be granted to secure payment.

[15] I am satisfied that Hames Sharley has failed to comply with Clause 6 of the Record of Settlement and that situation of non-compliance continues today. The Authority accepts Ms Douglas' evidence of the amount outstanding in the sum of \$4,722.50 net as follows:-

The total amounts due under the Record of Settlement

Compensation under s123(1)(c)(i) \$9,000.00 net

Medical expenses \$800.00 net

Payment towards legal expenses (including GST) \$2,500.00 net

March expenses \$265.70 net

April expenses \$175.60 net

Payment for annual leave (based on 38.38 days annual leave) (\$8,044.49 gross) \$5,740.88 net

Payment for sick leave for the period between 11 April and 9 May (\$4,192.00 gross) \$2,808.64 net

Total owed \$21,290.82 net

The following payments have been received from Hames Sharley:

29. 29 May: Part payment of s123(1)(c)(i) compensation \$1,500.00 net

30. 30 May: Part payment of annual leave (based on 31.41 days) \$3,827.02 net

6 June: Payment for remainder of s123(1)(c)(i) compensation and part payment of \$9,990.00 net medical and legal expenses (paid by Hames Sharley Australia)

14 June: Payment for remainder of medical and legal expenses \$810.00 net

30 August: Payment for March and April expenses \$500.00 net

Total paid \$16,537.02 net

Total outstanding \$4,722.50 net

[16] **Hames Sharley is ordered to comply with clause 6 of the Record of Settlement and is ordered to do so within 14 days of the date of this Determination. The payment of \$4,722.50 to Ms Douglas will constitute compliance.**

[17] As Ms Douglas has stood out of the sums due to her, I think it fit she have interest on this sum. **I order Hames Sharley to pay to Margaret Douglas interest on the sum of \$4,722.50 at the rate of 9% per annum from 31 May 2006 until the date of payment.**

Penalty

[18] Penalties are penal sanctions for breaches of an agreement. The Authority may order that the whole or any part of a penalty be paid to any person. Penalties, being punitive in nature, are directed at proscribing undesirable behaviours or conduct. It is logical that such behaviours be deliberate or wilful. It has been said that generally speaking, a penalty is appropriate only where there has been a wilful breach or default.

[19] I do not accept that Hames Sharley could have had any doubt as to the sums owed to Ms Douglas. I find it has deliberately withheld payment and the final satisfaction of the debt owed to her. I fail to see any justification for its failure to provide the reference it agreed it would. I find too that it has imposed conditions on the provision of the case studies that it is not entitled to. I have reached the view that Hames Sharley's very late correspondence seemingly raising various disputes are nothing more than contrivances aimed at frustrating performance of the Record of Settlement. For these reasons, I conclude it has wilfully breached the terms of the Record of Settlement.

[20] Recorded settlements of employment relationship problems are to be honoured in every instance. The Authority will ensure the objects of the Act are not compromised by imposing penalties in appropriate cases. This is one such case and I am satisfied on the balance of probabilities that a penalty is warranted.

[21] I assess the penalty adopting a totality approach in the sum of \$3,000.00. **I order Hames Sharley to pay the sum of**

\$3,000.00 as a penalty. Of this sum, pursuant to [section 136](#) of the [Employment Relations Act 2000](#), Hames Sharley is to pay \$2,000.00 to Margaret Douglas and the remaining \$1,000.00 into the Authority, that sum to be paid by the Authority into the Crown Bank Account.

Damages

[22] Ms Douglas seeks an award of non-economic damages in the amount of \$15,000.00. That claim is not appropriately dealt with on papers alone. If Ms Douglas wishes to pursue this matter, her counsel must confirm that intention to the Authority in writing within 14 days of the date of this Determination so that appropriate arrangements may be made.

Costs

[23] If costs are sought, Ms Dines/Ms Muir may lodge a memorandum making a case for costs within 14 days of the date of this Determination. Mr Kashyap shall have 14 days thereafter to respond.

Leon Robinson

Member of Employment Relations Authority

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