

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 28/10
5278436

BETWEEN

BEVAN RICHARD
GOLDSMITH
Applicant

AND

THE IRISH ROVER LIMITED
Respondent

Member of Authority: Dzintra King
Representatives: Applicant In Person
No Appearance for Respondent
Investigation Meeting: 21 January 2010
Determination: 25 January 2010

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The applicant, Mr Bevan Goldsmith, seeks compliance with a settlement agreement made pursuant to s149 Employment Relations Act 2000.

[2] The respondent, The Irish Rover Limited, filed a Statement in Reply more than fourteen days after receipt of the Statement of Problem. No application had made been made for an extension of time.

[3] The respondent agreed to participate in a conference call but was unavailable at the time the call was scheduled. The mater was set down for a hearing which the respondent, despite having been served with notice of the hearing, failed to attend.

[4] The settlement agreement, signed on 8 July 2009, provided for the payment of the sum of \$3,5000 in four instalments and a penalty of \$100 for each payment not received by the due date. The agreement also provided for the provision of a written reference.

[5] Mr Goldsmith also seeks a penalty for breach of the settlement agreement.

[6] Section 149 (4) provides that the Authority may impose a penalty when a term of a settlement agreement has been breached.

[7] A penalty of \$3,000 is imposed upon the respondent. Of this, the sum of \$2,000 is to be paid to the applicant and \$1,000 to the Crown.

[8] Section 137 (1) (a) (iii) provides that a compliance order may be issued in the case of breach of a settlement agreement.

[9] The respondent is to comply with the settlement agreement and pay Mr Goldsmith the sum of \$3,500. This is to be paid in full within fourteen days of the date of this determination.

[10] The provision of the agreement providing for a penalty for non-payment is unenforceable: *Ozturk v Gultekin t/a Halikarnas Restaurant* [2004] 1 ERNZ 572. If the amount agreed on as damages for a particular breach is a genuine estimate of the loss that the parties expect will be caused by that breach then that constitutes liquidated damages and is recoverable. However, where, as in this case, the provision in the settlement agreement is an attempt to compel performance then that is not recoverable because it is unconscionable to recover, in a case of contractual breach, a sum that is not proportionate to the actual loss that would be incurred.

[11] The respondent is also to pay the applicant's filing fee of \$70.

Dzintra King
Member of the Employment Relations Authority