

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

WA 119/09
File Number: 5150234

BETWEEN Leigh Greer
Applicant

AND Pro Parts Palmerston North
Limited
Respondent

Member of Authority: Denis Asher

Representatives: Michelle MacManus for Mr Greer
Mark Gapp for the Company

Investigation Meeting The parties agreed the Authority would determine this
matter on the papers

Submissions Received By 11 August 2009

Determination: 27 August 2009

DETERMINATION OF THE AUTHORITY

The Problem

[1] Mr Greer seeks enforcement of a mediated settlement agreement signed on
12 February 2009 and costs.

- [2] The Company agrees it signed the settlement agreement and says it did so in good faith but that subsequent trading circumstances mean it is unable to comply with the terms of the agreement.
- [3] This is a matter involving admitted non-compliance with a mediated settlement and I agreed with the parties' common position that further mediation would not assist.

Background

- [4] By way of a record of settlement pursuant to s. 149 of the Employment Relations Act the Company agreed to pay Mr Greer the sum of \$4,500 under s. 123(1)(c)(i) of the Act within 7 days of that agreement, i.e. by 19 February 2009.
- [5] Payment was not made by the agreed date: Ms MacManus promptly and properly sought an update from the Company first on 25 February and then on a number of subsequent occasions.
- [6] By email dated 12 March the Company's then representative advised of the respondent's cash flow problems and that it was unable to make the payment in full at the time. An offer of payment arrangements was made prior to 18 March; it was declined.
- [7] Mr Greer was not satisfied with these turn of events and enforcement proceedings were commenced; a statement of problem was filed on 20 April 2009.
- [8] A series of conference calls involving the parties took place from 22 May during which the Company's director and representative, Mr Gapp, reiterated earlier advice communicated on behalf of the respondent about its trading difficulties and cash-flow problems. During the first conference call without prejudice discussions about weekly payments were entered into: Ms MacManus sought payments of \$500, however Mr Gapp advised (and undertook to commence) payments of \$50 of a week, which he said was all the Company could manage. Mr Gapp also undertook to provide financial advice including a statement from the respondent's accountant as to the Company's trading position.

- [9] Delays occurred in obtaining limited financial information about the Company's trading position. A cashflow report for April/May 2009 and turnover details based on the same 2 months for 2008 were provided on a confidential basis: i.e. they were provided to Ms MacManus but not to the applicant, and as she was not able to disclose the content to her client she did not consider that information. Instead, independent verification was sought.
- [10] I can report here that the difference between these narrow windows indicated a 67% reduction this year.

Applicant's Position Summarised

- [11] Mr Greer is seeking to establish whether the current payment arrangement from the respondent is fair (emailed submission of 6 August from Ms MacManus). He suspects it is not and finds the accountant's statement unhelpful and seeks independent verification. The applicant would prefer to be paid the entire amount.
- [12] \$50 a week has been received since Wednesday 27 May.

The Company's Position Summarised

- [13] As is made clear above, the Company agrees it has not complied with the terms of the mediated settlement agreement.
- [14] However, it attributes its failure to deteriorating trading conditions including:
- a. It imports a large percentage of its products, but since signing the mediated settlement the US dollar has dropped in value resulting in greater import costs at the same time as a major decline in turnover (Mr Gapp says as much as 50%);
 - b. As a result of trading difficulties the Company is carrying a larger older debtors ledger;
 - c. It has had to put in place time payment arrangements with one of its major suppliers; and

- d. The Company "*is on the edge*" of its overdraft (statement in reply).

Discussion and Findings

- [15] There is no evidence to challenge the respondent's claims about its trading position whereas there is modest information in support.
- [16] By that margin I accept the Company's claim that it is not in a financial position to comply with the original mediated settlement. It follows that it would make no sense to oblige the Company to make a payment that it cannot meet but which might jeopardise its ability to remain trading and to pay the applicant over a longer period.
- [17] It is equally fair and reasonable to permit Mr Greer to resubmit his compliance application in the event the Company ceases making regular, weekly payments of \$50 or in the event of the respondent's demonstrably improved economic circumstances.

Determination

- [18] I decline the application for compliance but reserve leave to Mr Greer to resubmit the same in the event of the changed circumstances set out in par 17 above.
- [19] Costs are reserved. I note here that Mr Greer is to recover his \$70 filing fee by it being added to the amount owed to him by the Company.

Denis Asher
Member of the Employment Relations Authority