

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2011] NZERA Auckland 512
5360473

BETWEEN KRISTIN WENDY KAY
 Applicant

AND MAORI BOY GLASS
 LIMITED
 Respondent

Member of Authority: R A Monaghan

Representatives: K Kay in person
 M Kirkman, advocate for respondent

Investigation Meeting: 30 November 2011

Determination: 1 December 2011

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Kristin Kay says her former employer Maori Boy Glass Limited (MBGL) breached three of the terms of a settlement dated 20 September 2011 and recorded by a mediator under section 149 of the Employment Relations Act 2000.

[2] Ms Kay seeks an order for compliance with a term requiring the payment of money, as well as orders for the payment of a penalty under s 149(4) of the Act in respect of the breaches, and further orders under s 136(2) that the payments be made directly to her.

[3] MGBL has counterclaimed asking that the settlement be set aside, that the parties effectively be returned to the positions they were in prior to entry into the settlement and that the original dispute be re-opened and heard in the Employment Court.

The alleged breaches of the settlement agreement

[4] Despite the presence in the settlement of a confidentiality provision, it is often necessary to refer in detail to the terms of a settlement in the course of an enforcement action. It has been necessary to detail certain of the terms of settlement here.

[5] The first of the terms said to have been breached required a compensatory sum to be paid to Ms Kay in six weekly instalments until payment had been completed. The term provided further that:

3..... If one payment is missed on the due date the total debt shall become a debt due and payable immediately.

[6] The second read:

6. The Respondent shall provide the Applicant a positive written reference within 7 days of the date hereof and should a prospective employer call regarding the applicant's employment with the Company they will be directed to Monty Kirkman who will speak positively to the reference.

[7] The third read:

8. The parties agree to close the side business they were running together as follows: The Applicant will keep the money still in the business account and any money still to be paid for stock by clients and the Respondent shall keep the materials and the remaining stock. The parties agree they will communicate by email to arrange collection of the stock by the Respondent from the Applicant.

[8] Ms Kay said, and it was accepted, that some of the payments required under clause 3 of the settlement were withheld. Secondly, with reference to clause 6, Ms Kay said that a prospective employer calling for a reference was unable to speak with Monty Kirkman, a director and shareholder of MBGL and the person with whom she worked.

[9] Thirdly, with reference to clause 8, Ms Kay did not assert there was a failure to close the 'side business', or any other breach of the clause. Rather she sought an order that Mr Kirkman discontinue making the product that had been sold in the 'side business', and an order that she receive a half share of any profit from sales made after the date of the settlement.

Payment of monies owed

[10] Mr Kirkman was not entitled to withhold payment under the settlement.

[11] MBGL is therefore ordered to comply with clause 3 of the settlement by paying to Ms Kay the sum of \$1,340.

[12] I confirm my oral order that payment is to be made to the bank account nominated by Ms Kay by the close of business on 2 December 2011.

The reference

[13] Mr Kirkman provided a reference pursuant to clause 6, but Ms Kay said he failed to respond to efforts made by a potential employer to contact him by telephone to verify the reference.

[14] Mr Kirkman explained a sequence of attempts by him and by the prospective employer variously to contact each other, or to arrange to discuss Ms Kay's reference at a convenient time. The sequence he described is commonly and colloquially referred to as telephone tag. It was never completed, but Ms Kay obtained employment in any event.

[15] As Mr Kirkman's explanation was satisfactory I find there was no breach of clause 6.

Closure of business

[16] Clause 8 provided only for the closure of the 'side business', and did not in itself prevent either party from commencing a new and even similar business. I do not accept that the mere fact Mr Kirkman may have commenced or continued dealing with the product in question amounts to a breach of clause 8.

[17] If there are intellectual property or other issues associated with the matter they are not referred to in the settlement, are not before the Authority, and if they arise out

of a business relationship rather than out of an employment relationship they are not within its jurisdiction. I note in addition that the settlement does not include a restraint of trade provision. Accordingly even if Mr Kirkman has commenced or continued to sell the product previously sold through the parties' 'side business', I can address the matter only with reference to the text of clause 8.

[18] In that there was no suggestion that, for example, Mr Kirkman continued to operate the 'side business,' I find there is no breach of clause 8 as long as any subsequent business activity on the part of either party is new and separate from the activities of the 'side business'. In that respect the fundamental dispute between the parties is concerned with a disagreement as to their rights in respect of the continued sale of the product in question, rather than with clause 8.

[19] I am not satisfied there has been a breach of clause 8. With further reference to the remedies sought, nothing in clause 8 and the associated enforcement provisions gives the Authority the power to order Mr Kirkman to cease the subsequent activity.

[20] Similarly, the Authority cannot order Mr Kirkman to account to Ms Kay for 50% of the profits from the subsequent activity.

[21] There will therefore be no orders in those respects.

The counterclaim

[22] For his part Mr Kirkman said that while the 'side business' was closed as required under the settlement, contrary to her obligation under clause 8 Ms Kay failed to return stock (including materials) belonging to the business and in her possession at the time. He withheld some of the money owed under clause 3, in an amount a little less than he assessed as the value of the stock concerned.

[23] Ms Kay said she has returned all of the stock in her possession. Further, at the investigation meeting she provided additional items to Mr Kirkman which Mr Kirkman regarded as being within the definition of 'stock'. Ms Kay acknowledged an obligation to return the items but had retained them because Mr Kirkman had

withheld payments under clause 3. She was not entitled to act in that way, and her actions have meant that she, too, was in breach of the settlement.

[24] Mr Kirkman said that if Ms Kay had returned remaining stock and confirmed the return by email as she said she did, he did not receive the message and was not advised of the return of the property. He also said that there is a discrepancy between the amount of stock he has received by way of return, and his financial record. He said the explanation of the discrepancy must be that Ms Kay is still in possession of stock, and he requires its return. He had a further concern that, after the date of settlement, Ms Kay may have sold stock rather than returning it. Finally he questioned Ms Kay's good faith in respect of the entirety of the employment relationship problem.

[25] As a result the counterclaim has been raised.

[26] I determine the counterclaim with reference to s 149 of the Employment Relations Act. That section contains a scheme under which, at the request of the parties to an employment relationship problem, a duly authorised mediator may sign the agreed terms of the parties' resolution of the problem. Provided the procedure set out in s 149 is followed - as it was here - the settlement so signed has the following effect:

(3) ...

- (a) *th[os]e terms are final and binding on, and enforceable by, the parties; and*
- (ab) *the terms may not be cancelled under s 7 of the Contractual Remedies Act 1979; and*
- (b) *except for enforcement purposes, no party may seek to bring those terms before the Authority or the court, whether by action, appeal, application for review, or otherwise.*

[27] These provisions mean the settlement cannot be set aside, the parties cannot be returned to the positions they were in prior to entry into the settlement, and the original dispute cannot be referred to the Employment Court.

[28] The counterclaim cannot proceed in the terms in which it was made.

Penalties

[29] I acknowledge that the statement of problem included claims for penalties for breach of the settlement.

[30] In the circumstances described above, I make no orders for the payment of penalties.

Summary of orders

[31] MBGL is ordered to pay to Ms Kay the sum of \$1,340 by the close of business on 2 December 2011.

[32] MGBL is further ordered to reimburse Ms Kay for the filing fee of \$71.56.

R A Monaghan

Member of the Employment Relations Authority