

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

AA 112/10  
5164615

BETWEEN                      TERRY LEYDON  
   Applicant  
  
AND                                EFFECTIVE FENCING  
   LIMITED  
   Respondent

Member of Authority:      Yvonne Oldfield  
  
Representatives:            Mr Leydon in person  
   Sean Robertson-Welsh for Respondent  
  
Investigation Meeting:     5 March 2010  
  
Determination:              10 March 2010

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1]      This application, lodged in the Authority in June 2009, is for an order for compliance with terms of settlement entered into after mediation on 25 November 2008. In his statement of problem Mr Leydon claimed that the respondent failed to comply with the following term of the agreement:

*“3. Effective Fencing NZ will supply Terry Leydon within 7 days of the date hereof, a mutually agreed reference. This will be sent to his home address within 7 days of today’s date. The contents of the reference will be supported in the event of any verbal inquiries.”*

[2]      Mr Leydon claimed that no written reference arrived within the specified timeframe. He said that on 12 December 2008 he emailed Mr Robertson Welsh

providing an address and asking for the reference to be forwarded to him. When he still got no response, he placed the matter in the hands of his solicitor who emailed a further reminder to Mr Robertson Welsh on 17 December 2008. Mr Leydon told me that neither he nor his solicitor received any reply to these messages. As well, he claimed to have been informed by a recruitment consultant that when she had contacted the respondent for a verbal reference Mr Robertson Welsh declined to give one.

[3] On 5 June 2009 the matter was lodged with the Authority. By way of relief, Mr Leydon sought:

- i. "Receipt of the written reference*
- ii. Compliance with the agreement to act as a verbal referee*
- iii. Payment of a penalty sum to the applicant*
- iv. Payment of costs in bringing this compliance action"*

[4] After receiving the statement of problem Mr Robertson Welsh supplied to the Authority a certificate of service in respect of Mr Leydon's employment. Mr Leydon did not feel this document met the requirements of the terms of settlement and requested that the matter be referred to mediation. I understand mediation took place on 7 August 2009.

[5] Afterwards Mr Leydon advised the Authority that a partial settlement had been reached and that he wished the outstanding issues to be the subject of an Authority investigation. I scheduled an investigation meeting in order to clarify and determine whatever issues were outstanding.

## **Issues**

[6] At today's investigation meeting Mr Leydon presented the terms of settlement arising out of the mediation on 7 August 2009. Agreement had been reached on the wording of a written reference, which had been signed and was attached to the terms of settlement. It had also been agreed that the respondent would, within 7 days, supply a copy of the reference on company letterhead signed by Mr Robertson-Welsh. This did not occur within seven days however Mr Robertson- Welsh arrived at the

investigation meeting with the document in question and presented it to Mr Leydon in my presence. I am satisfied that the written reference has finally been provided in an agreed form.

[7] Mr Leydon clarified that the remaining issues for determination by the Authority were costs (the \$70.00 filing fee) and his claim for penalty for the respondent's breach of the original terms of settlement. He did not quantify this claim, saying he would leave it to the Authority's discretion, but he noted that he sought to have any penalty paid to him personally. In support of this request he argued that the respondent's failure to supply a written reference and to support its contents had compounded his difficulties in finding a job and caused him to be unemployed over an extended period.

[8] Mr Robertson Welsh told me that after the first mediation Mr Leydon's solicitor had presented him with proposed wording for the reference but it was couched in terms that Mr Robertson felt he could not agree to. He told me he did not know Mr Leydon well because the employment had lasted only 16 weeks and he was not Mr Leydon's immediate manager. He said that the original terms of settlement did not require him to simply sign whatever Mr Leydon proposed: they provided for a mutually agreed reference.

[9] He also says that his office sent out the certificate of service instead, shortly after the original mediation. Mr Leydon denies receiving or even seeing this document until it was forwarded to him by the Authority in mid 2009.

[10] Mr Robertson Welsh told me that he believed he had done everything he should or could be expected to do. He believed that in circumstances where there had been no agreement about content there could be no question of breach and no liability for penalty. As for the alleged failure to give a verbal reference over the phone, he said he has no recall of ever speaking to a recruitment consultant about Mr Leydon but suggested that maybe a consultant spoke to someone else who was not authorised to give a reference and declined on that basis.

[11] Finally he told me that he believes Mr Leydon is exaggerating the effect of lacking a reference from the respondent, given that the employment was so brief.

**Determination**

[12] Mr Robertson Welsh was correct in asserting that he could not be required to sign something he did not agree with. However, I accept that the particular terms of settlement required him to engage (in good faith) in attempting to reach such agreement. This required a response to the terms Mr Leydon's solicitor proposed and if he did not feel able to sign them, an alternative proposal. Although Mr Robertson Welsh says he sent a certificate of service soon after the mediation, the copy provided to the Authority is not dated and I cannot safely conclude that it was presented at any stage prior to the proceedings being lodged here.

[13] It is critical to the dispute resolution process that parties to employment relationship problems honour terms of settlement entered into through mediation. Failure to do so, without reasonable explanation, should properly be subject to the imposition of a penalty. However, in this case, Mr Robertson Welsh has attended a second mediation which has resolved the outstanding substantive issues between the parties. By signing a reference which complies with the terms of the original agreement he has rectified his breach of that agreement. In these circumstances I do not accept that a penalty (which is a punitive measure in the nature of a fine) is appropriate.

[14] **The claim for penalty is declined. The claim for costs is allowed. I order the respondent to pay to the applicant the sum of \$70.00 costs.**

Yvonne Oldfield

Member of the Employment Relations Authority