

BETWEEN ROGER McRAE
 Applicant

AND THE \$2 SHOP LIMITED
 Respondent

Member of Authority: Leon Robinson

Representatives: Applicant In Person
 John Haigh QC, Counsel for Respondent

Determination: 30 April 2007

PRELIMINARY DETERMINATION OF THE AUTHORITY

[1] The applicant Mr Roger McRae ("Mr McRae") applies to the Authority for a compliance order to enforce a Record of Settlement dated 9 August 2006 (the "Record of Settlement").

[2] The application was properly lodged in the Authority on 20 November 2006. The \$2 Shop Limited did not lodge its statement in reply within the time prescribed and so by Memorandum of 21 December 2006, I directed the matter proceed to an investigation meeting to be held on 14 February 2007. I recorded that the \$2 Shop Limited would require the Authority's leave to defend the application.

[3] In January 2007 the Authority was advised the \$2 Shop Limited had retained counsel. As counsel was not in a position to deal with the matter until today, I adjourned the investigation meeting to today.

[4] Mr Haigh has today sought leave to defend the application. Mr Brian Salmon is the owner of the \$2 Shop Limited. He produces a written statement which he read to the Authority under oath. Mr McRae has responded to the matters raised.

[5] I granted leave to the \$2 Shop Limited because it is always preferable that an application be dealt with on its merits and because I did not appreciate there would be any prejudice to Mr McRae in granting that leave.

[6] Prior to the investigation meeting, Mr Haigh lodged a statement in reply which referred to an annexed memorandum. The memorandum made submissions that:-

- i. the compliance order sought by Mr McRae be refused; or
- ii. that an adjournment be granted prior to the matter being determined to allow further investigation by both the Police and a private investigator to be completed.

[7] The grounds for the submissions is an allegation that Mr McRae has acted in a dishonest and fraudulent manner. The memorandum has annexed to it various witness statements apparently to the Police alleging theft by Mr McRae during the period of his employment with the \$2 Shop Limited.

[8] Mr McRae has read the reply and statements lodged in the Authority. I warned him that I did not require him to address the allegations as he has a right of silence and also a privilege against incriminating himself.

[9] That warning is said by Mr Haigh to be problematic because the \$2 Shop Limited wishes to raise the allegations of criminal conduct as relevant to the enforceability or otherwise of the Record of Settlement. Mr Haigh further refers to the Authority's equity and good conscience jurisdiction as also relevant in the exercise of the Authority's discretion in relation to the grant of orders for compliance. As I understand it, the submission is that it would be contrary to equity and good conscience to order compliance in circumstances where there is an alleged strong case of theft.

[10] I have during the course of the today's investigation meeting, concluded the enquiries I would ordinarily make in applications for compliance but I have declined to pursue enquiries relating to the alleged criminal matters. I remain to be persuaded of their relevance and so I have invited Mr Haigh to make submissions to the Authority of the relevance of such matters having regard to the seemingly insurmountable prohibitive terms of section 149(3) of the *Employment Relations Act 2000*.

[11] Mr Haigh has 21 days from today's date to lodge those submissions. Mr McRae will have seven days after service of those submissions to reply. I will determine the issue thereafter and advise the parties of further steps in the investigation as may be necessary to conclude it.

Leon Robinson
Member of Employment Relations Authority