

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI
TE WHANGANUI-Ā-TARA ROHE**

[2022] NZERA 210
3169263

BETWEEN DOUGLAS ANTHONY MENDE
Applicant

AND MENDE BIOTECH LIMITED
Respondent

Member of Authority: Michael Loftus

Representatives: Jon Parker, counsel for the Applicant
Murray Osmond, advocate for the Respondent

Investigation Meeting: By telephone conference on 13 May 2022 and on the
papers with input up to and including 23 May 2022

Date of Determination: 24 May 2022

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] On 21 February 2022 I issued a determination in which I concluded the applicant, Douglas Mende, was due unpaid wages and holiday pay in the amount of \$30,728.11.¹ Mr Mende claims he is yet to be paid and seeks a compliance order.

[2] A further award of \$4,500 as a contribution toward costs followed on 18 March 2022 though it was not mentioned in the original compliance claim as it was not then overdue.²

[3] Mende Biotech accepts neither payment has been made but for various reasons contends compliance should not be ordered.

¹ *Mende v Mende Biotech Limited* [2022] NZERA 46

² *Mende v Mende Biotech Limited* [2022] NZERA 100

The Authority's investigation

[4] The Statement of Problem was lodged on 4 April 2022. It sought compliance with orders made in original arrears determination. No reply was lodged technically meaning the respondents needed leave of the Authority to defend the claim.³

[5] Notwithstanding that a telephone conference was held on 13 May in which Mende Biotech's representative participated. Leave to defend was granted with it being grudgingly agreed by both parties the matter would be determined on the papers. It was further decided, given the concession the amounts ordered had not been paid, that Mende Biotech's Statement in Reply would double as, and contain, its arguments as to why compliance should not be granted and an outline of the facts upon which it relied. That was subsequently lodged on 23 May and Mr Parker then provided a short reply which was followed late in the day with Mende Biotech lodging a stay application in the Employment Court.

Discussion

[6] As already Mr Mende sought a determination he was due unpaid wages and holiday pay. He was successful and Mende Biotech was ordered to pay a total of \$30,728.11 no later than 21 March 2022.⁴ The parties agree the payment has not been made.

[7] The subsequent costs determination was not raised in the original compliance claim but the issue was aired in the telephone call of 13 May by which time that payment was also overdue.

[8] On its face the compliance application must succeed, at least with respect to the original arrears determination. The Authority has jurisdiction to order compliance with one of its determinations.⁵ The determination has been made but Mende Biotech has chosen to ignore the orders contained therein. Indeed, comments made during the telephone conference of 13 May would lead to a conclusion that is a deliberate decision and the company has no intention of paying. It is for that reason I also consider the application now extends to the costs determination. It was, as said, raised during the telephone conference and this is recognised and apparently accepted in Mende Biotech's documentation.⁶ Furthermore I conclude that

³ Regulation 8(3) of the Employment Relations Authority Regulations 2000

⁴ Above n 1 at [49]

⁵ Section 137(b) of the Employment Relations Act 2000

⁶ Statement in Reply / submission at [1]

Mende Biotech's attitude means it is almost inevitable another compliance request will follow. I see no reason to inflict further cost on Mr Mende by delaying the inevitable dispute about that amount.

[9] As already said, Mende Biotech not only accepts the amounts have not been paid but has indicated it has no intention of complying. Its reasons appear twofold.

[10] The first is that it has lodged various claims in other jurisdictions via which it seeks some \$460,000 from Mr Mende. Included therein is some \$260,000 which it says Mr Mende owes an overdrawn current account. Indications are that both matters might be aired in the District Court on 16 June 2022, though it is likely to be a first call in respect to both matters.

[11] The second reason for non-compliance is that the Authority's original decision has been challenged.

[12] The challenge I disregard. A challenge does not act as a stay. The original orders remain in place and are, at present, undisturbed.

[13] Turning to the claims brought by Mende Biotech and its principles against Mr Mende. It is being argued it would be inequitable to enforce my determinations pending resolution of the other matters by the District Court. It is also noted Mr Mende has advised Mende Biotech he is being legally aided in the District Court. This, it is argued, suggests impecuniosity though the implications of this are not stated.

[14] Again, these arguments do not sway me. The matters being aired in the District Court are not within the jurisdiction of the Authority. Furthermore the outcome is unknown. Mende Biotech might not succeed and either way an outcome may be some time away. It would, in my view, be inequitable to deprive Mr Mende of money he has been found to be due as a potential offset against amounts that are as yet unproven without proper process in circumstances where a legal option is available. That remedy is a stay application.

[15] Turning to the impecuniosity argument. Its main problem is its relevance has not been explained but if, as suggested, Mende Biotech is concerned the money I have ordered may, assuming it is successful in the District Court, disappear beyond its reach before that occurs I once again suggest the proper way this be addressed is via a stay pending the Employment Court's consideration of the challenge.

[16] The fact Mende Biotech's argument do not sway me means compliance will be ordered. It is now for the Employment Court to consider whether or not it remains enforceable when it considers the stay application.

Conclusion and orders

[17] For the above reasons I order the respondent, Mende Biotech Limited, comply with my earlier determinations and pay Douglas Mende the sum of \$35,228.11 (thirty five thousand, two hundred and twenty eight dollars and eleven cents gross).

[18] Payment is to be made no later than 4.00pm on Tuesday 21 June 2022.

[19] In closing I caution the respondent that failure to comply with the above orders may result in further consequences. Should such a failure be pursued in the Employment Court⁷ they potentially include the imposition of fines, the sequestration of property and/or imprisonment for those responsible for the failure. Conversely a certificate of determination may be obtained and the matter pursued in the District Court which might lead to liquidation of the company.⁸

[20] Costs are reserved. Having been totally successful Mr Mende should, if he wishes to seek costs, do so by serving a memorandum within 14 days of the date of issue of this determination. From the date of service Mende Biotech will then have 14 days to lodge any reply.

Michael Loftus
Member of the Employment Relations Authority

⁷ Sections 139 and 140 of the Employment Relations Act 2000

⁸ *Denyer v Peter Reynolds Mechanical Ltd t/a The Italian Job Service Centre* [2015] NZEmpC41 at [42] and *Broeks v Ross EmpC* Auckland AC36A/09, 11 November 2009 at [5]