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Michelle v Noel Leeming Group Limited CA144/10 (Christchurch) [2010] NZERA 630 (9 July 2010)

Last Updated: 5 November 2010

IN THE EMPLOYMENT RELATIONS AUTHORITY CHRISTCHURCH

CA 144/10 5301266

BETWEEN RIANNE MICHELLE

Applicant

A N D NOEL LEEMING GROUP

LIMITED

Respondent

Member of Authority: Representatives:

Investigation Meeting: Determination:

James Crichton

No appearance for Applicant Stuart Simpson, Advocate for Respondent

7 July 2010 at Dunedin

9 July 2010

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant (Ms Michelle) filed her statement of problem on 1 April 2010 and the statement in reply was filed on 21 April 2010. The Authority directed the parties to mediation in a telephone conference held on 20 May 2010 specifically timed to suit the commitments of Mr David Feist, advocate for the applicant. Notwithstanding those efforts by the Authority, Mr Feist did not bother to make himself available for the telephone conference, thus inconveniencing the Authority and the respondent.

[2] I directed mediation be undertaken and this was eventually arranged for 5 July 2010, just two days before the investigation meeting date which I had also set at the telephone conference on 20 May.

[3] The mediation was completely abortive because Ms Michelle did not attend, although her advocate was present as was Mr Simpson for the respondent (Noel

Leeming). Understandably, Mr Feist immediately withdrew from representation of Ms Michelle.

[4] The Authority's support staff had devoted considerable attention to try to contact Ms Michelle to establish that she was going to attend the Authority's investigation meeting, but were unsuccessful in getting any response from her. However, the respondent's advocate, Mr Stuart Simpson, had more success. A month prior to the mediation on 3 June 2010, he had emailed Ms Michelle to confirm a telephone conversation of that same day and to propose a settlement. There was no response from Ms Michelle on that occasion, but Mr Simpson sent a further email to Ms Michelle on 1 July 2010 referring to the upcoming mediation. Again, she took no steps. After Ms Michelle's failure to appear at mediation, and while Mr Simpson was in

Dunedin as a consequence of the mediation and the shortly following investigation meeting, he, by impressive detective work, was able to meet with Ms Michelle on the evening of 6 July 2010 and remind her of her obligations. She indicated that she was too busy to attend the investigation meeting.

[5] On the morning of the hearing, half an hour before start time, I telephoned Ms Michelle personally to remind her of her obligations but the cellphone simply went to voicemail. My message indicated to her that if she did not attend the investigation meeting she risked her case being dismissed and further she had the prospect of a costs award against her in favour of Noel Leeming.

[6] The appointed time for the commencement of the investigation meeting passed and after waiting for half an hour past the notified start time, I determined that it was appropriate to proceed. I was satisfied by that point that with the proactive efforts of Mr Simpson, the applicant Ms Michelle was properly and fully advised of her obligations on more than one occasion but that she remained *too busy* to attend the investigation meeting.

Determination

[7] That being the position, I determined that the proper course of action was to dismiss Ms Michelle's application for want of prosecution and, on the application of Noel Leeming, to consider the question of costs.

[8] There was no question that Ms Michelle has put Noel Leeming to significant cost in defending her application. She has failed to attend both a mediation and an investigation meeting to progress her claim. It may be that there were communication difficulties between Ms Michelle and Mr Feist, but that does not excuse her behaviour. This matter is her application, not Mr Feist's, and she has an obligation to ensure that she is prosecuting it with due diligence. She has chosen to make a claim against her former employer but taken no steps whatever to progress that claim, thus causing cost to Noel Leeming which it understandably seeks recovery of.

[9] Even if Ms Michelle had communication difficulties with Mr Feist (as may be the case), it is still plain that she personally was advised of her obligations a month beforehand through the good offices of Mr Simpson of Noel Leeming and that she was reminded again in person the night before the investigation meeting that the matter was proceeding. I myself rang Ms Michelle to remind her before the investigation meeting started. She took no steps whatever, either to appear at the investigation meeting or to contact the Authority's office and seek for the matter to be adjourned. As a consequence of her various failures to address the issue, the Authority has been inconvenienced and devoted resource to a hearing which could easily have been made available to another party. She has also caused loss to Noel Leeming and it is entitled to recover its costs against her.

[10] Noel Leeming has provided me with a schedule of its costs in attending the abortive mediation and investigation meeting in relation to this matter including the travel of Mr Simpson from Auckland to Dunedin, his accommodation and other incidental expenses and the loss to Noel Leeming of his time for the two days in question. I direct that that amount is recoverable against Ms Michelle.

[11] Ms Michelle is to pay to Noel Leeming the sum of \$1300.00

[12] A certificate of determination is to be issued by the Authority.

James Crichton

Member of the Employment Relations Authority