

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

[2012] NZERA Christchurch 256  
5156904

BETWEEN            MILLER STUDIOS LIMITED  
                                 Applicant  
  
A N D                 RODNEY DAY  
                                 Respondent

Member of Authority:    M B Loftus  
  
Representatives:         Tony Johnston, on behalf of the Applicant  
                                 No appearance for the Respondent  
  
Investigation Meeting:    23 November 2012 at Dunedin  
  
Submissions Received:    At the investigation  
  
Date of Determination:    26 November 2012

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1]     The applicant, Miller Studios Limited, seeks an order that Mr Day comply with the terms of a mediated settlement.

**Non appearance on behalf of the Respondent**

[2]     Mr Day failed to appear at the investigation meeting. That was not a surprise given his previous dealings with the Authority.

[3]     The application was filed on 27 March 2009. Mr Day could not then be found and the documents were not served upon him. It was not until February 2012 that his whereabouts were ascertained and the Statement of Problem was eventually served on 5 May 2012. Attached was advice Mr Day was required to lodge a Statement in Reply within 14 days. That has not occurred but receipt of the documents saw Mr Day contact the Authority by both phone and e-mail.

[4] During a conversation on 19 June 2012 Mr Day advised he had obtained legal assistance and would send contact details. That has never occurred and attempts to acquire the details have elicited responses such as *I/we have not got time for this at the moment* (e-mail from Mr Day dated 22 June 2012).

[5] The Authority's normal procedure sees the scheduling of a telephone conference at which the parties discuss the forthcoming investigation meeting, its timetabling and conduct. That was scheduled for 29 June 2012 and Mr Day was advised. He failed to participate.

[6] As a result, and again in accordance with normal processes, the Authority set a date for the investigation meeting – 23 November 2012. Again Mr Day was advised – indeed, it required the assistance of a document server to ensure he received the Notice of Hearing. Included there-in is a warning:

*If the Respondent does not attend the investigation meeting, the Authority may, without hearing evidence from the Respondent, issue a determination in favour of the Applicant.*

[7] Mr Day failed to attend and his absence was neither notified nor explained.

[8] Given these facts I conclude Mr Day is aware of the investigation meeting and I know of no reason why I should not proceed. I choose to do so – Miller Studios is entitled to have its claim determined, especially given the delays already suffered.

## **Background**

[9] This matter has its origins in 2005. It was then Miller Studios made the first in a series of wage overpayments to Mr Day. It later discovered the error and sought recompense. That led to the filing of the Statement of Problem in 2007. The claim was referred to mediation.

[10] On 10 July 2007 the parties reached a settlement. The settlement was concluded pursuant to the provisions of section 149 of the Employment Relations Act 2000 and signed by a mediator.

[11] The settlement required Mr Day pay Miller Studios the sum of \$25,000. There would be a single payment of \$10,000 and the balance would be paid in fortnightly instalments of \$200 commencing Wednesday, 25 July 2007.

[12] The payment of \$10,000 was made and the instalment payments commenced, as agreed, on 25 July 2007. The instalment payments continued to be made until 29 May 2008 though not as envisaged by the agreement. Weeks were missed and a number of payments were for lesser amounts though these were balanced by three payments that exceeded the required amount. The final payment of 29 May 2008 saw Mr Day in advance of the schedule by \$350 at that point in time.

[13] No further payment has been made and \$10,050 remains outstanding.

[14] Miller Studios seeks an order that Mr Day comply with the settlement and pay the residual amount. Miller Studios also seeks interest, costs and the imposition of a penalty given Mr Day's *blatant disregard* for the record of settlement.

### **Determination**

[15] The Authority has the power to order compliance with a settlement entered into under section 149 of the Act (see sections 137 and 151). I am satisfied the settlement was entered into in accordance with s.149 of the Act.

[16] Mr Johnston's evidence also satisfies me Mr Day has failed to comply. Mr Day, by failing to attend the investigation meeting or participate meaningfully in the Authority's processes, has offered no reason for the failure. I therefore see no reason why a compliance order should not be granted. It shall.

[17] Given Mr Day's failure to attend, there is no suggestion of an inability to pay. Indeed the only rationale offered is the comment contained in an unsigned letter attributed to Mrs Day and forwarded by Mr Day that *we did not receive the correct legal advice we should have....* Given the way it was tendered, that assertion is totally inadequate from an evidential perspective and is disregarded.

[18] There is no application for payments to be made in instalments as envisaged by s.138(4A) of the Act. Given that and the fact the time for completion of the payment schedule is now past, I order payment in full no later than 4pm on Friday 14 December 2012.

[19] Miller Studios also seeks interest on the outstanding amount. Interest is to reimburse someone for use, by others, of money that is theirs. While this is an application for compliance and the terms of settlement do not refer to interest, I note

other provisions of the Act. Interest may be awarded *in any matter involving the recovery of any money* (clause 11 of the 2<sup>nd</sup> schedule to the Act). The Courts have interpreted this provision widely and liberally – see for example *Solid Energy NZ Ltd v Manson & ors* (unreported) 15 December 2009, Judge Couch, CC 21/09.

[20] This matter has its origins in an attempt to recover money that was overpaid. The settlement provided for return of the money and this action is, in my view, simply a continuation of attempts to recover the money. There can also be no doubt Mr Day has, by failing to make payments properly due, continued to have use of money rightfully belonging to Miller Studios. This, I conclude, is a circumstance in which interest should be payable, especially in the absence of a contrary argument.

[21] The rate to be applied is prescribed in the Judicature (Prescribed Rate of Interest) Order 2011 (FR 2011/177). It is currently 5%. The latest date from which interest would become payable is that upon which Mr Day would have completed the payments had he adhered to the agreed schedule. That was 26 May 2010 but it is, in my view, a generous date to use given Miller Studios had, by then, already been deprived of the use of the bulk of the money. I conclude an appropriate compromise is the mid point - 27 May 2009. That means the interest payable as of the date of this determination is \$1,753.23. That amount is payable and will increase by \$1.37 with each calendar day that passes between the date of this determination and payment.

[22] Miller Studios also seeks the imposition of a penalty. Section 149(4) of the Act provides:

*A person who breaches an agreed term of settlement to which subsection (3) applies is liable to a penalty imposed by the Authority.*

[23] This is a record of settlement to which s.149(3) applies.

[24] I have already accepted the settlement has been breached. I also note the absence of an explanation as to why and Mr Day's cavalier response to the claim which strongly indicates the breach was deliberate. Given these factors, I conclude this is a situation in which a penalty should be applied. I consider \$500 to be appropriate.

[25] Normally a penalty is payable to the Crown but section 136(2) allows payment to an injured party. Having considered the circumstances, and the fact the penalty is

not for a technical breach but one which directly affected the applicant, I consider that appropriate and order the penalty be paid to Miller Studios Limited.

### **Costs**

[26] Miller Studios has been successful with its claim. It is therefore entitled to a contribution toward the cost of pursuing it. Mr Johnston is, however, an officer of the company and there are no legal costs. Reimbursable costs are limited to the Authority's filing fee which was, at the time of filing, \$70.00.

[27] I believe it appropriate Miller Studios be recompensed for that expenditure and order Mr Day to pay, in addition to the amounts specified above, a further \$70.00 as a contribution toward costs.

### **Orders**

[28] For the reasons given the respondent, Mr Rodney Day, is ordered to pay the applicant, Miller Studios Limited, the following:

- a. \$10,050 (ten thousand and fifty dollars) as required by the terms of settlement. Payment is to be made no later than 4pm on Friday 14 December 2012; and
- b. A further \$1,753.23 (one thousand, seven hundred and fifty three dollars and twenty three cents) as interest on the above sum. That amount will increase by \$1.37 (one dollar and thirty seven cents) with each calendar day that passes between 26 November 2012 and the date of payment; and
- c. A further \$70.00 (seventy dollars) as a contribution toward costs; and
- d. A penalty of \$500 (five hundred dollars) with payment to be made no later than 4pm on Friday, 14 December 2012.