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Mosscaff Limited v Murdoch (Wellington) [2018] NZERA 2049; [2018] NZERA Wellington 49 (31 March 2018)

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Mosscaff Limited v Murdoch (Wellington) [2018] NZERA 2049 (31 March 2018); [2018] NZERA Wellington 49

Last Updated: 4 July 2018

IN THE EMPLOYMENT RELATIONS AUTHORITY WELLINGTON

[2018] NZERA Wellington 49
3023835

BETWEEN MOSSCAFF LIMITED Applicant

AND ALISTAIR MURDOCH Respondent

Member of Authority: M B Loftus

Representatives: No appearance for Applicant

No appearance for Respondent Investigation Meeting: 31 May 2018 at Wellington Submissions Received: Nil

Determination: 31 May 2018

ORAL DETERMINATION OF THE AUTHORITY

[1] The applicant, MossCaff Limited, sought an order the respondent, Alistair Murdoch, comply with the provisions of a mediated settlement the parties concluded on 26 September 2017. In particular it seeks removal of social media posts which it says Mr Murdoch agreed to under the terms of settlement along with another he is said to have posted, apparently in contravention of the settlement, after it was agreed. MossCaff also seeks the return of a compensatory sum paid to Mr Murdoch in accordance with the terms of settlement as recompense for damage incurred as a result of his alleged failure to comply with the terms of settlement.

[2] Mr Murdoch's position is unknown as he has failed to participate in the Authority's process. There is no statement in reply nor any has there been any other response from him.

[3] Furthermore Mr Murdoch failed to attend the investigation meeting. Unfortunately, however, so did MossCaff which raises the question of what to do?

[4] I am satisfied MossCaff received the notice of investigation meeting given correspondence between one of the Authority's Support Officers and its notified *email address for service*. The correspondence included agreement with one of its directors over the scheduling of the investigation meeting and the passing of the subsequent notice thereof.

[5] I am not, however, sure as to whether or not Mr Murdoch is aware of the meetings scheduling. MossCaff was to arrange personal service of the documents at an address it understood he occupied but has failed to respond to a recent request it confirm that occurred.

[6] There were also two further attempts to contact MossCaff this morning though both have been unsuccessful.

[7] Contained in the notice of investigation meeting, which I am satisfied MossCaff has received, is advise that if the applicant does not attend the investigation meeting the matter may be dismissed.¹

[8] Given that, the absence of either notification or explanation of MossCaff's absence along with its failure to respond to recent approaches from the Authority I conclude it appropriate I apply the regulations and dismiss the application for lack of prosecution.

[9] Having done so I add a couple of comments for the party's guidance should there still be issues between them.

[10] The first regards MossCaff's request I order the return of a compensatory sum paid, albeit without admission of liability, to Mr Murdoch. Even if Mr Murdoch is in breach of the settlement that is not something I can do. Such an order would effectively cancel the agreement which is a course of action expressly prohibited by [section 149\(3\)\(ab\)](#) of the [Employment Relations Act 2000](#) and that section was introduced to address decisions which did as I am being asked to do here.

[11] The appropriate course of action would have been to seek a penalty payable to the applicant but that has not occurred.

¹ Note 1 to Form 8 of the [Employment Relations Authority Regulations 2000](#)

[12] That said Mr Murdoch should be made aware the documentary evidence attached to the Statement of Problem strongly suggests he failed to comply with the terms of settlement. If that is both so and remains the case he should be cognizant of the fact it is not too late for MossCaff to initiate penalty proceedings. He is therefore strongly advised to take urgent remedial action should that be necessary.

Conclusion

[13] For the above reasons I dismiss MossCaff's application.

[14] Given neither party attended the investigation there shall be no order as to costs.

M B Loftus

Member of the Employment Relations Authority

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