

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2011] NZERA Auckland 115
5333608

BETWEEN THIAGO SCHALCH
 Applicant

AND EASY STUDY & TRAVEL
 LIMITED
 Respondent

Member of Authority: Alastair Dumbleton

Representatives: Applicant in person
 Eduardo Goncalves, advocate for Respondent

Determination (on papers): 28 March 2011

DETERMINATION OF THE AUTHORITY

Application for compliance order

[1] On 20 December 2010 a Record of Settlement was signed under s 149 of the Employment Relations Act 2000. The parties to it were the applicant Mr Thiago Schalch and the respondent Easy Study & Travel Ltd. The Record was signed by Mr Schalch and has a signature above the name Easy Study & Travel Limited. Presumably it is that of the company's director Mr Eduardo Goncalves. A Mediator employed by the Department of Labour signed the Record as well.

[2] The problem now brought by Mr Schalch to the Authority is that the settlement has not been complied with.

[3] The Record expressly required Easy Study & Travel Ltd to pay Mr Schalch outstanding wages of \$2,840, as follows:

- (i) \$568 by or on 25 January 2011;
- (ii) \$568 by 28 February 2011;
- (iii) \$568 by 31 March 2011;
- (iv) \$568 by 30 April 2011; and
- (v) \$568 by 31 May 2011.

(There was a typographical error in respect of the first payment which the parties obviously intended would be made in January 2011, not 2010.)

[4] The payments are expressed in the Record to be in “full and final settlement of all matters between the Applicant and Respondent arising out of their employment relationship.”

[5] Mr Schalch has complained in the statement of problem he lodged on 2 February 2011 that the first payment was not made. He seeks an order requiring immediate payment of \$568 or the imposition of a penalty for delays in payments. He also asks for payment back to him of the application fee paid to the Authority for an investigation of his problem.

[6] In the statement in reply lodged by Easy Study & Travel Limited on 17 February 2011, it is admitted that the company signed the Record of Settlement and that it failed to make the January payment. This was because of cash flow issues.

[7] The statement in reply also refers to Mr Schalch as being a debtor to the respondent’s particular business, in the sum of \$3,900. An invoice explains this sum is made up of the tuition fee for a diploma course in tourism management.

[8] The respondent seeks to have the amount of \$3,900 deducted from the payment it agreed to make in instalments to the applicant. The company says it aims to honour its agreement as soon as the debt owed by the applicant has been settled.

[9] Mr Schalch has advised the Authority that a claim is before the Disputes Tribunal and awaits hearing on 18 May 2011, in relation to the debt allegedly owed by him to the respondent company.

[10] I find it is clear from the papers that the Record of Settlement entered into between the parties has not been complied with by the respondent company, as it did

not make the payment of \$568 that fell due on 25 January 2011. There is no evidence that the payment due at the end of February has not been made, and the payments due at the end of March, April and May are in the future and cannot be the subject of a compliance order at this time.

[11] Although compliance is a discretionary remedy under s 137 of the Act, I do not consider that the debt allegedly owed by the applicant to the respondent is a matter to be taken into account in declining a compliance order. In this case the money alleged to be owed clearly is not in relation to the employment relationship that apparently existed between the parties at material times. The debt is a civil matter between a provider and a receiver of services.

Compliance order

[12] Being satisfied that Easy Study & Travel Ltd has failed to comply with a Record of Settlement made under s 149 of the Employment Relations Act 2000, the Authority orders the respondent company to pay \$568 to Mr Schalch. The respondent is to comply as ordered within 14 days of service of this determination upon the company at its registered office and address for service, 4th floor, 220 Queen Street, CBD, Auckland.

[13] Within the same 14 days the respondent is also to pay \$71.56 to the applicant, being the application fee for a compliance order.

[14] The applicant will need to update the Authority if the payment due at the end of February 2011 was not made. If that is the case, after hearing from the respondent, the Authority will issue a further compliance order if necessary.

[15] The applicant will also need to wait until the dates at the end of March, April and May 2011 have expired for payment before seeking an order in relation to those. A compliance order cannot be made in anticipation of a future breach. It may be preferable for the applicant to wait until the end of May and then seek an order, if necessary, for the total outstanding balance at that time.

[16] For the information of the respondent company, failure to obey a compliance order such as this one made under ss 137 and 151 of the Act may provide a basis for an application to be made to the Employment Court for enforcement of the order. Under s 140 of the Act, where the Court is satisfied that any person (which includes a

company) has failed to obey a compliance order, the Court may order remedies. They may include a fine not exceeding \$40,000 and/or the seizure of property and for the proceeds of sale to be distributed to the person requiring enforcement of the Authority's order.

A Dumbleton
Member of the Employment Relations Authority