

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKĀURAU ROHE**

[2020] NZERA 58
3082898

BETWEEN KRISTINA STOROZHENKO
Applicant

AND ECO-SMART GROUP LIMITED
Respondent

Member of Authority: Anna Fitzgibbon

Representatives: Theresa Tudor, advocate for the Applicant
Michelle Pollak, counsel for the Respondent

Investigation Meeting: 10 February 2020 at Auckland

Oral Determination: 10 February 2020

ORAL DETERMINATION OF THE AUTHORITY

- A. The application by the applicant, Ms Kristina Storozhenko for a compliance order to enforce the terms of a settlement agreement with the respondent, Eco-Smart Group Limited (Eco-Smart) under s149 of the Employment Relations Act 2000 (the Act) is declined. Eco-Smart is not in breach of the terms of the settlement agreement.**
- B. Ms Storozhenko is to contribute the sum of \$500 to Eco-Smart’s legal costs.**

Employment Relationship Problem

[1] On 4 October 2019, the parties signed an agreement in settlement of an employment relationship problem (the settlement agreement). On 4 October 2019, a mediator employed by the Ministry of Business Innovation and Employment (MBIE) certified the agreement under the requirements of s 149 of the Act. In the process of

certifying the agreement the mediator had the parties confirm that they understood the terms of settlement were final, binding, enforceable and could not be brought before the Authority except for enforcement purposes.

The Applicant's claims

[2] In the statement of problem filed in the Authority on 29 November 2019, the applicant, Ms Kristina Storozhenko claims that the respondent, Eco-Smart has failed to adhere to the terms of the settlement agreement to pay her costs of representation totalling \$2,500 plus GST and to pay her the sum of \$32,500 in terms of s 123(1)(c)(i) of the Act.

[3] Ms Storozhenko sought a compliance order from the Authority requiring Eco-Smart to pay the sums specified in the settlement agreement together with penalties and costs.

The Respondent's response

[4] In a statement in reply filed in the Authority on 16 December 2019, Eco-Smart says the settlement agreement contained a condition to the payment of the specified sums. The condition was that payment would be made pending settlement of the sale of a "property deal". Settlement has not been effected and the sums are therefore not yet due.

Investigation Meeting

[5] Ms Storozhenko and Mr Mahoney, director of Eco-Smart each gave evidence before the Authority and both affirmed that their evidence was true and correct. Each witness had the opportunity to provide any additional comments and information and did so.

[6] As permitted under s 174E of the Act, this determination does not set out all the evidence or submissions received. The determination states findings of fact and law and makes conclusions on issues necessary to dispose of the matter.

Settlement Agreement

[7] The parties to the settlement agreement are Eco-Smart Group Limited and Kristina Storozhenko. Ms Storozhenko signed the settlement agreement as did Mr Ritesh Mani, the Director of Eco-Smart. A mediator employed by MBIE also signed the agreement. The relevant paragraphs are as follows:

2. Eco-Smart will make a contribution towards Kristina's costs of \$2,500 plus GST. Tudor Consulting will send an invoice to Eco-Smart within seven days of the date of this agreement.

3. Eco-Smart shall, without admission of liability, pay Kristina the sum of \$32,500 in terms of the provisions of s 123(1)(c)(i) of the Employment Relations Act 2000. This amount will be paid by way of direct credit into Kristina's bank account.

4. The payments mentioned in clause 2 and 3 of this agreement will be made in approximately six weeks from the date of this agreement. The exact date for payment will depend upon the time frame for completion of a property deal. Nick Palmer from Nielson's Lawyers Limited will provide a written undertaking to Kristina's representative on or before 4:00 p.m. 7 October 2019 that the payments will be made on completion of the said property deal. ...

[8] Mr Mani provided the Authority with a statement which he signed at the investigation meeting today. Mr Mani affirmed that his evidence contained in the statement was true and correct. In the statement Mr Mani provided details as to why the undertaking by Nielson's Lawyers Limited was not provided within the time frame set out in the settlement agreement. Neither Nick Palmer nor Nielson's Lawyers Limited were party to the settlement agreement. Mr Mani sets out issues which have led to the delay in settlement of the properties which he intends to pay Ms Storozhenko pursuant to the settlement agreement. These include a relationship breakdown with his business partner and council delays.

[9] In his witness statement Mr Mani states:

31. I am now in a position where I can provide an undertaking to Kristina to pay her and Tudor Consulting the amounts outlined in clauses 2 and 3 of the ROS [record of settlement] from the settlement of lot 35, 54 Cosgrave Road, Takanini. This property should settle by the end of February 2020 and will be the first Cosgrave property to settle and the first that I will receive a profit from.

32. Luke Meys from Neilson's lawyers sent an email to Tudor Consulting on 4 February 2020 offering to provide an undertaking on this property to Theresa Tudor in order that the applicant did not incur any further expenses in relation to her application for a compliance order. This offer was refused...

34. I am expecting the first Cosgrave property to get title and settlement on lot 35, 54 Cosgrave Road, Takanini. I can and will pay the settlement sums I owe to Kristina and Tudor Consulting in accordance with clause 4 of the ROS, being when the property deal for the first Cosgrave Road property is complete which means it settles

and I receive payment from the vendor. I am unable to make payment prior to that time.

[10] The wording of paragraph 4 of the settlement agreement is couched in vague terms and was not helpful. However, I agree with Eco-Smart that the condition which needed to be fulfilled before payment could be made by it to Ms Storozhenko and her representative, was that there be completion of the sale of a property. Mr Mani has never disputed that payment would be made to Ms Storozhenko and her representative. He has maintained throughout that payment would be made once the sale of the property had settled.

[11] Mr Mani, in response to questions from the Authority, confirmed that the Cosgrave property had gone unconditional at the end of January 2020 and that a deposit had been paid into Eco-Smart's lawyers' trust account. Mr Mani expects the certificate of title for the property to issue at the end of February 2020. Under the relevant sale and purchase agreement, settlement of the sale of the property and payment of the proceeds of the sale is to take place 5 working days following the issue of the certificate of title for the property. This is expected to be in early March.

[12] On the basis of the evidence, it is my view that Eco-Smart is not in breach of the settlement agreement. Accordingly, I decline to issue a compliance order as sought by Ms Storozhenko.

Costs

[13] Eco-Smart has been put to the cost of defending an application which in my view was premature and unnecessary. Based on the Authority's notional daily tariff I order Ms Storozhenko to pay costs of \$500 to Eco-Smart within 14 days of the date of this determination.

Anna Fitzgibbon
Member of the Employment Relations Authority