

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2012] NZERA Auckland 106
5367556

BETWEEN TRAFFIC MANAGEMENT
 NZ LIMITED
 Applicant

A N D JOSEPH IOSEFA
 Respondent

Member of Authority: K J Anderson

Representatives: R Drake, Advocate for Applicant
 No appearance from the Respondent

Investigation: On the papers

Date of Determination: 26 March 2012

DETERMINATION OF THE AUTHORITY

Compliance with a mediated record of settlement

[1] The parties attended mediation on 14 October 2011 for the purpose of resolving a problem that had arisen relating to the failure by Mr Iosefa to repay an overpayment of wages that he had received during his employment with Traffic Management NZ Limited (TML). Apparently, TML had sought repayment from Mr Iosefa but he resigned from his employment before arrangements could be made for appropriate deductions from his wages.

[2] The outcome of the mediation was that the parties entered into a *Record of Settlement* (RoS) signed by the parties and certified by a Mediator from the Department of Labour. The relevant term of the RoS (at clause 2) is that:

Joseph Iosefa shall pay Traffic Management NZ Ltd a minimum weekly payment of \$20 per week to repay the debt of \$1,950 that he owes to the company. These

amounts will be paid to the Applicant [TML] by way of automatic payment with the first payment to be made on October 21, 2011.

[3] Mr Iosefa has made only one payment of \$20 under the agreed terms of the RoS. Following several unsuccessful attempts to persuade him to comply with the repayment terms, TML now seeks a compliance order from the Authority. The applicant says that it has no faith that Mr Iosefa will commit to continuing the incremental payments set out in the RoS and now requires that Mr Iosefa repay the full sum of \$1,930 that is owed.

[4] The applicant also asks that a penalty be awarded against Mr Iosefa for breaching the RoS, pursuant to section 149(4) of the Employment Relations Act 2000. Finally, TML seeks an award of the costs associated with pursuing payment from Mr Iosefa.

[5] Mr Iosefa has refused to engage in any way with TML or the processes of the Authority. The *Statement of Problem* was delivered by courier and signed for by someone at the address of Mr Iosefa on 6 January 2012. Under a standard form letter from the Authority Support Officer, Mr Iosefa was invited to provide a statement in reply within 14 days, as required under Reg 8 of the Employment Relations Authority Regulations 2000: he has not done so. The Support Officer also left a similar message in the voice mail box of Mr Iosefa's cellphone; with no response. I am satisfied that Mr Iosefa is aware that he has failed to comply with the terms of the mediated RoS dated 14 October 2012 and that TML is seeking compliance accordingly. Unfortunately, Mr Iosefa has chosen not to engage in any attempt to resolve the problem that has arisen and the Authority is left to determine the matter accordingly.

Determination

[6] It is established to the satisfaction of the Authority that apart from making one payment of \$20, shortly after entering into the mediated record of settlement on 14 October 2011, Mr Iosefa has failed to comply with the provisions of clause 2 of the agreement. The failure to comply with the agreement is a breach for which a compliance order (among other remedies) is available to TML. While the applicant was prepared to accommodate Mr Iosefa in regard to incremental payments of \$20 each week, it is no longer prepared to do so and seeks payment in full of the sum of \$1,930. Given that Mr Iosefa has substantially breached the agreement that was entered into, TML is now entitled seek full payment.

[7] Therefore, pursuant to sections 137 and 151 of the Employment Relations Act 2000 (the Act), Mr Joseph Iosefa is ordered to make payment of the sum of \$1,930.00 to Traffic Management NZ Limited.

[8] TML also seeks the imposition of a penalty against Mr Iosefa under section 149(4) of the Act in regard to the breach of the agreement. Given Mr Iosefa's blatant breach of the record of settlement and his general failure to account for his actions, I conclude that it is appropriate to impose a penalty. There is also a public policy involved. This is that mediation is a process under the Employment Relations Act that encourages the parties to reach an agreement in good faith, without the requirement for adjudication, and the associated further time and expense being incurred. Upon agreement being reached in mediation the parties are expected to act in good faith in regard to the bargain they have entered into. While obviously circumstances can change regarding the ability of a party to comply with what they have agreed to, one would expect that a party acting in good faith should engage in a process whereby an explanation is forthcoming. Mr Iosefa has chosen not to engage in any manner at all and we are left to ponder whether he ever intended to comply with his obligation to repay the monies in question.

[9] In assessing the amount of an appropriate penalty to be awarded I am cognisant of the extent of the breach involved, the monies in question and that I have no tangible evidence available of Mr Iosefa's financial circumstances. Therefore, pursuant to sections 133 and 149 of the Act, I conclude that a penalty in the sum of \$200 is appropriate in the circumstances.

[10] Finally, TML asks for an order in regard to the costs the company has incurred in its attempts to obtain payment from Mr Iosefa. According to the submissions for TML, total costs of \$2,963 have been incurred. This includes \$2,060 for mediation. While I am cognisant of the various Employment Court judgments and determinations of the Authority pertaining to whether or not mediation costs should be taken into account; exercising the discretion available in such matters, I conclude that given the overall circumstances in this matter, it is not appropriate to give regard to the mediation costs incurred. In the round I conclude that it is appropriate that Mr Iosefa should make a contribution to the costs incurred by Traffic Management NZ Limited of the sum of \$400.00.

Summary

[11] For the reasons set out above, the orders of the Authority are:

1. Mr Joseph Iosefa is ordered to pay the sum of \$1,930.00 to Traffic Management NZ Limited along with an additional \$400.00 as a contribution to costs; a total of \$2,330.00.
2. Mr Joseph Iosefa is ordered to pay a penalty in the sum of \$200.00 to the Employment Relations Authority for subsequent payment to the Crown Bank Account.
3. The above payments shall be made not later than 21 days from the date of this determination.

K J Anderson
Member of the Employment Relations Authority