

NOTE: An order for the payment of a penalty appears at p 5 of this determination

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 432/10
5313435

BETWEEN

DOUGLAS STUART
TYRRELL
Applicant

AND

QUADRANT
WHOLESALEERS LIMITED
Respondent

Member of Authority: R A Monaghan

Representatives: D Tyrrell in person
No appearance for respondent

Investigation Meeting: 1 October 2010

Determination: 1 October 2010

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Douglas Tyrrell and his former employer, Quadrant Wholesalers Limited (QWL) are parties to a mediated settlement agreement reached under s 149 of the Employment Relations Act 2000 and dated 1 July 2010. Mr Tyrrell says QWL has breached a term of the settlement agreement requiring the payment of monies to him by failing to pay the agreed sum, and seeks an order that QWL comply with the settlement agreement by making payment in full.

[2] Mr Tyrrell also seeks a penalty for the breach of the agreement.

[3] QWL says it will pay part of the amount owed under the settlement agreement, but does not agree to pay the remainder on the ground that Mr Tyrrell owes that sum to it.

[4] The terms of the settlement agreement are expressed to remain confidential as far as the law allows, but for the purposes of the present problem it is appropriate and necessary to detail some of them. The material terms read:

2. Quadrant Wholesalers Ltd shall pay Douglas Stuart Tyrrell within 21 days of the date hereof, the compensatory sum of \$2,285 in terms of section 123(1)(c)(i) of the Employment Relations Act 2000. This amount will be paid to the Applicant by way of direct credit.

...

5. This is the full and final settlement of all matters between the Applicant and the Respondent arising out of their employment relationship and the termination thereof.

QWL's attendance at the investigation meeting

[5] QWL did not appear and was not represented at the investigation meeting.

[6] However a director and shareholder in QWL, Deane Fuller, participated in the telephone conference with the parties which the Authority conducts prior to an investigation meeting. During the conference Mr Fuller explained his reason for not accepting that QWL was obliged to pay the sum of \$2,285 (the settlement sum), and for seeking in effect to offset the settlement sum by \$2,000 which he says Mr Tyrrell owes QWL.

[7] I directed Mr Fuller's attention to clause 5 of the settlement agreement, and asked him to further explain his position in the light of that clause. He said he would take legal advice, and that he undertook to pay \$2,285 into his solicitor's trust account by the end of the following week. I also indicated that I would expect to receive further details of QWL's position on the application of clause 5 once Mr Fuller had taken advice.

[8] These matters were summarised in a Minute to the parties dated 3 September 2010. In addition Mr Fuller was directed to pay or cause to pay the sum of \$2,285 into his solicitor's trust account pending the resolution of this problem, and to provide any further reply to the Authority by the close of business on 17 September.

[9] The Authority has sought but been unable to obtain confirmation of payment into the solicitor's trust account. Otherwise Mr Fuller's further reply was provided as directed, but it merely asserted that the sum of \$2,000 Mr Fuller says QWL is owed is a 'separate issue' from the full and final settlement. The reply said further that legal advice Mr Fuller received was that the \$2,000 should be deducted and the remainder of the settlement sum be paid immediately, although he provided no other argument in support. The reply amounted to a repetition of the position advanced during the telephone conference.

[10] Meeting dates were offered to the parties and a notice of meeting dated 20 September 2010 was issued. Mr Fuller contacted the Authority to say he was unable to attend the meeting in person and sought to participate by telephone. However he also said he had 'absolutely nothing further to add to the hearing.'

[11] In those circumstances the meeting proceeded in Mr Fuller's absence, but I have taken into account the matters he has raised.

Order for compliance

1. Background

[12] Mr Fuller has expressed himself willing to pay the sum of \$285 to Mr Tyrrell but says Mr Tyrrell owes the sum of \$2,000 under an agreement reached at the time of entry into the employment relationship. Mr Fuller forwarded a cheque for \$285 to the Authority, but the cheque was made out to the Authority and was returned. In any event, Mr Tyrrell seeks a payment of the full settlement sum.

[13] Mr Fuller says Mr Tyrrell was paid \$2,000 at the commencement of his employment on the ground that he had advised he would continue working for QWL until he retired. Mr Tyrrell did not do so, and is obliged to return the payment.

2. Whether clause 5 precludes QWL's claim against Mr Tyrrell

[14] The substantive problem which led to the mediated settlement agreement was filed in the Authority on 2 March 2010. The Authority's file number was 5297543.

[15] Although the statement in reply on that file did not refer to the payment of \$2,000, Mr Fuller raised it in correspondence generated in the course of the employment relationship problem. One particularly relevant document was an emailed message from Mr Fuller to Mr Tyrrell's solicitor dated 13 February 2010, and attached to the statement of problem in the file. The message addressed disputes about Mr Tyrrell's various claims for payment, also reading in part:

Furthermore when your client started back with Quadrant Wholesale he advised he would continue to sell for the company until he retired. On that basis \$2,000 was paid to him. He also has no[t] fulfilled that agreement as well, so therefore we require the \$2,000 to be refunded at the time of his resignation, if that is what he was going to do.

[16] Although Mr Fuller gave no reason beyond bare assertion for his statement that \$2,000 must be deducted from the settlement sum, and no submissions on why clause 5 does not bar the claim he now purports to make, there might in principle have been an argument based on the decision of the Employment Court in *Marlow v Yorkshire New Zealand*¹. There the court addressed whether certain action was precluded in the face of an agreement expressed to be in full and final settlement of all matters arising from the applicant's employment. The court said at p 215:

... the agreement must be taken to be an agreement for the settlement of all claims under the contract of whatever nature and whether already commenced or only potential or inchoate but it must also be limited to claims of the existence of which both parties were aware and to claims of the nature they were discussing. ... The settlement cannot reasonably be taken to extend to preclude the plaintiff from making claims coming to light later out of unrelated events during the employment.

[17] In the circumstances as I have set them out it is obvious that the claim for \$2,000 is a claim of the kind envisaged by the first sentence above. Clause 5 of the settlement agreement applies to prevent Mr Fuller's attempt now to say Mr Tyrrell owes QWL the sum of \$2,000.

3. Orders

¹ [2000] ERNZ 206

[18] QWL is therefore ordered to comply with clause 3 of the settlement agreement by paying Mr Tyrrell the settlement sum of \$2,285 in full within 7 days of the date of this determination.

[19] QWL is further ordered to pay interest on this sum at the rate of 5.2% from the date 21 days after the date of the settlement agreement to the date of payment.

Penalty

[20] Section 149(4) of the Act makes a person who breaches agreed terms of a settlement reached under s 149 liable to a penalty imposed by the Authority.

[21] QWL has breached a term of the settlement by refusing or failing to pay the full settlement sum to Mr Tyrrell. His actions were wilful.

[22] Encouraging the resolution of employment relationship problems between the parties is an important feature of the scheme of the Employment Relations Act. Observing the terms of agreements reached as a result is similarly important. Accordingly I consider a penalty is appropriate and order QWL to pay a penalty of \$1,000 for the breach.

Costs

[23] QWL is ordered to reimburse Mr Tyrrell for the filing fee of \$70.

R A Monaghan

Member of the Employment Relations Authority