

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**AA 131/08
5112838**

BETWEEN SIMON ROBERT VON TUNZELMAN
 Applicant

AND MALCOLM BRIAN TAYLOR
 Respondent

Member of Authority: Leon Robinson

Representatives: Applicant In Person
 George Bogiatto, Counsel for Respondent

Investigation Meeting: 4 April 2008

Determination: 7 April 2008

DETERMINATION OF THE AUTHORITY

Application for Compliance

[1] The applicant Mr Simon Robert von Tunzelman ("Mr von Tunzelman") makes application for a compliance order against the respondent Mr Malcolm Brian Taylor ("Mr Taylor"). Compliance is sought with the Authority's Determinations numbered AA206/07 dated 9 July 2007 and AA206A/07 dated 13 August 2007.

[2] Mr Taylor did not lodge a statement in reply within the time prescribed for him to do so. By a Minute of 12 March 2008 I directed the matter proceed to investigation meeting on 4 April 2008. Mr Bogiatto sought leave to lodge a statement in reply out of time. I granted leave.

Non-compliance

[3] Mr von Tunzelman refers the Authority to its Determination of 9 July 2007 and paragraph [31] thereof where the Authority directed Mr Taylor and a limited liability company party to supply information evidencing Mr von Tunzelman's gross sales. Mr

von Tunzelman emphasises that direction was not complied with. However, he does not now ask the Authority to order compliance with that direction.

[4] Mr von Tunzelman next refers the Authority to its Determination of 13 August 2007 and paragraph [3] thereof where the Authority ordered Mr Taylor to pay to Mr von Tunzelman the gross sum of \$40,000.00 being arrears of wages as commission outstanding. Mr von Tunzelman gives evidence that order has not been complied with and confirms the situation of non-compliance continues today. He urges the Authority to now order compliance in respect of that order.

[5] Mr Bogiatto makes helpful submissions to the Authority. He submits there is no longer an expressed statutory provision declaring compliance orders to be the primary remedy as with the previous legislation. He submits that where there is doubt as to the correct meaning of an obligation the compliance procedure is not an appropriate remedy. He next submits that the Authority should not make a compliance order where there will be no practical benefit in doing so for example where a person required to pay is in a hopeless financial position. He draws a parallel between that situation and where there is an existing dispute, a compliance order is generally refused. He refers the Authority to authority where the Court has refused to make a compliance order as a "debt collecting action". He helpfully notes that it is not merely enough to show there has been non-compliance. It is always a matter of discretion whether to grant compliance.

[6] Mr Bogiatto also refers to authority that a compliance order will not be granted where the obligation sought to be enforced is unclear or where there are other remedies for resolving the dispute. In that regard he notes Mr Taylor has challenged the Authority's Determination and that such challenge indicates a more appropriate meaning of resolving the dispute.

The merits

[7] At the investigation meeting at Counsel's invitation I took evidence from Mr Taylor by telephone. I did not permit Mr Taylor nor Mr von Tunzelman to traverse matters or issues I have already made determinations in respect of.

[8] I do not disagree with Mr Bogiatto's submissions insofar as they state relevant principles. But I do not agree that there is a dispute here so as to place in doubt the appropriateness of an order for compliance. The substantive dispute has been resolved by the Determinations. Compliance is sought with a Determination of the Authority.

[9] It is not in dispute that there has not been compliance with the Authority's Determinations. Mr von Tunzelman today confirms the situation of non-compliance continues. Notwithstanding that position, Mr Bogiatto asks the Authority not to exercise its discretion to grant compliance.

[10] Mr von Tunzelman particularly emphasises that the Determination of 13 August 2007 has not been challenged in the Court. I accept that he is correct about that. I acknowledge however, that the Determination of 9 July 2007 has been challenged. If that first Determination is successfully challenged, the latter Determination is likely impeachable. But I appreciate the point Mr von Tunzelman makes - the second Determination finding Mr Taylor liable is not challenged and that is a matter of fact. His point is then this - the submission that there is an alternative remedy available by challenge and therefore as a matter of discretion compliance ought to be refused, is not then sustainable.

[11] Mr Bogiatto questioned Mr Taylor at today's meeting. Mr Taylor gave evidence that he is now resident in Australia and has resided there for one year. He says he has no assets in New Zealand and is unable to pay \$40,000.00 to Mr von Tunzelman. He says he has no income and does not intend to return to New Zealand. When his counsel asked him why he has not paid Mr von Tunzelman he said he believed it was not owed and that he disagreed with the Determination ordering the same. This evidence was led in support of counsel's submission that compliance ought to be refused because it serves no purpose as Mr Taylor is unable to comply.

[12] Mr Bogiatto also points out that Mr von Tunzelman has taken steps to enforce the Authority's Determinations in the District Court. He submits such action militates against exercising the discretion in Mr von Tunzelman's favour.

[13] It is not satisfactorily explained to me why Mr Taylor has not sought a stay of the Determination now in question. The fact that there is a challenge of some kind is a neutral factor in my assessment. The Determination is entitled to be respected until it is substituted by a judgment of the Court otherwise.

[14] I am satisfied that Mr Taylor has not complied with my determination of 13 August 2007. I am not persuaded by any of the submissions Mr Bogiatto has helpfully made that I should exercise my discretion not to order compliance with the Authority's Determination of 13 August 2007. None of the submissions persuade me I should not affirm by way of compliance an earlier Determination which obviously would not have been made if it were considered inappropriate, unmeritorious or unwarranted.

[15] Accordingly, Mr von Tunzelman has made out a case for the exercise of the discretion in his favour and he is entitled to have the discretion so exercised.

[16] Mr Taylor's Counsel has reminded the Authority of the Court's further jurisdiction in respect of applications of the present kind. Typically, at this juncture in my own Determinations on such applications I restate those further consequences. I need not do so on this occasion and have no doubt Mr Taylor has been informed by his counsel.

Orders

[17] **I now order Malcolm Taylor to comply with my determination of 13 August 2007 and to do so by 2 May 2008.**

[18] Mr von Tunzelman is entitled to be reimbursed the lodgement fee on this application. **Malcolm Taylor is ordered to pay \$70.00 to Simon von Tunzelman.**

Leon Robinson
Member of Employment Relations Authority