

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 155/09
5159476

BETWEEN

ROBERT MURPHY
First Applicant

DENISE SERGEANT
Second Applicant

AND

SMARTSTUD SYSTEMS
LIMITED (IN
RECEIVERSHIP)
First Respondent

TRAFFIC ELECTRONICS
LIMITED (IN
RECEIVERSHIP)
Second Respondent

Member of Authority: Alastair Dumbleton

Representatives: Robert Murphy in person, and for Second Applicant
Alan Garrett, advocate for Receivers

Telephone Conference: 14 May 2009

Determination: 15 May 2009

DETERMINATION OF THE AUTHORITY

[1] Mr Robert Murphy and Ms Denise Sergeant seek orders requiring payment of money previously determined by the Authority to be due to them.

[2] On 31 October 2008, under AA375/08, the Authority ordered Smartstud Systems Limited and Traffic Electronics Limited to pay Mr Murphy and Ms Sergeant various amounts owing from their employment with those companies, including pay in lieu of notice. The amounts were \$4,166.67 for Mr Murphy and \$4,916.67 for Ms Sergeant.

[3] Mr Murphy and Ms Sergeant have not received their pay in lieu of notice and seek further orders to compel payment, and also for interest and for fees and expenses incurred in enforcing the Authority's determination.

[4] Both companies have been in receivership since 23 June 2008 and are being administered by KordaMentha.

[5] As the companies have not yet been placed into liquidation, Mr Murphy and Ms Sergeant are entitled to seek from the Authority a compliance order requiring the companies to observe the determination issued on 31 October 2008. The remedy of compliance is a discretionary one however.

[6] I confirm that as discussed during the telephone conference with Mr Murphy and Mr Garrett on 14 May 2009, I consider that in the particular circumstances the discretion should be exercised against making the orders sought.

[7] I accept the report of Mr Garrett given in his letter of 28 April 2009, that the receivers have been carrying out their functions and duties pursuant to the Companies Act 1993 and the Receiverships Act 1993. In doing so they have paid employee preferential claims pursuant to the Seventh Schedule of the Companies Act 1993 but have declined payment of the in lieu of notice claims (and reimbursement of filing fees) which, in their view, are not covered by the Seventh Schedule and accordingly rank as unsecured. The receivers' advice is that in the circumstances they have no power to pay those monies.

[8] Mr Murphy has questioned the view of the receivers that in lieu of notice payments do not fall under the Seventh Schedule. If the receivers are wrong about that Mr Murphy and Ms Sergeant may have been kept out of money they are entitled to receive.

[9] There is no evidence before the Authority even suggesting that the receivers from KordaMentha have not acted entirely in accordance with their professional and statutory obligations in the way they have disbursed such moneys as have been realised from assets.

[10] Unfortunately it is same situation as in many receiverships. There is simply not enough money available to go around all the creditors. Those who have

preferential claims must be paid out first which usually results in there being insufficient funds to pay those who have lesser priority.

[11] A compliance order will not yield up money that is not there because of an insufficiency of remaining funds after higher ranking creditors have been paid.

[12] In any event the only orders the Authority could make are against the respondent companies on the basis that they were the employers of Mr Murphy and Ms Sergeant. The Authority could not make orders against the receivers even if it took a different view to theirs as to the preference to be given to in lieu of notice payments. Any problem in that regard is not an employment relationship problem able to be resolved by the Authority.

[13] There is no question that Mr Murphy and Ms Sergeant remain entitled to all the payments determined as owing to them by the Authority, and there is no question that the respondent companies remain liable to make those payments. The real issue is about the way proceeds from asset realisations have been distributed by the receivers. Any remedies available to Mr Murphy and Ms Sergeant if they wish to challenge KordaMentha about that, lie outside the jurisdiction of the Authority.

[14] Accordingly, no orders are made.