

The Problem

[1] The applicants say the respondents are in breach of an Authority consent determination and seek compliance.

The Investigation

[2] As a result of a telephone conference call on 5 July 2010 I issued various directions including a timeline for the parties to file evidence and/or submissions in respect of this matter. As part of that direction I required Authority support staff to forward by courier service copies of the statement of problem and my directions to the first respondent's address for service and to the second respondent's address as recorded in the NZ Companies Office record: the latter, Mr Choudhry, is the first respondent's sole director. I took this action because of the respondents' failure to provide a statement in reply or to participate in the telephone conference on 5 July.

Background

[3] At the parties' request I issued a consent determination dated 2 February 2010 (WA 15/10) incorporating a settlement agreement.

[4] As is made clear by the applicants in the statement of problem and their subsequent submissions, the respondents are in breach of the settlement agreement and therefore the consent determination.

[5] Copies of email communications attached to the statement of problem from Mr Choudhry clearly acknowledge the respondents' breaches of the settlement agreement/consent determination.

[6] The applicants now seek a compliance order requiring payment by the respondents of outstanding monies, a penalty and costs on an indemnity basis.

[7] All efforts, including leaving messages on Mr Choudhry's portable phone and communications to his and the Companies addresses as listed in the NZ Companies

Office record as at the date of this determination, have been unsuccessful in drawing a response from the respondents.

[8] The material forwarded to the Company's address for service has been signed for, whereas the material forwarded to Mr Choudhry's personal address has been returned with the descriptor, "*unknown*" (communication to the Authority).

[9] I am satisfied notice of this matter has been properly served on the respondents, that they have enjoyed a fair and reasonable opportunity to participate and that – notwithstanding their failure to engage – it is appropriate for me to proceed to determine this matter: ss 160 (1) & 173 of the Employment Relations Act 2000 (the Act) applied.

Discussion and Findings

[10] The evidence before the Authority is not contested: the respondents entered into a settlement agreement and asked that it be incorporated into a consent determination. I accepted their request. The settlement/consent determination required the respondents to, amongst other things, pay each of the applicants the sum of \$3,500 under s. 123 (1) (c) (i) of the Act. Payment would be at the rate of \$100 to each applicant per week with the first payment commencing by 5 March 2010. The first respondent agreed also to pay the applicants' legal costs of \$1,700 plus GST within 14 days of receipt of an invoice from the applicants' representative. The second respondent personally guaranteed the first respondent's compliance with the settlement agreement.

[11] While the respondents have paid the applicants' legal costs, they immediately were in breach of their undertaking to make weekly payments of \$100 to the applicants, from 5 March. Payments to the applicants proceeded irregularly, and were increasingly in arrears. No payments have been made to the applicants since 1 April. The outstanding amount owed to each of the applicants is, at the date of this determination, \$3,100.

[12] The email communications between the second respondent and the applicants' representative make clear that the latter ensured the former was well aware of being in

breach of his undertakings and the risk of compliance action if that failure persisted; unfortunately, the respondents have “*simply gone quiet*” (par 4, the applicants’ submissions received on 12 July).

[13] The respondents are plainly in breach of their undertakings. No good or clear reason has been articulated on their behalf in respect of this failing. I therefore accept the applicants’ application and order compliance with the unmet provisions of the settlement agreement/consent determination.

Penalty Application

[14] A penalty is claimed against the first respondent “... *for the failure to comply with the Authority’s order*” (par 3. (c) Statement of problem). No argument or submissions in support of this remedy have been provided.

[15] In *Xu v McIntosh* [2004] 2 ERNZ 448, 451 the Employment Court found that:

In determining the quantum of penalties to be imposed for the breaches of the ERA ... the first question to ask was, how much harm had the breach occasioned? Further, how important was it to bring home to the party in default that such behaviour was unacceptable, or to deter others from it? The next question ... was: was the breach technical or inadvertent, or was it flagrant and deliberate?

[16] The importance of adhering to the settlement agreement/consent determination was clearly explained to Mr Choudhry at the Authority’s investigation meeting on 2 February 2010: the second respondent acknowledged my comments.

[17] There has been no real effort by Mr Choudhry to communicate his situation, or that of the first respondent, or their reasons for non-compliance to the Authority.

[18] Bearing the above in mind, I find there is no reason to regard the breach other than as flagrant and deliberate.

[19] The applicants gave evidence to the Authority at its investigation on 2 February of the damage done to them by the respondents’ actions in respect of their original employment relationship problem: while I have been provided no evidence of

damage to them arising in respect of this second application and the respondents' noncompliance, I am obliged to conclude that that second failure is no better than the first, that it will have harmed the applicants, particularly as the record of settlement contained compensation at a level well below their original and seemingly legitimate claims, and should therefore be addressed by way of a penalty.

[20] I am satisfied, consistent with *Xu* (above), that a penalty of \$2,000 against the first respondent in favour of the applicants is just, and that all of the penalty should be paid to Messrs Cao & Chen: ss. 136 (2) of the Act applied.

Determination

[21] Consistent with the above:

- a. Global Horticulture & Verticulture Limited is directed to comply with the settlement agreement/consent determination it entered into on 2 February 2010 and to do so no later than 28 days from the date of this determination, namely by 13 August 2010. In other words, by 13 August it is to pay all arrears owing the applicants per the payment arrangement set out in the settlement agreement/consent determination, and to ensure regular weekly payments thereafter of the outstanding balance.
- b. The first respondent is to pay a penalty of \$2,000 (two thousand dollars) in respect of its breach of the settlement agreement/consent determination, and is to pay that sum by way of \$1,000 (one thousand dollar) payments to each of the applicants;
- c. Kashaf Ali Rizwan Choudhry is directed to comply with the settlement agreement he entered into on 2 February 2010 and to ensure that the orders made against the first respondent as set out above are met by no later than 13 August 2010; and

- d. I do not accept the unsupported claim for costs on an indemnity basis, as filed. But, having regard to the evident efforts of the applicant's representative to date, I am satisfied instead that the respondents should pay costs to the applicants of \$700 (seven hundred dollars).

Denis Asher

Member of the Employment Relations Authority