

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

WA 149/10
File Number: 5311924

BETWEEN Tina Mills
 Applicant

AND Avatar Management Limited t/a
 Maida Vale Retirement Village
 Respondent

Member of Authority: Denis Asher

Representatives: Christine Sargeson for Ms Mills
 Pat Wynd for the Company

Investigation Meeting On the papers

Submissions Received 9 September 2010

Determination: 21 September 2010

DETERMINATION OF THE AUTHORITY

The Problem

- [1] Is the respondent (the Company) in breach of a consent determination?
- [2] If so, should compliance be ordered, and interest and costs awarded?

The Investigation

[3] During a telephone conference call on 19 July 2010 the parties agreed to try to resolve this matter on their own terms, failing which, and by way of an agreed deadline, the Authority would determine the matter on the papers.

[4] By email dated 19 August an Authority senior support officer advised the parties that, as the matter had not been resolved, the timetable agreed to for filing a statement in reply and submissions would apply.

Background

[5] The relevant facts are agreed.

[6] On 18 May 2010 the parties asked the Authority to record by way of a consent determination their agreement in respect of a separate employment relationship problem (refer WA 100/10, 5162520).

[7] One of the agreed terms of settlement was that the Company would contribute \$3,625.00 to Ms Mills' legal costs: payment of that sum was effected on 20 May.

[8] Another of the agreed terms of settlement was that the Company would pay Ms Mills a compensatory sum of \$15,000 by 2 June 2010: from the outset the respondent has been in breach of this provision. To date \$13,000 remains outstanding (four payments of \$500 having been made on 16 & 28 June, 26 July and 27 August).

[9] In its statement in reply received on 23 August one of the Company' directors and owners, Ms Pat Wynd, advised amongst other things that – following discussions with a business/financial manager, an accountant and bank manager – neither she nor the Company could make payment in full to Ms Mills “*at this stage*” (par 3).

[10] Ms Wynd also advised that, “... *until some of the large financial commitments were cleared I could only make payments of \$500.00 per month at this stage*” (above).

Applicant's Position

[11] The settlement of 18 May was reached on the basis that payment would be made within an agreed 14 days timeframe. That timeframe expired on 2 June.

[12] A payment rate of \$500 per month is grossly inadequate and will take 27 months to satisfy the debt. Such a delay is adverse to Ms Mills' financial position.

[13] The respondent has failed to present a realistic payment proposal. This is an absence of good faith and reinforces Ms Mills' concerns the Company is unwilling to comply with the consent determination regardless of its financial circumstances.

[14] The respondent's claim of a dire financial position is at odds with recent development in its retirement village (refer to an attached internet reproduction of an advertising feature in the Taranaki Daily News of 23 July 2010 that features the development of 38 luxury villas with 14 more to be built).

[15] Ms Mills continues to seek interest from 2 June 2010 to the date of payment, and a contribution to her costs in respect of bringing this action.

Respondent's Position

[16] In submissions dated 9 September, Ms Wynd advised that, amongst other things, that the development of luxury villas is being undertaken by a legal entity other than the respondent.

[17] In the same submission Ms Wynd has attached an audit of a separate legal entity, Avatar Corporation Limited dated 2 December 2009. At par 5 of the audit it notes that:

The viability of Avatar Corporation is very much dependent on a vibrant and successful operation of the whole facility. In order to look at the financial position of Avatar as a Group, a review of financial viability (based on the draft financial statements available for the other entities) was carried out by audit. The following was noted:

- *As at 31 March 2009, the Company is technically insolvent.*

Discussion

[18] At the time of entering into the 18 May consent determination the Company was represented by both Ms Wynd and experienced counsel.

[19] Attached to the Company's statement in reply was a 'to whom it may concern' letter dated 20 July 2010 purporting to be from (according to the letterhead) a firm of chartered accountants who act on behalf of the respondent. I say 'purported' because the letter is signed by somebody on behalf of another person and is not in affidavit form. The author is misinformed as to his or her understanding that the Authority "*has ordered the Company to make a payment ...*". That is not the case as the payment referred to was one freely entered into by the respondent.

[20] The letter details the nature of the Company's income stream and how the proportion of Government determined fees to operating expenses has diminished over the past 10 years to a point that "*to make a profit from the business is very difficult. In fact for the last three financial years the Company has recorded a loss*".

[21] The letter goes on to note that the Company has to manage its cash flow very carefully in order that staff are paid wages on time and trade creditors paid in a timely manner; to achieve this the Company has on occasions entered into arrangements with creditors to pay larger accounts off over a period of time. In all such instances full payment has been made.

[22] The letter concludes with the observation that a lump sum payment (now of \$13,000) will cause financial stress for the Company: it will need to go into debt and its ability to make ongoing payments elsewhere "*will be more difficult*".

[23] The most recent observations in respect of the financial viability of the respondent are those contained in the unsworn letter of 20 July. I note, crucially, that the 20 July letter does not say the Company cannot pay the lump sum it freely agreed to, but observes that to do so would cause it stress and the respondent would go further into debt.

[24] The letter of 20 July makes the suggestion that it would be meritorious to spread payment over a period of time. Unfortunately, neither the respondent nor Ms Wynd has offered suggestions as to a suitable spread other than the arrangement unilaterally adopted by the respondent, and opposed by the applicant.

[25] As is made clear above (par 17) the respondent also relies on observations contained in an audit for the year ended 31 March 2009 in respect of Avatar Corporation Limited. One of those observations, set out in its preliminary paragraphs notes that:

The responsibility for the implementation and monitoring of good internal and management control rests with the Board ...

Findings

[26] After regard to the above, I find that – in the absence of evidence the Company cannot make the lump sum payment Ms Wynd freely committed it to make – it would be wholly unfair and unreasonable to not grant the compliance order sought by Ms Mills.

[27] Similarly, having been denied the use of monies since 2 June, Ms Mills should enjoy payment of interest on the outstanding sum until it is received in full by her.

[28] I am reinforced in this finding by the submission that Ms Mills compromised her claims on the basis of the benefit of earlier settlement but was denied that outcome.

[29] For completeness' sake, and for the reasons set out above, I record here my finding that the evidence before the Authority is not sufficient for me to direct compliance by way of s. 138 (4A) of the Employment Relations Act 2000, i.e. “*order payment to the employee by instalments, but only if the financial position of the employer requires it*”.

Determination

[30] The Company is to pay Ms Mills the sum of \$13,000 no later than 28 days from the date of this determination.

[31] Bearing in mind the present Reserve Bank 90-day bill rate, the Company is also to pay to Ms Mills interest of 5% on monies outstanding from 2 June. Leave is reserved to the parties to refer that calculation back to the Authority if agreement on the same is not forthcoming.

[32] As requested, costs are reserved.

Denis Asher

Member of the Employment Relations Authority