

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2012] NZERA Wellington 146
5387803

BETWEEN VANESSA ROSS FOR THE
ESTATE OF JAMES THOMAS
FARLEY
Applicant

AND CACTUS SECURITY
(TARANAKI) LIMITED
Respondent

Member of Authority: P R Stapp
Representatives: Vanessa Ross, for the Applicant
Evan Williams, for the Respondent
Investigation Meeting: On the papers
Information and statements by: 19 October 2012
Determination: 29 November 2012

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] This is an employment relationship problem filed by Vanessa Ross on behalf of the Estate of James Thomas Farley. The problem she has raised is about the late payment of a settlement recorded under s.149 of the Employment Relations Act 2000 (the Act). She is pursuing a claim on behalf of the estate against Cactus Security (Taranaki) Limited (Cactus Security) for not paying a settlement on time. In particular she is seeking the costs relating to getting compliance of the settlement plus interest on the unpaid money, reimbursement of the filing fee, telephone calls, travel/accommodation expenses and loss of wages (to attend the Authority) and legal costs. Also, she is seeking a penalty for a breach of settlement, and compensation for

emotional stress and inconvenience caused by the respondent in breaching the settlement.

[2] The respondent denies the claims.

[3] Both parties agreed for the matter to be dealt with on the papers after a telephone conference with the Authority held on 17 September 2012 and the receipt of further information/submissions. I considered that it would not be constructive to direct the parties to mediation because of the background and that they have not been able to settle anyway.

[4] I accept that Ms Ross has the authority to act on behalf of the Estate of Mr Farley. Her name, as the legal personal representative, needs to be substituted for the name of Mr Farley under clause 18 of Schedule 2 of the Employment Relations Act (the Act). I accordingly join Vanessa Ross to properly correct the citation under s 221 of the Act because she is acting for the estate and she is a signatory on the Record of Settlement.

The facts

[5] The facts in this matter are relatively straightforward. A Record of Settlement was entered into between Vanessa Ross for the Estate of James Farley, and Cactus Security at New Plymouth, on 25 August 2011. The signatories were Ms Ross for the Estate of James Farley and Mr Evan Williams, director of Cactus Security. A mediator from the Ministry of Business Innovation and Employment (formerly the Department of Labour) (MBIE) signed off the Record of Settlement on 25 August 2011 and in doing so confirmed that the parties had explained to them:

- (a) The terms were final and binding on and enforceable by the parties;
- (b) Except for enforcement purposes, the parties were not able to seek to bring the terms before the Authority or the Court, whether by action, appeal, application for review or otherwise.

[6] Ms Ross contends that details were given by her to the mediator for a payment under the settlement and that she assumed the settlement would be complied with by Mr Williams and the company and that she would not have to follow it up. The first payment of 50% of the full sum was due 28 days after the signing of the Record of

Settlement. The balance of the money was due on 30 October 2011. Upon reviewing her bank accounts later she found that no payments had been made on time. She approached the mediator concerned at MBIE, to ascertain what had happened. She says that she was informed by the mediator that the matter had been followed up with Mr Williams and that there had been various attempts made to communicate with Mr Williams.

[7] After a month when there had been no payment, Ms Ross says that she followed the matter up again with MBIE and thereafter she decided to refer the matter to the Employment Relations Authority.

[8] Ms Ross filed a Statement of Problem in the Authority dated 2 July 2012 in an attempt to obtain the payment under the record of settlement. It is accepted by Mr Williams that there were delays by him in making the payment under the record of settlement, but he says that this was not his fault as MBIE had not provided the banking and account numbers of the applicant to enable the payment to be made on or before the due date. Ultimately, the payment was made to Ms Ross, on 4 July 2012 by Mr Williams.

[9] Mr Williams' defence in this matter is that he was not provided with an account number by the department and that he had no responses to his emails and he lays the blame for this at the department.

The issue

[10] The issues for the Authority to determine are:

- (a) What is there to enforce; and
- (b) Is Ms Ross, on behalf of the estate, entitled to any further payments, relief/remedies for the non-payment of the sum by the due date?

Determination

[11] It is a fact that the payment required under the Record of Settlement was not paid on time. However, once Mr Williams received the details as to where he was required to make the payment, he did so. This happened on 4 July 2012. Payment was made albeit late.

[12] Thus, as the payment has now been made, there is no need to deal with this matter by way of a compliance order.

[13] I accept that Ms Ross has been put to the cost of pursuing this matter and in that regard it is only fair that the respondent reimburse the filing fee of \$71.56, because of the late payment that he must ultimately be accountable for. This is because I am satisfied that, without Ms Ross filing a Statement of Problem in the Authority, this matter may have been further delayed having regard to the information referred to in the emails and the time between them and the payment being made. I accept that she genuinely filed to get the payment because of the lapse in time and communications she had with MBIE.

[14] Also as there was a delay with the payment being made Ms Ross has been deprived of the use of the money she was entitled to. This is half the full amount that was due 28 days after signing the record of settlement and the balance due on 30 October 2011. She is entitled to interest on the full amount for the late payment to 4 July 2012, when the payment was actually made. Interest is payable under clause 11 of Schedule 2 of the Act for the recovery of money in accordance with the Judicature (Prescribed Rate of Interest) Order 11 January 2011 (applying on and after 1 July 2011). Interest is currently calculated at 5% per annum under that order. My calculation is for the 40 days the first payment of half the sum was not paid prior to 30 October 2011, one day for the late payment of the balance due on 30 October 2011 and 279 days for the full amount of late payments from 31 October 2011. Therefore Cactus Security (Taranaki) Limited is required to pay Ms Ross \$123.15 interest.

[15] Mr Williams has an explanation about why he did not make the payment in the time required under the Record of Settlement. His explanation relates to his attempts to communicate with MBIE and its failure to provide him with details to make the make the payment to Ms Ross's account. Ms Ross says that she provided the necessary details. However it remains unexplained why it was that Mr Williams could not get a response from MBIE, when it, according to Ms Ross, had attempted to make contact with Mr Williams, and she decided to file her matter with the Authority. Once the matter was filed in the Authority payment occurred. Mr Williams' explanation does not excuse his failure to comply on time. The payment was Cactus Security's responsibility since the Record of Settlement was between Ms Ross for and on behalf of the Estate of Mr Farley and Cactus Security (Taranaki) Limited.

Furthermore there are no terms in the Record of Settlement binding MBIE to do anything. Any involvement of MBIE is another matter between the parties and MBIE. However, I am prepared to accept that Mr Williams has provided an explanation. I say this because there has not been a full hearing in regard to the matter where the evidence could be tested under cross examination, and that MBIE has not been involved in any investigation to test Mr Williams' evidence. This is not a matter for a penalty as claimed, I hold. This is because there is information that seems to indicate there has been some communication difficulties and confusion and Mr Williams did finally receive details to make the payment. If there was any penalty it would have had to be paid to the Crown as a matter of public policy in regard to the enforcement of settlements and because Ms Ross has been awarded interest on the amounts not paid on time.

[16] In respect of all of the other claims that Ms Ross has made, I am dismissing them for the following reasons:

- (i) That the only cost in the pursuing the matter relates to the filing fee. No other legal costs have been presented.
- (ii) That I am not satisfied that the claims as they have been made by Ms Ross are fair and reasonable in regard to pursuing such a matter. In this regard, she would not be entitled to lost wages to attend to the matter in the Authority because I see no linkage between her claim for lost wages and attending to this matter in the Authority. This is especially so given there did not need to be an investigation meeting. Payment has been made. The only time taken has been involved in the paperwork and telephone conference.
- (iii) That there is no basis on which Ms Ross can claim compensation for emotional stress and inconvenience in bringing a claim for compliance and penalties. The settlement makes no provision for such a remedy. The Authority has no express powers to make such a remedy of compensation in a compliance matter.

Orders of the Authority

[17] I therefore order Cactus Security (Taranaki) Limited to pay Vanessa Ross for and on behalf of the Estate of James Thomas Farley \$123.15 interest and \$71.56 for the filing fee to close the matter.

P R Stapp
Member of the Employment Relations Authority