

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**[2013] NZERA Auckland 568
5437357**

BETWEEN

YOLANDE DUNN
Applicant

AND

ESE TATUPU FUNERAL
DIRECTORS & MORTUARY
EMBALMERS LTD
Respondent

Member of Authority: Eleanor Robinson
Representatives: Mike Harrison, Advocate for Applicant
Respondent in Person
Investigation Meeting: 11 December 2013 at Auckland
Determination: 11 December 2013

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] A Record of Settlement (the Settlement) was signed under s 149 of the Employment Relations Act 2000 (the Act). The parties to the Settlement were the Applicant, Ms Yolande Dunn, and the Respondent, Ese Tatupu Funeral Directors and Mortuary Embalmers Ltd.

[2] The Settlement had been signed by the parties and forwarded to the Mediation Services of The Ministry of Business, Innovation and Employment (MBIE) for signing by a mediator. The Settlement had been signed by the MBIE mediator on 22 August 2013.

[3] The issue now brought before the Authority by Ms Dunn is that the Respondent has not complied with clauses 1 to 4 of the Settlement, which state:

1 In consideration of a settlement of this matter, the Employer will pay the Employee compensation amounting to a weekly sum of \$619.00 (as amended and initialled by the parties) for a period of 13 weeks. This is a total amount of \$8044.00 (as amended and initialled by the parties) paid in terms of s123(1)(b) of the ERA 2000.

- 2 *The Employer will make a contribution to the employees legal costs in the sum of 2000.00 excluding GST to Employment Equity Ltd upon receipt of an invoice for this sum.*
- 3 *The payments referred to in clause 1 above will be made in 13 weekly instalments to the employee. It is agreed that if any individual payment is missed or is late then the total outstanding amount will become immediately due and payable.*
- 4 *The payments referred to in clause 2 above will be made within 7 days of the signing of this agreement.*

[4] The Settlement was certified under s 149 of the Act by the Mediator. That certification confirmed that before making the agreement, the parties were advised and accepted they understood the agreed terms:

- a. were final, binding and enforceable; and
- b. could not be cancelled; and
- c. could not be brought before the Authority or the court for review or appeal, except for the purposes of enforcing those terms.

[5] Ms Dunn has applied for a compliance order based on the fact that payments set out in clause 1 did not commence within 7 days of the Settlement having been signed by the MBIE Mediator.

[6] Mr Ese Tatupu stated that he had not wilfully not complied with the Settlement but attributed the delay in payments to a breakdown in communication between the parties as a result of Mr Tatupu having appointed a Mr Kelly Flavell to represent him during the Settlement process.

[7] Mr Tatupu confirmed that the Respondent had commenced payment by instalments with effect from 1 November 2013.

Determination

[8] Whilst the Settlement refers in clause 4 to the legal costs payments in clause 2 being made in full in the event that they were not paid within 7 days of the signing of the agreement, I find that the parties intended, understood, and accept that the 7 day term applied also to the commencement of the instalment payments to Ms Dunn.

[9] I accept that the non-compliance situation is partly attributable to the breakdown in communications between the Respondent and its duly appointed representative, Mr Flavell.

[10] However that does not wholly absolve the Respondent for bearing some responsibility in this matter, especially as Ms Dunn's representative, Mr Harrison, had been pro-active in trying to resolve the situation which had arisen without the intervention of the Authority.

[11] From the evidence available to the Authority, I am satisfied that the Respondent has failed to comply with the Settlement.

[12] I note that the Respondent has made six instalment payments to Ms Dunn, with a further payment to be made on 13 December 2013. I also note that the legal costs due under clause 2 of the Settlement have now also been paid.

[13] **In order to effect compliance with the Settlement, I therefore order Ese Tatupu Funeral Directors and Mortuary Embalmers Ltd to pay Ms Dunn, no later than 14 days from the date of this determination, the outstanding sum of \$3,711.00.**

Penalty

[14] The Act includes provisions encouraging parties to resolve their employment relationship issues between themselves. The Settlement represents such a resolution and therefore the failure by one party to honour the terms of any resulting agreement is a serious matter.

[15] Public confidence in s 149 settlements will be undermined if it is perceived that parties are permitted to breach these settlements with impunity. It is important that the parties can have confidence in the enforceability of the terms of agreed settlements. It is consequently in the public interest to impose a penalty which will act a deterrent to others who may contemplate engaging in such behaviour.

[16] However in determining this matter I take into consideration the fact that the Respondent has made a number of payments in accordance with the Settlement in addition to the legal costs payable in accordance with the Settlement. Additionally I take into consideration the fact that the Respondent has not wilfully evaded its responsibility under the Settlement.

[17] Accordingly I make no order for a penalty.

Costs

[18] Mr Harrison has applied for costs on behalf of Ms Dunn.

[19] It is unusual for the Authority to allow preparation time per day of the investigation meeting, and I am not persuaded that this is a matter in which I should depart from that position.

[1] Having had regard to the principles set out in *Da Cruz*, the time taken for the Investigation Meeting, and the conduct of the parties, I consider that a contributory award towards Ms Dunn's actual costs is reasonable.

[2] Adopting the notional daily tariff rate of the Authority as \$3,500.00, I take that as the appropriate starting point for costs.

[3] I order Ese Tatupu Funeral Directors and Mortuary Embalmers Ltd to contribute \$500.00 towards Ms Dunn's actual costs.

[20] I order that Ms Dunn be reimbursed for the Authority's filing fee by Ese Tatupu Funeral Directors and Mortuary Embalmers Ltd in the sum of \$71.56.

Eleanor Robinson
Member of the Employment Relations Authority