

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2013] NZERA Wellington 108
5423102

BETWEEN THE CHIEF EXECUTIVE OF
THE DEPARTMENT OF
CORRECTIONS
Applicant

AND PAUL CUTBUSH
Respondent

Member of Authority: Trish MacKinnon

Representatives: Juliet Dobson, for the Applicant
No appearance by the Respondent

Investigation Meeting: 14 August 2013

Determination: 9 September 2013

DETERMINATION OF THE AUTHORITY

Application for compliance order

[1] Mr Cutbush was employed by the Chief Executive of the Department of Corrections (the Department) as Manager, Project Delivery, from 3 December 2012 to the date of his resignation on 8 April 2013. The parties entered into a Record of Settlement, which was dated 12 April 2013 and signed off by a mediator of the Ministry of Business, Innovation and Employment on 16 April 2013.

[2] The agreed terms of settlement included 3 specific terms for the Department to meet. It also required Mr Cutbush to return to the Department all property or information in his possession belonging to the Department. This included a Blackberry phone, laptop, swipe access card, and staff ID card.

[3] The Department says it has complied with all its obligations under the Record of Settlement but Mr Cutbush has not. It filed a statement of problem on 19 June

2013, together with a request that the Authority deal with the matter on an urgent and *ex parte* basis. Following several unsuccessful attempts to retrieve the departmental property from Mr Cutbush, he had informed the department of his intention to sell some of it.

[4] The department sought a compliance order requiring Mr Cutbush to return the departmental property within seven days of the compliance order being made, and costs.

[5] I accorded urgency to the matter but declined to proceed on an *ex parte* basis. I gave leave to the department under Regulation 19A of the Employment Relations Authority Regulations and clause 4A(a) of Schedule 2 of the Employment Relations Act 2000 to serve the application on Mr Cutbush overseas. Service could be effected by email and was to be accompanied when served by a notice in form 8.

[6] Mr Cutbush was to be given a reduced period of 15 days to respond, and could do so by email. A telephone conference would be scheduled once documents had been served on him.

Failure of the respondent to attend the telephone conference and investigation meeting

[7] Mr Cutbush did not provide a statement in reply. Nor did he lodge an objection to the Authority's jurisdiction as provided for in form 8. An Authority Support Officer notified Mr Cutbush by email on 12 July 2013 that a telephone conference was scheduled for 18 July 2013 at 12.30 p.m. NZ time (10.30 a.m. Queensland time). If he chose not to participate, the telephone conference would proceed in his absence and decisions on how the matter would be dealt with would be made without his input.

[8] The Authority received a response from Mr Cutbush's email address, apparently from his wife, on 12 July 2013. The email, which was copied to the Department, advised that Mr Cutbush was travelling in Europe and would not be available for the telephone conference. The email noted that "*(t)he laptop has been waiting for pickup for 3 months*".

[9] The Department responded to that email, asking for a suitable time for the items to be picked up by TNT couriers. On 17 July 2013 the Department received a

response from Mr Cutbush's email address stating that the property could be picked up after 4 p.m. the following day.

[10] The telephone conference scheduled for 18 July was rescheduled for 23 July 2013, on the basis that the problem may have been resolved by then by the property being collected by the courier on 18 July.

[11] In the event, the property was not collected. The courier company was apparently unable to get a response by email or telephone from Mr Cutbush or Ms Cutbush. An email sent on the evening of 18 July 2013 from Mr Cutbush's address to TNT couriers, the Authority and the Department stated that the "*pack*" was left outside all day but not collected. The email said if it was not picked up the following day it would "*go back in the safe*". The email also contained allegations of ill treatment of Mr Cutbush by the Department.

[12] Mr Cutbush did not attend the telephone conference on 23 July 2013. A further conference call was scheduled for 29 July. Mr Cutbush emailed the Department on that day, and copied in the Authority, alleging he had been "*constructively terminated by a bully in the Department*" and stating that he had "*no interest in telecons*".

[13] Mr Cutbush did not attend the next telephone conference on 29 July 2013. The matter was directed to an investigation meeting on 14 August 2013, and Mr Cutbush was advised accordingly, and informed of the requirement for any witness statements to be filed and served by 12 August 2013.

[14] Mr Cutbush did not provide a witness statement and he failed to attend and/or be represented at the Authority's investigation meeting. The start of the investigation meeting was delayed to enable an Authority Support Officer to make contact with him. The Support Officer had no success in contacting him by telephone, but did receive an email from Mr Cutbush stating that the goods had been picked up by the courier.

[15] As there was no way to verify the contents of the package that had been picked up, and no good reason advanced by Mr Cutbush for his non-attendance at the investigation meeting, I decided to proceed. My decision was made pursuant to clause 12 of Schedule 2 to the Employment Relations Act 2000 which provides:

If, without good cause shown, any party to a matter before the Authority fails to attend or be represented, the Authority may act as fully in the matter before it as if that party had duly attended or been represented.

[16] At the conclusion of the investigation meeting I agreed to await advice from the Department about the contents of the package that was currently in transit from Australia before making a decision on this matter.

Evidence and discussion

[17] The Department, through its witness Tara Sewell, provided a significant amount of evidence, mainly in the form of email correspondence between the Department and Mr Cutbush. The evidence also included the Record of Settlement signed by the parties on 12 April 2013, and by the Mediator on 16 April 2013.

[18] The Record of Settlement set out the details of the agreement reached by the parties and the obligations of each of them towards the other. It provided that Mr Cutbush would return all Departmental property in his possession, including certain specified items) "*upon enforcement of this agreement*".

[19] Similar wording to that italicised above was used in the provision relating to the Department's obligation to pay Mr Cutbush's final pay. I am satisfied that the parties' intention was that the starting point for the Department's obligations over final pay, and Mr Cutbush's obligations over the return of Departmental property, would be the date the Mediator signed the agreed terms of settlement.

[20] The Record of Settlement was expressed to be in full and final settlement of all matters between Mr Cutbush and the Department arising out of their employment relationship.

[21] The email correspondence showed the efforts made by the Department to retrieve its equipment from Mr Cutbush in accordance with the Record of Settlement. The Department attempted from April 2013 to have Mr Cutbush return the equipment or, alternatively, to have it picked up by a courier from his home address in Tamborine.

[22] I am satisfied from the evidence presented that the Department made numerous attempts to retrieve its equipment. Mr Cutbush was ostensibly cooperative at the outset, but effectively thwarted all efforts made by the Department to persuade

him to return its property himself, or cooperate in the Department's efforts to have a courier uplift it.

[23] Mr Cutbush supplied various reasons for this. On one occasion he noted that the Department was assuming he was in Australia; on another occasion he stated that "*no one will be available in QLD tomorrow*". Yet other responses were "*this won't work today*" or "*that won't be possible*".

[24] Many of Mr Cutbush's responses to the Department's communications simply ignored the issue of the return of the equipment. Instead they addressed other matters, such as the tax paid on his final payment from the Department, and the detail of the record of service provided to him by the Department. The Department responded to all of his queries and concerns but its property remained firmly in Mr Cutbush's possession.

[25] After a number of email exchanges during April and May 2013, Mr Cutbush notified the Department on 4 June 2013 not to contact him again stating that "*(T)he equipment will be sold on E Bay due to the failure to arrange pick up etc*".

[26] The Department's Acting General Manager, Human Resources, Richard Waggott, wrote to Mr Cutbush reminding him of his obligations to return the equipment. That resulted in an emailed response that the Department had failed to pick up the equipment and that Mr Cutbush considered the matter now closed. A further email from him advised Mr Waggott that Mr Cutbush was "*fine if you want to put in a bid for the blackberry on Trademe*".

[27] At that point the Department filed documents in the Authority, stating its concern that some of the equipment could contain sensitive Department of Corrections information. This information could enter the public domain if Mr Cutbush were to follow through on his threats to sell the Department's equipment.

[28] Following the filing, and serving on Mr Cutbush, of the Department's Statement of Problem in this matter, Mr Cutbush again professed his willingness to facilitate the Department's courier service collecting the equipment from his property.

[29] However, his cooperation was conditional upon his receiving confirmation that the Department's application to the Authority had been withdrawn, and on

resolution of the record of service issue. I note that the provision of a record of service was not an agreed term of the Record of Settlement between the parties.

Subsequent events

[30] On 23 August 2013 the Department advised the Authority it had received some of its property from Mr Cutbush, but that it had not received the staff ID card.

Determination and Order

[31] A compliance order is no longer required for the return of most of the Department's property that was in Mr Cutbush's possession. The Department has requested that one be issued for the return of his staff ID card.

[32] Mr Cutbush's staff ID card was specified in the Record of Settlement and should have been returned with other items. I order Mr Cutbush to return to the Department of Corrections the staff ID card it issued to him. The item is to be returned within 14 days of the date of this determination.

Costs

[33] The Department seeks an award to cover the cost of external legal advice it sought and received in the matter, and the reimbursement of its filing fee. I find it more likely than not that Mr Cutbush would not have cooperated with the Department's courier for the return of most of the property if the Department had not commenced these proceedings.

[34] I therefore find it appropriate for Mr Cutbush to contribute to the expenses incurred by the Department of Corrections. I order him to pay the Department the sum of \$71.56, being the cost of the filing fee in the Authority.

Trish MacKinnon
Member of the Employment Relations Authority