

[3] The parties attempted to resolve the matter between them but were unable to agree and accordingly a telephone conference with the Authority was held on 7 August 2019. The family member attended for Mr Bell. In the course of the conference call, however, the family member notified the withdrawal of representation, and rescinded advice given in the statement in reply of an intention to pay some outstanding monies on Mr Bell's behalf. The telephone conference was adjourned at that point and attempts were made to contact Mr Bell directly.

[4] A further telephone conference was scheduled for 21 August 2019. Mr Bell, although notified of it in advance, did not attend that telephone conference and it proceeded in his absence. It was agreed with the applicant that the matter be determined on the papers by way of affidavits and submissions.

[5] Both parties were advised in writing of the timetable that would apply. Mr Tansley provided an affidavit with attached documentation. His representative, Ms Coley, filed submissions on Mr Tansley's behalf. Mr Bell did not participate in the process and has supplied neither an affidavit nor submissions. I am satisfied he has been appropriately informed of the Authority's process and of the timeframe put in place for his participation.

The settlement agreement

[6] Relevant paragraphs of the settlement agreement entered into by the parties on 16 November 2018 and signed by a mediator that day are reproduced below.

[7] At the request of Mr Tansley, and in the interests of preserving the confidentiality of the agreed settlement as far as is compatible with the need for disclosure in the current compliance proceedings, not all of the monetary amounts have been disclosed:

4. The respondent will pay the applicant [sum redacted] within the terms of section 123(1)(c)(i) of the Employment Relations Act 2000. This 19 consecutive weekly instalments of [sum redacted], with the first payment commencing on 26 November 2018.
5. Upon receipt of invoice, the respondent will pay \$1,500.00 plus GST towards the applicant's representation costs no later than 23 December 2018. This invoice will be emailed to abconcrete260@gmail.com for the purposes of payment.

Compliance

[8] Section 137(1) of the Act provides that the Authority may order compliance in a number of specified situations. These include where any person has not observed or complied with any terms of settlement or decision that s 151 provides may be enforced by compliance order.

[9] Section 149 provides, in relation to settlements such as this one which were made through the provision of the Ministry of Business, Innovation and Employment's mediation services, that where the conditions specified in that section have been met, those terms are final and binding on, and enforceable by, the parties. I am satisfied in this instance that those conditions have been met.

[10] The terms may not be cancelled under sections 36 to 40 of the Contract and Commercial Law Act 2017 and, except for enforcement purposes, may not be brought before the Authority or the Court. A person who breaches an agreed term of settlement is liable to a penalty imposed by the Authority.

[11] Section 151 provides that any agreed terms of settlement that are enforceable by the parties under s 149(3) may be enforced by compliance order under s 137 or, in the case of a monetary settlement, either by compliance order or by using the procedure under s 141. The latter section provides for enforcement through the District Court. I am satisfied that the settlement agreement in this matter meets the requirements of s 151.

The evidence and submissions

[12] In submissions on behalf of Mr Tansley, Ms Coley refers to the unambiguous binding and enforceable nature of the agreement entered into by the parties on 16 November 2018. She submits the first breach of the agreement occurred on 23 December 2018 when the respondent failed to make payment of a contribution to the costs associated with Mr Tansley's representation in accordance with clause 5 of the agreement.

[13] Ms Coley provided evidence of the invoice she had sent to Mr Bell on 19 November 2018 in accordance with clause 5. I accept she provided the invoice to the respondent within the time frame of the settlement agreement; no payment has been made by the respondent; and the invoice remains outstanding in full. Mr Tansley's affidavit supports Ms Coley's submission.

[14] Mr Tansley deposed that Mr Bell commenced paying instalments under clause 4 of the settlement agreement on 26 November 2018 and that he made a total of eight instalments. Mr Tansley further deposed that he had not received a payment from the respondent since the week commencing 7 January 2019. He appended to his affidavit a copy of his bank statements covering the period in question and the subsequent period up to 28 February 2019. These show a number of payments were made by "Co.scape (20 Alex payment)". I accept Mr Tansley's evidence that those payments were made by Mr Bell under the terms of clause 4 and that there is an outstanding sum of \$3,200.24 in compensation owing to him.

[15] Ms Coley also refers in her submissions to attempts Mr Tansley made through his advocate to inform the respondent that the terms of the record of settlement they had agreed were not being adhered to. No response was received from Mr Bell and there was no attempt to resolve those breaches. In Ms Coley's submission the respondent's failure has been contemptuous in terms of its obligations in accordance with the mediated settlement.

[16] The respondent failed to attend the telephone conference arranged by the Authority or to provide any reason for not doing so. He has also failed to respond to the applicant's claims other than through a concerned family member whose assistance and offer to pay monies owing to the applicant were withdrawn. There has been no direct contact at all from Mr Bell.

[17] Had Mr Bell been unable for good reason to attend the second telephone conference, or to provide an affidavit and submissions in accordance with the Authority's timetable, he could have contacted the Authority to provide an explanation. His failure to do so is inexplicable.

[18] If Mr Bell had complied with the terms of the settlement agreement the payments to Mr Tansley would have been completed by 8 April 2019, and the payment of costs to Ms Coley would have been completed by 23 December 2018 at the latest. Both of those dates are long past. It is fitting that Mr Bell be ordered to comply with the payments agreed in the settlement agreement. In the absence of evidence from the respondent of his financial position, it is not appropriate to order payment by instalment.¹

¹ Section 138(4A) refers.

Should a penalty be imposed?

[19] The breach of the mediated settlement agreement renders Mr Bell liable to the imposition of a penalty of up to \$10,000.² Penalties are at the discretion of the Authority and are generally imposed for the purpose of punishment as well as discouragement to others.

[20] Ms Coley submits that a penalty is due for the reasons I have cited from her submissions above. She may be correct in that. However, at this point I consider it more important to achieve compliance by the respondent with the payments agreed in the mediated settlement agreement.

[21] I will order compliance with those payments and adjourn the matter without imposing a penalty or making a final determination, to allow the compliance order to be complied with while the matter is adjourned.³

Orders

[22] Alex Bell trading as ABC Concreting is ordered to comply with the mediated settlement agreement of 16 November 2018 by paying:

- (a) \$3,200.24 to Gabriel Tansley, being the outstanding amount owing from the settlement agreement.
- (b) \$1,725.00, being \$1,500.00 plus GST, to Kelly Coley Limited.
- (c) The payments in (a) and (b) above are to be made to the respective recipients by 16 December 2019.

[23] If the respondent fails to pay the amounts ordered within the specified timeframe this matter will be reconvened for the purpose of considering the imposition of a penalty.

Costs

[24] Mr Tansley asks for the reimbursement of the Authority's filing fee and of all costs associated with or incidental to the matter. As Mr Tansley has not advised the fees he has incurred in seeking compliance, I reserve the issue of costs, other than to award him the filing fee.

² S 135(2)(a) of the Act.

³ In accordance with s 138(5).

[25] Alex Bell trading as ABC Concreting is ordered to reimburse Mr Tansley \$71.56, being the filing fee he has incurred in making this application for compliance.

Adjournment

[26] This matter is adjourned until 17 December 2019, or any earlier date on which the applicant advises the Authority of Mr Bell's compliance with the outstanding terms of the mediated settlement agreement.

Trish MacKinnon
Member of the Employment Relations Authority