IN THE EMPLOYMENT COURT OF NEW ZEALAND
WELLINGTON

I TE KŌTI TAKE MAHI O AOTEAROA
TE WHANGANUI-A-TARA

[2024] NZEmpC 98
EMPC 462/2023

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	DAVID CRICHTON Plaintiff
AND	DIG & TIP EARTHWORKS LIMITED First Defendant
AND	SELWYN TORRANCE Second Defendant

Hearing: 21 March 2024

Appearances: P McBride and S Radcliffe, counsel for the Plaintiff
S Torrance, agent for first defendant and second defendant in person

Judgment: 7 June 2024

JUDGMENT OF JUDGE J C HOLDEN

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[1] On 6 December 2022, following a mediation with a Ministry of Business, Innovation and Employment mediator, David Crichton and Dig & Tip Earthworks Ltd entered into a record of settlement.

[2] Later that month, Mr Crichton filed proceedings in the Employment Relations Authority because he said that Dig & Tip had breached the Record of Settlement in multiple ways and had committed numerous statutory breaches. Against Dig & Tip he sought:

(a) compliance orders requiring compliance with the Record of Settlement and the law;

(b) penalties for breach of the Record of Settlement;

(c) orders for payment of monies due to Mr Crichton under s 131 of the Employment Relations Act 2000 (the Act), being wages and holiday pay; and

(d) costs.

[3] In the Authority Mr Crichton also sought to join Selwyn Torrance, who is the managing director of Dig & Tip, seeking:

(a) an order giving leave under ss 142W and 142Y of the Act to bring proceedings against Mr Torrance personally;

(b) compliance orders requiring that Mr Torrance take all necessary steps to have Dig & Tip meet its obligations to Mr Crichton;

(c) to the extent that Dig & Tip failed to forthwith make payment to Mr Crichton of monies due, an order that Mr Torrance do so personally;

(d) penalties for being party to breaches of Mr Crichton's employment agreement (being for non-payment of wages and other monies due); and

(e) costs.

[4] The Authority made orders requiring Dig & Tip to comply with various obligations in the Record of Settlement, and to pay a penalty of $6,000 for breaches of the Record of Settlement and its failure to keep records compliant with statute.[1]

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[1] *Crichton v Dig & Tip Earthworks Ltd* [2023] NZERA 688 (Member Szeto) at [73] and [100].

[5] Mr Crichton now challenges the determination on a non-de novo basis. The challenge is with respect to the Authority's findings:

(a) that it could not go behind the Record of Settlement and consider Mr Crichton's claim for unpaid wages and holiday pay afresh as a claim under s 131 of the Act;[2]

(b) that any sums for unpaid wages and holiday pay did not attract statutory interest;[3] and

(c) declining leave for Mr Crichton to recover any arrears from Mr Torrance personally.[4]

The proceedings were set down for formal proof

[6] Neither Dig & Tip nor Mr Torrance filed any papers in the Court and, accordingly, the matter was set down for formal proof.[5]

[7] Mr Torrance attended the hearing. The Court asked him if he wished to have the matter stood down while he obtained advice and/or whether he wished to seek an adjournment of the hearing. He declined both offers and the matter proceeded. Mr Torrance was given leave to, and did, address the Court in the course of the hearing.

The parties entered into a record of settlement

[8] The key paragraphs in the Record of Settlement in issue state:

> 8. In reaching this agreement the parties confirm that neither has agreed to forego minimum entitlements (monies payable under the Minimum Wage Act 1983, the Holidays Act 2003, or the Home and Community Support (Payment for Travel Between Clients) Settlement Act 2016) as specified in s 148A(3) of the Employment Relations Act 2000.
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> 9. Final pay including owed holiday pay will be paid on the next available pay run following the date of settlement (7th December 2022 Bank Account number: [*omitted*]).

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2 At [22], [47], [64], and [67].
3 At [69].
4 At [99].
5 As allowed for under cl 16 of sch 3 of the Employment Relations Act 2000.

> 10. Dig & Tip Earthworks Limited agree that claims for wages raised by David Crichton regarding unpaid hours will be checked and paid in full where required to meet minimum entitlements detailed in clause 8 above.
>
> 11. This is a full and final settlement of all matters between the parties arising out of their employment relationship.

[9] The Authority concluded that Dig & Tip had not properly checked Mr Crichton's claim for wages regarding unpaid hours.[6] The Authority found that by not checking Mr Crichton's claims, Dig & Tip was in breach of cl 10 of the Record of Settlement.[7] The Authority found that Mr Crichton had not been paid his wages in full where required to meet minimum entitlements, and that this too was a breach of cl 10 of the Record of Settlement.[8]

[10] The Authority also found that Mr Crichton was not paid the correct amount of owed holiday pay, and that this was a breach of cl 9 of the Record of Settlement.[9] There were other breaches of the Record of Settlement in respect of payments which were made late, property which was exchanged late and for disparaging comments.[10]

[11] The Authority ordered Dig & Tip to comply with cl 9 of the Record of Settlement by paying Mr Crichton his owed holiday pay, within 14 days of the date of the determination.[11] It also ordered Dig & Tip to comply with cl 10 of the Record of Settlement, which required it to check Mr Crichton's claim for unpaid hours and pay them in full where required to meet the minimum entitlements detailed in cl 8 of the Record of Settlement. This was to be done within 14 days of the date of the determination.[12]

[12] The Authority, however, did not consider it had jurisdiction to go behind the settlement and consider the claim for unpaid wages and holiday pay as a wage arrears claim under s 131 of the Act. The Authority member found that the appropriate course

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6 *Crichton v Dig & Tip Earthworks Ltd*, above n 1, at [28].
7 At [33].
8 At [48].
9 At [56].
10 At [57]–[62].
11 At [100(b)].
12 At [100(a)].

was to consider whether there was a breach of the Record of Settlement, for which the remedy under s 149 of the Act is a compliance order. [13]

The Act covers mediation and mediated settlements

[13] Section 148 of the Act covers confidentiality of mediation, providing that any statement, admission, or document created or made for the purposes of mediation, and any information that, for the purposes of the mediation, is disclosed orally in the course of the mediation, must be kept confidential.[14] No evidence is admissible in Court of any such statement, admission, document or information.[15]

[14] Section 148A provides:

> **148A Certain entitlements may be subject to mediation and agreed terms of settlement**
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> (1) The entitlements specified in subsection (3) may be the subject of—
>
> (a) mediation under this Part; and
>
> (b) agreed terms of settlement under section 149(1).
>
> (2) Despite subsection (1), a person who is employed or engaged by the chief executive to provide mediation services and who holds a general authority to sign agreed terms of settlement under section 149(1) must not sign agreed terms of settlement in which a party agrees to forgo all, or part, of the party's entitlements specified in subsection (3).
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> (3) This section applies to wages or holiday pay or other money payable by the employer to the employee under the Minimum Wage Act 1983, the Holidays Act 2003, the Home and Community Support (Payment for Travel Between Clients) Settlement Act 2016, or the Support Workers (Pay Equity) Settlements Act 2017.

[15] Section 149 relevantly provides:

> **149 Settlements**
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> (1) Where a problem is resolved, whether through the provision of mediation services or otherwise, any person—
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> (a) who is employed or engaged by the chief executive to provide the services; and

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13 At [22].
14 Employment Relations Act 2000, s 148(1).
15 Section 148(3).

(b) who holds a general authority, given by the chief executive, to sign, for the purposes of this section, agreed terms of settlement,—

may, at the request of the parties to the problem, and under that general authority, sign the agreed terms of settlement.

(2) Any person who receives a request under subsection (1) must, before signing the agreed terms of settlement,—

(a) explain to the parties the effect of subsection (3); and

(b) be satisfied that, knowing the effect of that subsection, the parties affirm their request.

(3) Where, following the affirmation referred to in subsection (2) of a request made under subsection (1), the agreed terms of settlement to which the request relates are signed by the person empowered to do so,—

(a) those terms are final and binding on, and enforceable by, the parties; and

(ab) the terms may not be cancelled under sections 36 to 40 of the Contract and Commercial Law Act 2017; and

(b) except for enforcement purposes, no party may seek to bring those terms before the Authority or the court, whether by action, appeal, application for review, or otherwise.

(3A)…

(4) A person who breaches an agreed term of settlement to which subsection (3) applies is liable to a penalty imposed by the Authority.

[16] Section 151 provides:

151 Enforcement of terms of settlement agreed or authorised

(1) This section applies to—

(a) any agreed terms of settlement that are enforceable by the parties under section 149(3):

(b) …

(c) …

(2) A matter referred to in subsection (1) may be enforced—

(a) by compliance order under section 137; or

(b) in the case of a monetary settlement, in one of the following ways:

(i) by compliance order under section 137:

> (ii) by using, as if the settlement, recommendation, or decision were an order enforceable under section 141, the procedure applicable under section 141.

The employment relationship problems were settled at mediation

[17] Mediation is a cornerstone of the Act. It facilitates parties to settle their employment relationship problems and so bring them to an end. The effect of a valid settlement is set out in s 149(3) of the Act.

[18] That does not mean that a settlement entered into under s 149 is completely impenetrable. It may be set aside where there are grounds for finding that the agreement is void or voidable at its inception, being grounds such as capacity, duress, or unconscionability.[16] There is no suggestion here that the Record of Settlement was void or voidable at its inception.

[19] A further issue potentially arises where a settlement involves minimum entitlements. Section 148A(1) allows minimum entitlements to be the subject of mediation and agreed terms of settlement; s 148(2), however, prohibits a mediator from signing off on a settlement if, as part of the settlement, an employee agrees to forego their minimum entitlements.

[20] The view of the Court in *8i Corp v Marino* was that, where there is a failure in the certification process, which would include where a mediator has signed off a record of settlement in contravention of s 148A(2), the certification is ineffective and the constraints within s 149(3) are inoperative.[17]

[21] In saying that, the Court must distinguish between a settlement whereby the employee purports to forego a minimum entitlement, which is not permissible, and a settlement reached to avoid the risk of litigation where the claim includes provision for disputed minimum entitlements, which is permissible.[18] As the Court in *Crossen v Yangs House Ltd* held, were the situation otherwise, a purported settlement of a

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16 *TUV v Chief of New Zealand Defence Force* [2020] NZCA 12, [2020] 2 NZLR 446, [2020] ERNZ 1 at [42]–[45].
17 *8i Corp v Marino* [2017] NZEmpC 69, [2017] ERNZ 315 at [44]–[46] and [49].
18 *Crossen v Yangs House Ltd* [2021] NZEmpC 102, [2021] ERNZ 438 at [43]–[44].

dispute that included claims for statutory minimum entitlements would not produce finality.[19] It also would undermine s 148A(1).

[22] As the Court in *Crossen* noted, such an interpretation is consistent, too, with the intention of s148A as set out in the explanatory note to the Employment Relations Amendment Bill (No 2) 2010 that led to its introduction, which included that the intention of the section was not to prevent minimum entitlements from being considered in mediation but, rather, to ensure that the lawful amount of them, once determined, cannot be reduced.[20]

[23] No issue under s 148A arises in these proceedings. The Record of Settlement did not include any agreement by Mr Crichton to forego his minimum entitlements. This was reinforced with the certification from the mediator that, before he signed the Record of Settlement, he explained to the parties the effect of ss 148A, 149(1) and 149(3) of the Act. The mediator also certified that the parties had advised him that no minimum entitlements had been foregone in reaching the settlement. Clause 8 of the Record of Settlement gave the mediator the assurance needed to satisfy himself that the certification was not in breach of s 148A(2) of the Act.

[24] I do not accept the argument made by Mr McBride, counsel for Mr Crichton, that cl 10 "carved out" minimum entitlements from the settlement. The Record of Settlement does not purport to leave any matters arising under that employment relationship unresolved; it expressly says that all matters between the parties arising out of their employment relationship were settled. It includes the standard provisions signed off by the parties, saying that they understood that once the mediator signed the agreed terms of settlement, the settlement was final and binding on and enforceable by them; and that except for enforcement purposes, neither of them may seek to bring the terms before the Authority or Court whether by action, appeal, application for review, or otherwise.

[25] Mr McBride also submits that the Record of Settlement did not exclude or change the character of the underlying employment relationship problem as to

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19 At [44].
20 At [45].

remuneration due under the employment agreement (and law).[21] That problem, he says, had not been resolved, but existed outside of the settlement.

[26] He refers to s 238 (and thus s 131) of the Act. Section 238 provides that the parties cannot contract out of the provisions of the Act and s 131 provides that an employee may recover money payable under an employment agreement (including wages) in the Authority, despite any agreement to the contrary purporting to accept a lower rate.[22] While I accept s 238 does not sit altogether comfortably with s 149, s 149 must prevail; that is, a settlement that complies with s 149(2) has the effect described in s 149(3). It would be counter to the policy underlying s 149 and the promotion of mediated settlements in the Act for the Court to go around such a settlement.[23] It would go against the finality that the Act envisages for mediated settlements.

[27] In short, the Record of Settlement recorded a full and final settlement between Mr Crichton and Dig & Tip. It confirmed rather than compromised Mr Crichton's minimum entitlements. If Dig & Tip had complied with the Record of Settlement, there would be no problem. The difficulties arise because it has not complied with the Record of Settlement.

[28] Having fully and finally settled his employment relationship problems at mediation, Mr Crichton is left with enforcing the Record of Settlement.

Dig & Tip had obligations under the Record of Settlement

[29] Under the Record of Settlement, Dig & Tip had obligations to make certain crystallised payments, which it has done, although later than was agreed.[24]

[30] The Authority accepted that Dig & Tip had not complied with the obligation to pay holiday pay as provided for in cl 9 of the Record of Settlement and ordered

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21 Citing ss 131 and 238 of the Employment Relations Act 2000; and s 4 of the Wages Protection Act 1983.

22 Employment Relations Act 2000, s 131(2).

23 See *TUV v Chief of New Zealand Defence Force* [2022] NZSC 69, [2022] 1 NZLR 78 at [44] and [57]–[61].

24 *Crichton v Dig & Tip Earthworks Ltd,* above n 1, at [8] and [9].

Dig & Tip to pay that to Mr Crichton. Mr Crichton says that has not been paid to him and seeks payment. Mr Crichton had taken 5 days annual holidays, but the Authority found that 6.5 further days had incorrectly been recorded as annual holidays.[25]

[31] The next issue is whether Dig & Tip has complied with cl 10 of the Record of Settlement. Clause 10 left the amount Dig & Tip was obliged to pay rather vague. It might have been a reasonable clause if it was intended to be simply a washup provision, but probably was not a wise clause for the parties to agree to where it covered what has transpired to be a fairly substantive claim for unpaid hours by Mr Crichton.

[32] Nevertheless, under cl 10, Dig & Tip had two obligations: first, it had to check Mr Crichton's claims for wages and, second, it had to pay any unpaid hours in full "where required to meet minimum entitlements detailed in clause 8".

[33] The Authority agreed that Dig & Tip did not check Mr Crichton's claim for wages regarding unpaid hours.[26] Accordingly, it was in breach of the first obligation in cl 10 of the settlement and a compliance order was made. But that does not let it off the hook with respect to the second obligation. In that respect, the combined effect of cls 8, 9 and 10 is that, if Mr Crichton worked hours for which he was not paid, Dig & Tip was to make payment for those hours, and related holiday pay, based on the Minimum Wage Act and the Holidays Act.

[34] The Authority found that Mr Crichton worked in excess of 40 hours per week but was not paid for those extra hours.

[35] As the Record of Settlement provided that he would be paid for those extra hours to comply with the Minimum Wage Act, Mr Crichton is entitled to an order that Dig & Tip comply with the second part of cl 10, that is, it must pay him for the shortfall in hours, calculated using the minimum wage, and holiday pay on those hours.

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25 At [55].
26 At [28].

[36] Although Mr Torrance appeared at the hearing and made it clear that Dig & Tip did not accept that Mr Crichton worked overtime, Mr Crichton has given evidence to the Court that he worked on average 55 hours per week, being 15 hours' overtime. That evidence is consistent with the findings of the Authority, and I accept it.[27]

[37] Mr Crichton was an adult worker paid by the hour. He was employed by Dig & Tip from 17 January 2022 until 6 December 2022. For the 10.57 weeks from the beginning of his employment until 31 March 2022, the hourly minimum wage was $20 per hour.[28] For the 35.71 weeks from 1 April 2022 until the termination of Mr Crichton's employment, the hourly minimum wage was $21.20 per hour.[29] This leads to a sum due of $14,526.78.[30]

[38] Mr Crichton's entitlement to holiday pay is calculated at the rate of eight per cent of gross earnings, less any amount paid to him for annual holidays taken in advance.[31] Gross earnings are all payments required to be paid under his employment agreement, including wages and payment for overtime.[32] Wages due for contracted hours under the employment agreement totalled $70,800,[33] and I have calculated overtime payments as $14,526.78, bringing Mr. Crichton's gross earnings to $85,326.78. Eight per cent of gross earnings is $6,826.14. As Mr Crichton took five days of annual leave in advance,[34] $1,600 must be subtracted from that sum.[35] As Mr Crichton was paid 1.75 days of annual leave when he left Dig & Tip, a further $560 must also be subtracted,[36] producing a figure of $4,666.14.

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27 At [36], [46] and [48].
28 Minimum Wage Order 2021, cl 4(a).
29 Minimum Wage Order 2022, cl 4(a).
30 10.57 weeks x 15 hours per week x $20 per hour = $3,171; and 35.71 weeks x 15 hours per week x $21.20 per hour = $11,355.78; and $3,171 + $11,355.78 = $14,526.78.
31 Holidays Act 2003, s 23.
32 Section 14.
33 See *Crichton v Dig & Tip Earthworks Ltd,* above n 1, at [37]. From the start of employment until 25 April 2022: 14 weeks x 40 hours per week x $35 per hour = $19,600; from 26 April 2022 until 6 December 2022: 32 weeks x 40 hours per week x $40 per hour = $51,200; total = $70,800.
34 See *Crichton v Dig & Tip Earthworks Ltd,* above n 1, at [53] and [55]; and Holidays Act 2003, ss 83(3) and (4).
35 5 days x 8 hours x $40 per hour.
36 *Crichton v Dig & Tip Earthworks Ltd,* above n 1, at [51]: 1.75 days x 8 hours x $40 per hour.

No orders against Mr Torrance

[39] These shortfalls in payment are as a result of the breaches of the Record of Settlement, not of the employment standards under the Act.[37] Accordingly, there is no basis to make orders against Mr Torrance personally pursuant to s 142Y of the Act.

Interest is payable

[40] Interest is payable on these sums and is sought by Mr Crichton.[38]

[41] The Record of Settlement was signed on 6 December 2022. No date is included for compliance with cl 10 of the Record of Settlement, but 14 days would have been reasonable. On that basis, I order interest to be paid on the sum of $14,526.78 from 20 December 2022 through to the date of payment. In accordance with cl 9, I order that interest be paid on the sum of $4,666.14 from 7 December 2022 through to the date of payment. Both of those interest sums are to be calculated in accordance with sch 2 of the Interest on Money Claims Act 2016.

Costs are sought

[42] The statement of claim sought costs in the Authority as against Mr Torrance and costs in the Court as against both Dig & Tip and Mr Torrance. Mr Crichton has been unsuccessful in obtaining orders against Mr Torrance personally, so no costs are recoverable from him. Costs in the Court are available against Dig & Tip.

[43] Mr Crichton seeks costs in this Court on a category 2B basis:

STEP	DESCRIPTION	ALLOCATED DAYS (BAND B)
1	Commencement of proceeding by way of challenge by plaintiff	2
11	Preparation for first directions conference	0.4
13	Appearance at first directions conference	0.2

[37] Employment Relations Act 2000, ss 5 and 142Y(1)(b).
[38] Schedule 3 cl 14: "any proceedings for the recovery of any money".

35	Preparation of plaintiff's affidavit	2
38	Preparation for hearing	2
39	Appearance at hearing	0.5
41	Memorandum seeking directions as to service (defendant's refusal to engage in proceedings)	0.4
41	Memorandum informing Court of plaintiff's application in the Authority	0.4
Total		**7.9**

[44] Using a category 2 rate of $2,390[39] this leads to a total of $18,881, which is less than Mr Crichton's actual costs.

[45] On balance, given Mr Crichton's lack of success in some aspects of his challenge, I consider an appropriate sum for costs in these proceedings to be $15,000.

Summary of orders

[46] In summary, Dig & Tip is to pay the following sums to Mr Crichton:

(a) Unpaid hours: $14,526.78.

(b) Holiday pay: $4,666.14.

(c) Interest on $14,526.78 from 20 December 2022 to the date of payment, calculated in accordance with sch 2 of the Interest on Money Claims Act 2016.

[39] "Employment Court of New Zealand Practice Directions" <www.employmentcourt.govt.nz> at No 18; and High Court Rules 2016, sch 2.

(d) Interest on $4,666.14 from 7 December 2022 to the date of payment, calculated in accordance with sch 2 of the Interest on Money Claims Act 2016.

(e) A contribution to costs of $15,000.

[47] These sums are to be paid within 21 days of the date of this judgment.

J C Holden
Judge

Judgment signed at 2.30 pm on 7 June 2024