IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2011] NZERA Auckland 326
5343354

	BETWEEN	ROY BRENCHLEY Applicant
	AND	GARRY WOOLSTON Respondent

Member of Authority:	Rachel Larmer
Representatives:	Ms Ngatai, Advocate for Applicant No appearance for Respondent
Investigation Meeting:	22 July 2011 by telephone conference
Determination:	25 July 2011

DETERMINATION OF THE AUTHORITY

A **Mr Garry Woolston is ordered, by 5 August 2011, to comply with the parties' agreed terms of settlement which were entered into under s149 of the Employment Relations Act 2000 ("the Act").**

B **Mr Garry Woolston is ordered to pay Mr Brenchley:**

(i) **Interest of 5% per annum on $17,268 from 21 April 2011 until this amount has been paid in full; and**

(ii) **$323.76 for disbursements.**

C **A penalty of $5,000 is imposed on Mr Woolston under s149(4) of the Act. Mr Woolston is ordered to pay $1,500 of the penalty to the Crown and $3,500 of the penalty to Mr Brenchley.**

Employment relationship problem

[1] Mr Roy Brenchley sought orders under s.137(1)(a)(iii) and s151 of the Act that Mr Woolston comply with agreed terms of settlement which required him to pay Mr Brenchley $17,268 by 21 April 2011. No money has been paid and Mr Woolston

has not responded to efforts by Mr Brenchley and his representative to find out why payment has not been made.

[2] Mr Brenchley sought an order that Mr Woolston pay interest on the money he owed from 21 April 2011, which was the date the payment was due. Mr Brenchley also asked that a penalty be imposed on Mr Woolston in accordance with s149(3) of the Act for his breach of an agreed term of settlement and that the penalty be paid to him, instead of the Crown. Mr Brenchley sought to recover the disbursements/expenses he had incurred in respect of this application.

Service

[3] In accordance with the Authority's usual method of serving documents, Mr Brenchley's statement of problem was sent to Mr Woolston by CourierPost on 9 May 2011. A track and trace record stated it was delivered at 10.50am on 10 May 2011.

[4] When no statement in reply was received, the Authority sent Mr Woolston a letter dated 26 May 2011 by CourierPost reminding him he had to seek leave to file a statement in reply out of time if he wanted to defend Mr Brenchley's application. A track and trace record stated this letter was delivered at 7.30am on 27 May 2011.

[5] An investigation meeting was scheduled for 21 June 2011. On 7 June 2011 a notice of hearing was sent by Courier Post to Mr Woolston. A track and trace record stated this was delivered at 7.30am on 8 June 2011.

[6] In the course of confirming in advance of the investigation meeting on 21 June 2011 that the statement of problem and notice of hearing had been served on Mr Woolston, the Authority became concerned the signature on the document delivery form appeared to be that of the courier driver, not Mr Woolston. Further inquiries with CourierPost confirmed the driver and not the recipient of the documents had signed for them.

[7] Surprisingly, CourierPost was unable to tell the Authority whether the track and trace documents had been personally delivered to someone at Mr Woolston's home address or whether they had been left in his letterbox. The Authority was therefore not satisfied it had adequate proof of service, so the 21 June 2011 investigation meeting was adjourned for personal service to occur.

[8] The Authority scheduled a new investigation meeting for 11am on Friday, 22 July 2011 so the notice of hearing could be served on Mr Woolston at the same time as Mr Brenchley's statement of problem and associated documentation was personally served on him.

[9] Mr Brenchley's representative, Ms Karen Ngatai, who lives in Taumarunui, twice travelled to Mr Woolston's home outside of normal work hours in an attempt to personally serve him, but did not see him.

[10] Mr Brenchley engaged a private investigator, Mr Hugh Thomson who provided an affidavit of service in which he deposed documents were served on Mr Woolston at his home at 9.30am on Saturday, 2 July 2011.

[11] However, Mr Thompson's affidavit of service did not identify who the documents had been personally served on and it did not say what documents had been served and it did not annex as exhibits to the affidavit the documents he had served. Mr Thompson's affidavit also said he had served a witness summons and conduct money, but no summons had been issued in this matter.

[12] These were fundamental defects, so the Authority did not accept Mr Thompson's affidavit as proof of service.

[13] However, Ms Ngatai had also engaged Mr Ronald Buchannan, who was a process server who lived in Taumarunui, to serve Mr Woolston. Mr Buchannan personally served Mr Woolston with Mr Brenchley's statement of problem and attached documentation together with the notice of hearing for the 22 July 2011 investigation meeting at 7.35am on 2 July 2011.

[14] Mr Buchannan provided a properly sworn affidavit of service that identified the documents he had served and which annexed the service documents as exhibits to his affidavit. Mr Buchannan deposed he personally served the documents on Mr Woolston at his home address of 649 Paparoa Road, RD 3, Taumarunui. Mr Buchannan deposed he knew it was Mr Woolston he had served because he knew Mr Woolston personally. They had both lived in Taumarunui for many years, Mr Buchannan had previously served documents on him, and Mr Woolston had acknowledged his name before the documents were served.

[15] I am satisfied personal service of Mr Woolston occurred on 2 July 2011. I believe Mr Woolston has been made aware of the nature and extent of the claim against him. I am also satisfied that all proper steps have been taken to advise Mr Woolston of the time and place of the Authority's investigation meeting into this matter.

Investigation process

[16] No statement in reply or application for leave to file a statement in reply out of time has been filed. Mr Woolston has not responded to the Authority's attempts to contact him. He has also failed to respond to Mr Brenchley's and Ms Ngatai's attempts since 21 April 2011 to contact him. The Authority advised Mr Woolston's former solicitor it was trying to contact him, but that did not result in any response from him.

[17] Although Mr Woolston has failed to engage in the Authority's investigation process it is not appropriate to delay the investigation of this matter because of that.

[18] Mr Brenchley lives in Napier and his representative lives in Taumarunui. I am based in Auckland. The nature of the claim and the fact no statement in reply had been received caused me to decide that, for cost and efficiency reasons, it was appropriate to conduct my investigation meeting by telephone.

[19] A letter dated 19 July 2011 was sent by CourierPost to Mr Woolston advising him that the investigation would not be in Hamilton but would take place by telephone conference instead. The letter confirmed the investigation would still proceed at 11am on Friday, 22 July 2011.

[20] Mr Woolston was provided with contact details for the telephone conference in case he wished to participate in the investigation. He was also reminded again that if he wanted to defend Mr Brenchley's application he had to seek leave to file a statement in reply out of time. No response was received from Mr Woolston.

[21] At 11am on 22 July 2011 I made inquiries with the Hamilton office to see if Mr Woolston had appeared there. I was advised Mr Woolston had not reported to reception and he was not in the investigation room or surrounding area. I am therefore satisfied he did not appear in Hamilton. If he had appeared in Hamilton then

arrangements were in place to enable him to participate in the investigation by telephone.

[22] Although the notice of hearing stated the investigation would start at 11am, I delayed starting until 11.15 am in case Mr Woolston contacted the Authority. He did not do so.

Terms of settlement

[23] The parties signed a record of settlement on 7 March 2011. It was stated to be in full and final settlement of all matters between the parties. It recorded the settlement was final, binding, and enforceable. The agreed terms of settlement were signed by a mediator from the Department of Labour, who certified to the matters required under s149 of the Act.

[24] Under the terms of the settlement Mr Brenchley had to withdrawn his personal grievance claim for unjustified dismissal, with there being no issue as to costs. Mr Brenchley duly did this.

[25] Although the record of settlement contained a confidentiality clause, it is appropriate for me to set out the clauses Mr Woolston has breached.

[26] Clause 2 of the agreed terms of settlement stated Mr Woolston would pay Mr Brenchley:

> *(a) "$10,000 pursuant to s.123(1)(c)(i) of the Employment Relations Act 2000;*
>
> *(b) The equivalent of four weeks' wages ($317 x 4 = $1,268 less tax) pursuant to s.123(1)(b) of the Employment Relations Act 2000; and*
>
> *(c) $6,000 as payment towards reimbursement of relocation expenses in accordance with s.123(1)(b) of the Employment Relations Act 2000."*

[27] Clause 3 stated:

> *"All monetary amounts payable under these terms will be paid within 21 days of the record being ratified by a mediator and will be paid directly to the employee's bank account."*

[28] A copy of Mr Brenchley's bank deposit slip was attached to the record of settlement.

[29] The mediator signed the record of settlement on 31 March 2011, so Mr Woolston had to pay Mr Brenchley $17,268 by 21 April 2011.

Breach of agreed settlement

[30] Mr Woolston has clearly breached the agreed terms of settlement. He has not made any payment to Mr Brenchley, nor has he explained why he has not complied with his payment obligations.

[31] When Mr Woolston did not make the payments due under clause 2, Mr Brenchley contacted Mr Woolston's solicitor, Miss Jamie Bright. Ms Bright did not have any explanation for the breach. Ms Ngatai has also contacted Miss Bright on numerous occasions about Mr Woolston's breach. She has been told Mr Woolston had not responded to his solicitor's attempts to contact him. Ms Ngatai also left a number of telephone messages for Mr Woolston on his own phone, but he has not responded to any of them.

[32] On 9 May 2011, Mr Brenchley filed a statement of problem seeking a compliance order, interest, and a penalty for breach of a settlement agreement.

Mediation

[33] Because this matter involved the alleged breach of the terms of an agreed settlement which had been signed under s.149 of the Act, I considered mediation was not appropriate.

Outcome

[34] Mr Brenchley's personal grievance claim arose on 5 October 2010. He initially applied for mediation and attempted to resolve matters himself. When that was unsuccessful he filed a statement of problem on 17 December 2011 which alleged he had been unjustifiably dismissed.

[35] The parties subsequently resolved the matter through their representatives. They entered into agreed terms of settlement which they asked a mediator from the Department of Labour to sign off under s.149 of the Act.

[36] This required Mr Woolston to pay Mr Brenchley $17,268 by 21 April 2011. I am satisfied he has not made any payment so there is no doubt Mr Woolston has breached an agreed term of settlement. I consider that unless a compliance order is made Mr Woolston is unlikely to comply with the agreed terms of settlement.

[37] A compliance order under s137(1)(a)(iii) of the Act is therefore necessary and appropriate.

Compliance order

[38] Mr Woolston is ordered to comply with the agreed terms of settlement between the parties which was signed by a mediator on 31 March 2011. Mr Woolston is ordered to pay Mr Brenchley $17,268 by 05 August 2011.

Interest

[39] The Authority has power to award interest under clause 11 of the Second Schedule of the Act at the rate prescribed by s.87(3) of the Judicature Act 1908, which is currently 5% per annum.[1]

[40] I consider it appropriate to award interest. Mr Woolston has had the use of money that should have been paid to Mr Brenchley. Mr Brenchley has had to borrow money because Mr Woolston did not pay him.

[41] I order Mr Woolston to pay interest of 5% per annum on $17,268 from 21 April 2011 until it has been paid in full.

Penalty

[42] Under s.149(4) of the Act, a person who breaches an agreed term of settlement to which s.149(3) of the Act applies, is liable to a penalty of up to $10,000 for an individual or up to $20,000 for a company. The primary purpose of a penalty is to punish wrongdoing.[2]

[1] Judicature (Prescribed Rate of Interest) Order 2011 (SR2011/177)
[2] *Xu v McIntosh* [2004] 2 ERNZ 448

[43] Mr Woolston, as an individual who has breached the terms of an agreed settlement, is liable to a penalty not exceeding $10,000.[3]

Previous penalties

[44] Since 2006, the Authority has imposed a penalty for a breach of agreed terms of settlement in 32 cases. Penalties have ranged from $150 to $4,000. All these penalties were all awarded prior to 1 April 2011, so the maximum penalty when they were imposed was $5,000 for an individual and $10,000 for a company. In 25 of the 32 cases all or part of the penalty has been awarded to the applicant.

[45] From 2006 to date the average penalty imposed by the Authority for a breach of the terms of s.149 agreed settlements was $1,236. The breaches have included breach of confidentiality provisions, failure to pay settlement funds, late payment or part payment of settlement funds, failure to provide a reference, and breach of an agreement not to make derogatory comments.

[46] The highest penalty of $4,000 has twice been imposed on individuals by the Authority.[4] In *Grenside v Gaskin*[5] the individual had deliberately breached the confidentiality provisions of the s.149 settlement agreement. The Authority ordered that $2,000 of the $4,000 penalty be paid to the applicant.

[47] The Authority's determination was unsuccessfully challenged and the Employment Court agreed with the imposition and disposition of the penalty.[6] This was the only case since 2006 in which the Court has considered a penalty imposed by the Authority under s149(4) of the Act.

[48] In *Amey v Komene & Anor*[7] the respondent individual flagrantly breached the settlement agreement because he failed to pay the moneys due to the applicant. The entire $4,000 penalty was awarded to the applicant.

Harm caused

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[3] S 135 ERA.
[4] *Amey v Komene & Anor* 27 November 2008, CA 178/08; *Grenside v Gaskin* 30 April 2007, WA 67/07

[5] 30 April 2007, WA 67/07
[6] *Gaskin v Grenside* unreported, Shaw J, 27 Sept 2007, WC 20A/07
[7] 27 November 2008, CA 178/08

[49] In *Xu v. McIntosh*[8] the Employment Court stated the first question when imposing a penalty is "*how much harm has the breach occasioned?"*

[50] I find that the harm in this case has been serious. Mr Brenchley compromised his personal grievance claim for much less than he believed it was worth on the basis he would be paid quickly and he would be able to put his employment problems behind him and move on. That has not occurred.

[51] Mr Brenchley is not only out of pocket but he has also had to spend considerable time trying to obtain payment, which he has found very stressful. Mr Woolston's breach of the agreed terms of settlement has put Mr Brenchley under very serious financial pressure which has in turn has adversely affected his relationship with his wife. They have been unable to meet their mortgage payments.

[52] Mr Brenchley had promised his bank it would be paid the money Mr Woolston owed him in April 2011. Because he did not receive the money he was owed, he was unable to meet his mortgage payments and his bank threatened to foreclose on his lifestyle block. In an attempt to avert bankruptcy Mr Brenchley is travelling out of the district two or three days a week to work in an attempt to starve off bankruptcy. This has created significant stress for Mr Brenchley and his wife.

Mr Woolston's culpability

[53] The Employment Court in *Xu* said the next question was to focus on the perpetrator's culpability - "*was the breach technical inadvertent or was it flagrant and deliberate?*"

[54] I find Mr Woolston's breach was a flagrant and deliberate breach of a very serious nature. Mr Woolston was aware of his obligations because he had personally signed the record of settlement. He induced Mr Brenchley to compromise his claim, which cannot now be reactivated, on the basis he would be paid three weeks after the mediator signed the agreement. Mr Brenchley met his obligations under the agreed settlement but Mr Woolston did nothing to meet his.

[55] Mr Woolston has ignored the many and various attempts to engage with him over his failure to pay. His is a sustained breach which has occurred over a period of more than three months and which is still ongoing.

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[8] Ibid 2

Public interest

[56] The Act includes provisions encouraging parties to resolve their employment relationship problems themselves. The failure of a party to honour the terms of any resulting settlement is therefore a very serious matter. Public confidence in s.149 settlements will be undermined if there is a perception they can be breached with impunity. It is important that those in employment relationships have confidence in the enforceability of the terms of agreed settlements.

[57] It is therefore in the public interest to impose a penalty which does not just punish Mr Woolston for his wilful breach of a s.149 settlement, but which is at a level which will deter others from engaging in such behaviour.

Amount of penalty

[58] Mr Woolston's breach is a serious one and the penalty needs to appropriately reflect the Authority's condemnation of his conduct. I consider a penalty of $5,000, which is half of the maximum, is necessary and appropriate.

Payment of penalty to Mr Brenchley?

[59] In *Xu*[9] the Court stated when deciding whether a penalty or any part of it should be paid to the victim of the breach, regard must be had to the degree of harm suffered as a result of the breach.

[60] I consider Mr Woolston's breach has harmed Mr Brenchley to a significant degree. Mr Brenchley almost lost his lifestyle property and he still has very serious financial problems. His health and relationship have suffered. Mr Brenchley's employment related problems are ongoing. Mr Woolston's breach has subjected Mr Brenchley to significant and ongoing stress for the last three months.

[61] I consider it appropriate that part of the penalty be paid to Mr Brenchley personally to reflect the effects Mr Woolston's deliberate breach has had on him. Mr Woolston is ordered to pay $3,500 of the $5,000 penalty to Mr Brenchley. The remaining $1,500 of the penalty is to be paid to the Crown.

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[9] Ibid 2

Costs

[62] Mr Brenchley has not incurred legal costs. He was represented by a community law centre so he will not be charged for Ms Ngatai's time.

[63] However, I am satisfied Mr Brenchley has incurred the following expenses which he has paid:

a. $71.56 filing fee;

b. $80.64 petrol reimbursement to Ms Ngatai for the two trips she made to Mr Woolston's home in order to personally serve him;

(a) $171.80 to Mr Buchanan for personal service on Mr Woolston.

[64] Mr Woolston is ordered to reimburse Mr Brenchley $323.76 the disbursements he has incurred in pursuing this application.

Rachel Larmer
Member of the Employment Relations Authority