

- [2] He seeks a direction that the respondent comply with its obligations as set out in the consent determination and the record of settlement, an order for costs and (in his amended statement of problem) a penalty.
- [3] In its statement in reply received on 20 October the company admitted to the consent determination and that it had not adhered to it, but alleged that Mr Bullock had breached the confidentiality provisions of the parties' settlement and had thereby *"invalidated his entitlement to payment ..."* (par 8).
- [4] The statement in reply advised of *"a person who is prepared to provide testimony, that the applicant has discussed matters relating to his termination of employment with the respondent and that he is to receive a financial/monetary settlement in respect to that circumstance. An affidavit confirming same will be made available to the authority"* (par 3).
- [5] The statement in reply also advised that the respondent *"is prepared to pay the applicant's lawyer's costs ... as per ... the agreement"* (par7).
- [6] The parties have not undertaken mediation in respect of this problem.
- [7] In a telephone conference with the parties on 1 December 2008 it was agreed the problem would proceed to an investigation on Thursday 4 December, commencing at 11.30 a.m.

Discussion

- [8] During today's investigation Mr Mason gave evidence on oath that he had not received Mr Bullock's lawyer's account until 17 October, by fax from his then advocate. He said the company was no longer in a position to pay that account. Mr Mason did not comment on the undertaking in his company's statement in reply filed on 20 October that payment of the account would be made.
- [9] Mr Mason also gave evidence that payment had not been made within the stipulated 7-days to Mr Bullock because he – Mr Mason – *"didn't know where to pay"*. He went on to say that because of Mr Bullock's breach the company would not be paying him the agreed settlement. He also said that the company could not afford to pay the settlement.

- [10] Despite the undertaking set out in the statement in reply, Mr Mason advised no evidence would be called to support the respondent's claim Mr Bullock had breached the parties' settlement agreement.
- [11] On oath Mr Bullock denied breaching the settlement agreement's confidentiality provision.

Summary of Applicant's Position

- [12] In submissions on behalf of his client, Mr Mitchell said he had promptly posted his account to the address provided by Mr Mason, and which had previously ensured communication with the respondent. He said his subsequent efforts to contact the company's previous representatives had proven fruitless until very late advice was received that they no longer acted for the respondent because of unpaid accounts.
- [13] Mr Mitchell submitted that the alleged breach of confidentiality was a fabrication and the statement produced by Mr Mason from his accountant as to the respondent's trading position could not be relied on as an accurate picture: the report included no record of income and it was common for companies to offset losses in the way set out in the accountant's summary.
- [14] Mr Mitchell referred to evidence produced by the applicant in the earlier proceedings that quoted Mr Mason as saying the applicant "*would not be getting a fucking cent*" from him. Mr Mason had had since 26 July to provide evidence of any breach and had failed to do so. His conduct was deplorable and entirely lacking in good faith: it was consistent with the quote attributed to him.

Summary of Company's Position

- [15] The company's position is set out above.

Findings

- [16] I entirely accept the applicant's position and the submissions put to me by Mr Mitchell. In particular, I find that the company, via Mr Mason, its sole director, has deliberately and cynically breached the settlement it entered into with Mr Bullock, and the authority's determination that it consented to.

- [17] I am satisfied there is no evidence of any breach of confidentiality by Mr Bullock and that the allegation is a fiction designed to facilitate the company's efforts to escape its obligations to the applicant. The respondent has had ample opportunity to produce that evidence but – despite its undertaking in its statement in reply to do so by affidavit – has failed.
- [18] I do not accept the financial statement produced by Mr Mason accurately reflects the company's position. It is far from a complete picture. It should be looked at carefully because of the respondent's cynical conduct to date. It does not explain why as recently as 20 October in its statement in reply the company promised to pay Mr Mitchell's legal account but now claims it is unable to do so.
- [19] Because of the deliberate breach of the settlement agreement and consent determination this is a situation that requires a significant penalty. In all the circumstances I am satisfied a penalty of \$5,000 is appropriate: ss 134 & 135 (2) (b) of the Employment Relations Act 2000 applied.
- [20] I am also satisfied that, in all the circumstances, payment of this penalty should be made in its entirety to Mr Bullock: ss 136 (2) of the Act applied.
- [21] I draw to Mr Mason's attention the risk he runs of a finding under ss. 134 (2) of the Act, that he is actively abetting a breach.
- [22] I also repeat here to Mr Mason my comments made during today's investigation, that failure to comply with his company's settlement and agreement to the consent determination may see this problem escalate to a point of further penalties and risk of imprisonment and sequestration, under s. 140 (6) of the Act.
- [23] Costs were originally sought of \$913.75 (statement of problem). Since that time Mr Mitchell has filed an amended statement of problem and participated in a conference call and today's brief investigation. I am satisfied that a contribution to Mr Bullock's fair and reasonable costs of \$1200 is therefore appropriate: *PBO Limited (formerly Rush Security Limited) v Da Cruz* [2005] 1 ERNZ 808 applied.

Good Faith Report

[24] For the reasons set out above I am satisfied the respondent in the form of Mr Mason has obstructed rather than facilitated the Authority's investigation and has failed to act in good faith toward Mr Bullock: s. 174 of the Act applied.

Determination

[25] The company is directed to comply with its obligations as set out in the parties' record of settlement and as incorporated into the authority's consent determination, of 24 July 2008 and make payment of the monies specified therein to Mr Bullock and his lawyer within 14-days of this determination.

[26] The company is to pay within the same period a penalty of \$5,000 (five thousand dollars) to Mr Bullock.

[27] The company is to pay within the same period legal costs of \$1,200 (one thousand, two hundred dollars).

Denis Asher

Member of the Employment Relations Authority