

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**[2018] NZERA Auckland 223
3031135**

BETWEEN ANGELO CARDOZ
Applicant

AND MARTIN-HAUTUS THE
PACIFIC PEOPLES LEARNING
INSTITUTE LIMITED
Respondent

Member of Authority: Eleanor Robinson

Investigation Meeting: 17 July 2018 by telephone

Determination: 17 July 2018

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] During August 2017 a Record of Settlement was entered into under s. 149 of the Employment Relations Act 2000 (the Act). The parties to the Record of Settlement were the Applicant, Mr Angelo Cardoz, and the Respondent, Martin-Hautus The Pacific Peoples Learning Institute Limited (Martin-Hautus).

[2] The Record of Settlement was signed by the Applicant and by Ms Talei Solomon-Mua, at that time a Director, on behalf of Martin-Hautus. The Record of Settlement was also counter-signed by a Mediator employed by the Ministry of Business, Innovation and Employment on 10 August 2017.

[3] The issue which had been brought before the Authority by the Applicant is that the Respondent has not complied fully with clause 4 of the Record of Settlement, which states:

4. Martin-Hautus The Pacific Peoples Learning Institute Limited shall pay to Angelo Cardoz the sum of \$300.00 (three hundred dollars per week) gross, starting from 12 September 2017 until such time as the outstanding

sum of \$24,120.74 (twenty seven one hundred and twenty dollars and seventy four cents) has been satisfied.

[4] Clause 5 of the Record of Settlement states:

5. ... Martin-Hautus The Pacific Peoples Learning Institute Limited acknowledges should a default under the agreed payment schedule that the remaining balance becomes immediately due and payable.

[5] The Record of Settlement was certified under s 149 of the Act by the Mediator. That certification confirmed that before making the agreement, the parties were advised and accepted they understood the agreed terms:

- (a) were final, binding and enforceable; and
- (b) could not be cancelled; and
- (c) could not be brought before the Authority or the court for review or appeal, except for the purposes of enforcing those terms.

Background Facts

[6] Mr Cardoz claims that he has not been paid the full agreed amounts contained in clause 4 of the Record of Settlement which were due to be paid by the Respondent within the agreed payment schedule dates.

[7] During the period 11 September 2017 to 16 May 2018, the date Mr Cardoz last received a payment, there were several shortfalls in payment of the agreed weekly amounts of \$300.00. Since 16 May 2018 payment of the weekly amounts has ceased completely and Mr Cardoz says that \$18,170.24 of the agreed total amount of \$24,120.24 is outstanding.

[8] Ms Solomon-Mua said that Martin-Hautus has not intentionally withheld payment of the weekly amounts payable, but has been experiencing financial difficulties which were the reason why payment of the agreed amounts had not taken place.

Compliance Order

[9] The Record of Settlement refers in clause 5 to the remaining balance of the outstanding sums as set out in clause 4 being immediately due and payable in the event of a default in payment.

[10] I accept that the non-compliance situation is attributable to the financial circumstances of Martin-Hautus rather than to deliberate intention on its part. However there has been a default in the agreed payment and the circumstances do not wholly absolve Martin-Hautus from bearing responsibility for that default.

[11] From the evidence available to the Authority, I am satisfied that Martin-Hautus has failed to comply with clause 4 of the Record of Settlement.

[12] **In order to effect compliance with the Record of Settlement, I therefore order Martin-Hautus The Pacific Peoples Learning Institute Limited to pay Mr Cardoz, no later than 14 days from the date of this determination, the remaining balance in the sum of \$18,170.24 .00.**

Penalty

[13] The Act includes provisions encouraging parties to resolve their employment relationship issues between themselves. Mr Cardoz sought mediation accordingly and the parties entered in to the Record of Settlement which was intended to resolve the matter without jurisdictional intervention.

[14] The Record of Settlement presented a resolution to the issues between the parties and therefore the failure by one party to honour the terms of any resulting agreement is a serious matter.

[15] Public confidence in s 149 settlements will be undermined if it is perceived that parties are permitted to breach these settlements with impunity. It is important that the parties can have confidence in the enforceability of the terms of agreed settlements. It is consequently in the public interest to impose a penalty at a level which will act a deterrent to others who may contemplate engaging in such behaviour.

[16] Having considered the principles which should govern the imposition of a penalty, I note that the factors the Court must have regard to in determining the appropriate penalty under s.133A of the Act.¹

[17] These have been summarised in the recent Employment Court case of *Lumsden v Sky City Management Ltd* as including whether the breaches were committed knowingly or calculatedly, the duration of the breach, the number of people affected adversely and the extent of any departure from the statutory requirements. A history of previous breaches may also be relevant.²

[18] Whilst the breach in this case arises primarily from the failure to adhere to the agreed payment schedule in accordance with clause 4 of the Record of Settlement, I observe that, as submitted by Mr Santesso and identified on clause 2 of the Record of Settlement, there were breaches in Martin-Hautus meeting the minimum statutory requirements in regard to Mr Cardoz.

[19] Employers in New Zealand are expected and considered to know the minimum legal requirements in respect of their employees, and to adhere to them. As set out in *Labour Inspector v Cypress Villas Ltd (Cypress Villas)*, ignorance of the law is no defence.³

[20] I observe that the Record of Settlement reflects the agreement reached between the parties which recognised the minimum standard breaches. It also sets out in clause 6 the parties' agreement that neither had agreed to forego minimum entitlements payable under the statutes governing minimum entitlements.

[21] Mr Cardoz was entitled to expect the agreed payments would be made within the agreed timetable. His evidence is that he has suffered significant hardship and stress as a result of the default in payment.

[22] Martin-Hautus' evidence is that there have been no previous history of breach in 27 years of employing staff and that the present situation of default in payment has arisen in a situation in which financial difficulties have arisen leaving it with funding withdrawn and no assets.

¹ *Borsboom (Labour Inspector) v Preet PVT Ltd and Warrington Discount Tobacco Ltd* [2016] NZEmpC 143

² *Lumsden v SkyCity Management Ltd* [2017] NZEmpC 30

³ *Labour Inspector v Cypress Villas Ltd* [2015] NZEmpC 157 at [29]

[23] Mr Santesso submits that taking into consideration the adverse effects on Mr Cardoz and the significant number of breaches of the statutory entitlements, a global penalty of between \$10,000.00 and \$15,000.00 would be appropriate.

[24] In determining this matter I take into consideration both the adverse effects the non-payments under clause 4 of the record of Settlement have had on Mr Cardoz and the financial situation of Martin-Hautus.

[25] It is a principle as set out in *Preet* that final penalties set should not be at such a level that the liable employer either has an incentive for not paying or cannot pay them.⁴

[26] In all the circumstances I find that the penalty should be set at a level that reflects these considerations and also the fact that Martin-Hautus has made partial compliance with the Record of Settlement as reflected in the number of payments in accordance with the Record of Settlement (in addition to the representation costs payable in accordance with clause 3 of the Record of Settlement).

[27] I order that Martin-Hautus is to pay a penalty of \$7,000.00, of which 60% is to be paid to Mr Cardoz and 40% to the MBIE Trust Account. Payment is to be made within 14 days of the date of this Determination.

Costs

[28] This matter was dealt with by way of a short telephone investigation meeting.

[29] It is a principle set out in *PBO Limited (formerly Rush Security Ltd) v Da Cruz*⁵ that costs are modest. Costs are also reasonable as observed by the Court of Appeal in *Victoria University of Wellington v Alton-Lee*⁶ at para [48] “As to quantification, the principle is one of reasonable contribution to costs actually and reasonably incurred.”

[30] Martin-Hautus is ordered to pay Mr Cardoz the sum of \$250.00 costs, pursuant to clause 15 of Schedule 2 of the Employment Relations Act 2000.

Eleanor Robinson
Member of the Employment Relations Authority

⁴ *Preet* at [190] and [191]

⁵ [2005] 1 ERNZ 808

⁶ [2001] ERNZ 305