

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2018] NZERA Wellington 28
3023111

BETWEEN MATHYS COETZEE
 Applicant

AND UFB CIVIL LIMITED
 Respondent

Member of Authority: Michele Ryan

Representatives: Jane Jackman, Advocate for the Applicant
 No appearance for the Respondent

Investigation Meeting: 16 April 2018 at Palmerston North

Determination: 18 April 2018

**DETERMINATION OF
THE EMPLOYMENT RELATIONS AUTHORITY**

Employment Relationship Problem

[1] The applicant, Mathys Coetzee, says the respondent, UFB Civil Ltd (UFB), has not paid him according to cl. 3 and 4 of a Record of Settlement.¹

[2] Both clauses concern the payment of monies. Clause 3 required UFB to pay Mr Coetzee \$2,500 by way of 5 scheduled instalment payments between November 2017 and March 2018 inclusive. Clause 4 required UFB to pay costs of \$1,750 plus GST on receipt of an invoice.

[3] Mr Coetzee seeks an order for compliance as well as a penalty in his favour as a consequence of the breach. He asks also that he be reimbursed costs and disbursements associated with this claim.

¹ Pursuant to s 149 of the Employment Relations Act

The investigation

[4] UFB has not engaged with the Authority at all over the course of these proceedings. On 7 December 2017 a copy of the applicant's statement of problem was served on the respondent's then address for service.² No response to that documentation was received by the Authority.

[5] Courier-post 'track and trace' records confirm the Authority's parcel, containing a Notice of Investigation Meeting and a further copy of the statement of problem, was delivered to 29 Lynwood Road, New Lynn, Auckland, on 2 March 2018 at 8.36am. This was UFB's address for service at that time.³

[6] The Notice detailed the date and location of the meeting. It informed the respondent that should it fail to attend the Authority's meeting a determination in favour of the applicant may be issued.⁴

[7] I am satisfied that service of a Notice of Investigation Meeting was effected. UFB is taken to have been aware of the scheduled investigation meeting and the consequence of non-attendance.

[8] No good cause was furnished by UFB for its failure to attend the fixture and the investigation meeting proceeded pursuant cl. 12, Schedule 2 of the Act.

Is UFB in breach of the settlement agreement?

[9] The parties both signed a declaration section within the Record of Settlement affirming they understood the effect of the settlement. Amongst other things, the section states that the settlement is binding and enforceable, and that a penalty may be imposed should a party breach the agreement. The mediator certified he was satisfied the parties each understood these conditions.

[10] There is email evidence which demonstrates UFB was aware on or by 22 November 2017 that it had not paid the first instalment payment. It appears UFB

² UFB changed its name to Civil Communications Ltd (CCL) on 31 July 2017. The company appears to have reverted to its original nomenclature on 17 January 2018.

³ Recorded in the Companies Officer Register

⁴ Note 2 to Form 8 of the Employment Relations Authority Regulations 2000

ignored subsequent correspondence, sent on Mr Coetzee's behalf, to have it comply with the settlement agreement.⁵

[11] There is no evidence that UFB has since performed any of the obligations set out at cl. 3 and 4 of the Record of Settlement. I accept Mr Coetzee's claims that UFB has not complied with Record of Settlement and that it remains in breach of that agreement. It follows that it is necessary to make an order for compliance pursuant to s 137(2) and s 151 of the Act.

Should a penalty against LITC be ordered?

[12] It has been difficult not to form an impression that UFB may have not intended to comply with the Record of Settlement in any event given the short period of 5 days between UFB's confirmation to the mediator and its failure to pay the first instalment payment. It remains unclear why UFB has not complied with terms it agreed with Mr Coetzee.

[13] I find a penalty of \$4,000 is appropriate.⁶ I have been unable to assess whether there any factors which would mitigate an order of this level. The penalty quantum has been reached having assessed the nature and severity of the ongoing breaches and the need to signal to UFB that its non-compliance is unacceptable, to determine an amount proportionate to the breach and its consequences.

[14] The Act provides that penalties are to be paid to the Crown. Section 136(2) allows the Authority to order payment of a penalty to any person. Mr Coetzee has been directly and negatively affected by UFB and I order \$2,000 (half of the total penalty sum) be paid to him. The remaining sum is to be paid to the Authority which will then be deposited into a Crown bank account.

Costs

[15] Mr Coetzee was represented. The investigation meeting lasted under an hour. Mr Coetzee is entitled to costs associated with obtaining a compliance order. I accept work has been undertaken to progress this matter. UFC is ordered to pay Mr Coetzee \$700 as contribution towards the cost of this application and \$71.56 for the filing fee.

⁵ Email drafted by the respondent and sent to the applicant's representative on 22 November 2017 and 23 November 2017

⁶ Applying s 133A; *Borsboom (Labour Inspector) v Preet PVT Ltd* [2016] NZEmpC 143; *Lumsden v SkyCity Management Ltd* [2017] NZEmpC 30

Orders

[16] Pursuant to s 151(2) and s 137 of the Employment Relations Act I order UFB Civil Limited to make the following payments no later than 4.00pm on Monday 30 April 2018. UFB Civil Limited is ordered to:

- a. comply with the s 149 Record of Settlement and pay Mathys Coetzee;
 - (i) \$2,500 pursuant to s 123(1)(c)(i) of the Act in accordance with cl 3; and
 - (ii) \$1,750 plus GST of \$262.70 in accordance with cl 4; and
- b. pay Mathys Coetzee \$771.56 as a total contribution towards costs and the filing fee associated with this application; and
- c. pay the penalty sum of:
 - (i) \$2,000 to Mathys Coetzee; and
 - (ii) \$2,000 to the Authority.

Comment

[17] UFB needs to be aware that the imposition of a compliance order is a serious matter. Should UFB fail to comply with the compliance orders set out at para [16] Mr Coetzee is entitled to pursue the breach in the Employment Court or the District Court. The Employment Court has powers to impose a fine not exceeding \$40,000, order property to be sequestered, or sentence imprisonment not exceeding 3 months.⁷ Alternatively, a certificate of determination may be obtained from the Authority and enforcement obtained through the mechanisms and remedies available under the *District Courts Act 1946* and *District Courts Rules 2014*.

Michele Ryan
Member of the Employment Relations Authority

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Section 139 and 140(6)