

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2015] NZERA Auckland 310
5574156

BETWEEN BARRY DAVIS
 Applicant

AND PAYLESS PRINT LIMITED
 Respondent

Member of Authority: Robin Arthur

Representatives: Applicant in person
 James Deo for the Respondent

Investigation Meeting: On the papers

Determination: 2 October 2015

SECOND DETERMINATION OF THE AUTHORITY

- A. Under sections 133, 135, 136 and 149(5) of the Employment Relations Act 2000 Payless Print Limited must pay Barry Davis \$2000 as a penalty for breach of an agreed term of settlement.**
- B. For the purposes of further enforcement, a certificate of determination is to be issued to Mr Davis for the amount due as outstanding wages and holiday pay and for the penalty awarded to him.**

Employment Relationship Problem

[1] By determination on 11 September 2015 the Authority ordered Payless Print Limited (PPL) to comply with the term of a settlement agreement made in mediation with its former employee Barry Davis.¹ The agreement was certified under s 149 of the Employment Relations Act 2000 (the Act). The term required payment of outstanding wages and holiday pay by no later than 5 August 2015.

¹ *Davis v Payless Print Limited* [2015] NZERA Auckland 277.

[2] The determination also granted Mr Davis leave to apply for a penalty against PPL for breach of the agreed term. Mr Davis exercised that leave, seeking a penalty “for the company not paying money owed, which was expected and depended on”.

[3] PPL had not responded to Mr Davis’ original application (which was served at its registered office) or any subsequent correspondence from Authority. Despite this and because the prospect of the imposition of a penalty was a serious matter, further attempts were made to engage PPL in this proceeding. An affidavit of service sworn on 24 September 2015 by process server Naomi Taripo confirmed that a copy of a Member’s Minute and attachments was served on James Deo at PPL’s registered office on 23 September. Mr Deo was the man who signed the settlement agreement made with Mr Davis on the company’s behalf.

[4] The Authority also attempted to have the Minute served on PPL’s director Nathan Sharma at the residential address given for him on the Companies Office register but the service agency advised it had been unable to do so as its agent was told Mr Sharma was overseas “for a few weeks”.

[5] The attachments to the Minute comprised Mr Davis’ request for a penalty and a further copy of the Authority’s earlier determination of 11 September 2015.

[6] The Minute advised PPL to respond by 1 October 2015 if it wished to be heard (orally or in writing) before the Authority determined whether to award a penalty for breach of the agreement. The Minute also advised that in the event of no response from PPL, or no request from it to be heard, the Authority would proceed without holding an investigation meeting.²

[7] PPL has not responded to the Minute or asked to be heard. The penalty application has been determined on the papers without an investigation meeting being held. I was satisfied it was appropriate to proceed on that basis because PPL had adequate opportunity to respond and be involved but had not done so.

Penalty for breach of an agreed term of settlement

[8] There was no evidence PPL had paid the outstanding wages and holiday pay due to Mr Davis under the terms of the settlement agreement signed by Mr Deo on its

² Employment Relations Act 2000, s 174D.

behalf and certified by a Ministry of Business mediator on 8 July 2015. Mr Davis advised the Authority that PPL had not paid him. In the absence of any response, excuse or explanation by PPL, I accepted what Mr Davis said was true. Under s 149(5) of the Act PPL was liable for a penalty because its failure to pay was a breach of an agreed term. A penalty of up to \$20,000 may be awarded against a company for such a breach.³

[9] The Authority's power to impose penalties, and determine the level of penalty in the circumstances of each case, is guided by principles which consider factors such as harm caused, the need to deter others and whether the wrong-doer's actions were deliberate and without remorse.⁴

[10] The harm caused in this case was twofold. Firstly, Mr Davis has been denied the use of money he was entitled to have under the terms of a settlement agreement that the law declared were final, binding and enforceable. Secondly, PPL's breach undermined the integrity of the statutory arrangements for certified settlement agreements generally. More than 6000 such agreements were certified in 2014. The finality and certainty s 149 agreements provide employees and employers, who thereby also avoid the time and expense of further litigation, is fundamental to the efficient resolution of employment relationship problems.

[11] In this case, as in all concerning a settlement certified under s 149 of the Act, the mediator's certificate assured me both Mr Davis and Mr Deo (signing on PPL's behalf) had the final and binding nature of the agreement explained to them before the mediator signed it.

[12] A significant penalty was required to deter other parties from breaching such agreements in the way PPL had. PPL's failure to respond to Mr Davis' application and to the Authority's correspondence on this matter resulted in what I considered was the reasonable inference that PPL's actions were deliberate with no apparent remorse for its breach of an agreed term of settlement.

[13] Considering the circumstances of the case, the harm done, the need to deter others from acting in the same way and the apparently deliberate nature of the breach, I concluded a penalty of \$2000 should be imposed.

³ Employment Relations Act 2000, s 135(2)(b).

⁴ See *Xu v McIntosh* [2004] 2 ERNZ 448 at [47]-[48] and *Tan v Yang* [2014] NZEmpC 65 at [32].

[14] Exercising the discretion provided to the Authority under s 136(2) of the Act the whole of the penalty is to be paid by PPL to Mr Davis. The amount due as a penalty is additional to the amount still due to him in outstanding wages and holiday pay.

Certificate of determination

[15] For the purposes of further enforcement action Mr Davis might need to undertake this determination has also quantified the amount due to him under the record of settlement, in addition to the penalty also awarded. The amounts are recorded in a certificate of determination to be issued with this determination.

[16] The settlement agreement provided for Mr Davis to be paid a total of seven weeks in outstanding wages and holiday pay. It also included an additional amount of holiday pay (for a period from April to August 2015) but Mr Davis advised the Authority that he did not wish to pursue payment of that particular additional amount.

[17] Mr Davis advised the Authority that calculation of the weekly wages due should be based on an hourly rate of \$18 for 24 hours a week. For seven weeks the resulting sum was \$3024.

[18] The certificate of determination to be issued to Mr Davis has recorded he is due \$3024 as wages and holiday pay under a record of settlement certified under s 149 of the Act (as quantified by this determination) and \$2000 as a penalty awarded under ss 133, 135 and 136 of the Act.

Robin Arthur
Member of the Employment Relations Authority