

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI
TE WHANGANUI Ā TARA ROHE**

[2023] NZERA 499
3218219

BETWEEN	JESSE DEVONSHIRE Applicant
AND	NZ MATTOCK LOGGING LIMITED Respondent

Member of Authority:	Sarah Kennedy-Martin
Representatives:	Natasha Mould, Advocate for the Applicant No appearance for the Respondent
Investigation Meeting:	On the papers
Submissions received:	7 June 2023 from Applicant
Determination:	5 September 2023

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Jesse Devonshire was employed by NZ Mattock Logging Limited (NZMLL) in April 2021. An employment relationship dispute arose between the parties. The parties attended mediation and in resolving the issues they entered into a record of settlement (“the settlement agreement”) in accordance with s 149 of the Employment Relations Act 2000 (“the Act”).

[2] On 9 February 2023, a Ministry of Business, Innovation and Employment mediator certified their agreement. The effect of certification is that the terms agreed were final and binding and could only be brought before the Authority for the purposes of enforcement.

[3] Mr Devonshire says NZMLL breached the settlement agreement when it did not pay the full agreed settlement amount to Mr Devonshire and seeks to bring the terms of the settlement agreement before the Authority for enforcement purposes.

The Authority's investigation

[4] The parties agreed the matter could be heard on the papers. In addition to his statement of problem and the settlement agreement, Mr Devonshire provided a summary of events and the personal grievance letter from his advocate to NZMLL.

[5] NZMLL did not participate in the case management call (CMC) and has not responded to the Authority's communications. The notice of direction was delivered to NZMLL's address for service and informed NZMLL Mr Devonshire's application for a compliance would proceed on the papers unless the NZMLL indicated it wanted to be heard. No communication was received from NZMLL. I am satisfied it was aware of the present proceedings and has been given a fair and reasonable opportunity to respond. The Authority has the power to proceed if any party fails to attend.¹

Has there been a breach of the settlement agreement?

[6] Clause 5 of the settlement agreement between the parties provided NZMLL would pay Mr Devonshire \$4000.00 plus GST in three instalments of \$1333.33 for the provision of employment advocacy services.

[7] A payment plan was agreed to allow NZMLL to meet its obligations under the settlement agreement. The first instalment was paid. An invoice was sent for the second instalment on 1 March 2022 along with follow ups from Mr Devonshire's advocate. The invoice for the 1 April was not sent as the previous invoice was not paid and NZMLL stopped communicating. All other monies due under the settlement agreement have been paid.

[8] There has been a breach of clause 5 of the settlement agreement because \$2666.67 plus GST remains outstanding.

¹ Employment Relations Act 2000, Schedule 2, clause 12.

Should a compliance order be made?

[9] A compliance order may be made when any person has not observed or complied with the provision of an employment agreement or any terms of settlement or a decision that is a breach of s 149(3) and s 151 provides it may be enforced by compliance order.²

[10] I have already found there has been a breach of the agreed terms between the parties and under s 149(3) of the Act those terms are final, binding and enforceable. I am satisfied a compliance order is necessary given the balance of the amount agreed to in clause 5 remains unpaid. There is an obligation on NZMLL to comply with the terms of the settlement agreement it entered into with Mr Devonshire.

Should a penalty be awarded?

[11] Mr Devonshire seeks a penalty and given my finding above that NZMLL is in breach of the settlement agreement, it is liable to a penalty.³ The maximum penalty is \$20,000 in the case of a company.⁴ The standard of proof for the imposition of a penalty in this jurisdiction is on the balance of probabilities.⁵ The primary purpose of a penalty is to punish the wrongdoing and act as a deterrent to further breaches.⁶ Penalties can be appropriate for breaches of settlement agreements in order to protect the finality and integrity of s 149 agreements.

[12] It is important that parties ought to have confidence in settlement agreements under s 149 of the Act and in this case, there has been a breach of the settlement agreement. There is one breach, and it is ongoing, however, by virtue of requesting a payment plan, it could be implied finances are an issue. There is no information from NZMLL so I am unable to assess it's financial position under s 138(4A).

[13] Taking into account the relevant matters the Authority must have regard to when awarding penalties⁷ and the further guidance on penalties for breaches of settlement agreements set out in *ITE v ALA*,⁸ a penalty is likely appropriate in order to protect the finality and integrity of s 149 agreements.

² Employment Relations Act 2000, s 137(1)(a)(iii).

³ Above n2, s 149(4).

⁴ Above n2, s135(2)(a).

⁵ *Xu v McIntosh* [2004] 2 ERNZ 448 at [29].

⁶ *Borsboom v Preet PVT Ltd* [2016] NZEmpC 143 at [51] – [52].

⁷ Above n2, s 133A.

⁸ *ITE v ALA* [2016] NZEmpC 42 at [61].

[14] However, at this stage I decline to order a penalty as the focus is on compliance for Mr Devonshire. The final determination on penalty will be adjourned in accordance with s 138(5) of the Act to enable the compliance with the order below. Leave is reserved for Mr Devonshire to return to the Authority for a determination on penalty should the payments remain outstanding in breach of the compliance order. Interest can also be considered at that time.

Costs

[15] Mr Devonshire seeks costs of \$1500.00. The matter was heard on the papers, but it is appropriate to make an award of costs for preparation and filing the compliance order application. The Authority has adopted a notional daily tariff approach to costs. In the overall circumstances costs in the amount of \$750.00 are awarded together with reimbursement of the filing fee.⁹

Orders

[16] Mr Devonshire must provide to NZMLL an invoice from his advocate showing monies paid and owing under clause 5 of the settlement agreement.

[17] Compliance is ordered under s 137(2) of the Act and NZ Mattock Logging Limited must comply with clause 5 of the settlement agreement and pay the following to Jesse Devonshire within 21 days of receiving the invoice:

- (a) \$2,666.00 plus \$600.00 GST;
- (b) costs in the amount of \$750.00; and
- (c) the filing fee of \$71.55.

[18] Leave is reserved for Mr Devonshire to return to the Authority to pursue penalties and interest.

Sarah Kennedy-Martin
Member of the Employment Relations Authority

⁹ www.era.govt.nz/determinations/awarding-costs-remedies