

**Attention is drawn to the
order prohibiting publication
of certain information in this
determination**

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2014] NZERA Wellington 139
5467888

BETWEEN

ANDREW FLINT
Applicant

AND

NETWORK PLUMBING
LIMITED
Respondent

Member of Authority: Trish MacKinnon

Representatives: Mark Nutsford, Advocate for Applicant
David Hercus, for Respondent

Investigation Meeting: On the papers

Submissions received: 21 November 2014 from Applicant
None from Respondent

Determination: 24 December 2014

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Mr Flint raised an employment relationship problem with his former employer, Network Plumbing Limited (Network), in April 2014. The matter was resolved by mediation on 11 June 2014 when the parties entered into a Record of Settlement which they, and a mediator employed by the Ministry of Business, Innovation and Employment, duly signed.

[2] The settlement entailed, amongst other elements, the payment by Network of the sum of \$3,000 plus GST as a contribution to Mr Flint's costs. The sum was to have been paid within seven days of receipt of an invoice from Mr Nutsford.

[3] I prohibit from publication any other detail of the agreed settlement.

[4] Mr Nutsford submitted an invoice by email to Mr David Hercus, the Director of Network, on 13 June 2014. By the terms of the agreed settlement, payment was due by 20 June 2014. No payment was made by that date.

[5] On 23 June 2014 Mr Nutsford telephoned Network and left a message for Mr Hercus to contact him. He received no response from Mr Hercus and further calls he made and emails he sent over the next week received no response either.

[6] On Monday 30 June 2014, ten days after the due date for payment of the sum agreed in the mediated settlement, Mr Flint filed for compliance in the Authority. Mr Nutsford says by this stage he had received no contact from Mr Hercus and he had come to feel that any further attempt at communication with him would be fruitless.

[7] An Authority Support Officer processed the application and sent it and a letter outlining Network's obligation to respond within 14 days. This elicited a telephone response to the Authority from Mr Hercus in the week beginning Monday 14 July that he had made the payment due under the mediated settlement. Mr Nutsford subsequently confirmed that payment had been received on 7 July 2014. He also confirmed he wished the Authority to proceed as Network had breached the terms of the settlement and this had resulted in further costs being incurred.

[8] Mr Flint seeks reimbursement of the costs he incurred in filing the application for compliance in the Authority. He also seeks the imposition of a penalty against Network for breach of the mediated agreement.

[9] In the course of a telephone conference between the parties and the Authority on 19 November 2014 it was agreed that Mr Flint's application should be determined on the papers. The parties had the opportunity to make written submissions on the appropriate outcome of the matter.

[10] Mr Nutsford indicated he would be making submissions. Mr Hercus made it clear that he would not, and said that Network was no longer trading and was in the process of being "wound up". I note that the company is still registered with the Companies Office as of the date of this determination.

[11] In his submissions Mr Nutsford noted that Mr Hercus had told the Authority during the November 2014 telephone conference he had not paid the agreed sum on or by the due date because he did not have the money to do so at the time. Mr Nutsford said Mr Hercus had made no attempt to communicate that when he made his first

"very polite and very professional" enquiry regarding payment. If he had done that, arrangements could have been made which would have averted the need for Mr Flint to file an application in the Authority for compliance.

[12] Mr Nutsford also queried the veracity of Mr Hercus's statement regarding Network's inability to pay, noting that it arose within days after the mediation in which Mr Hercus had committed the company to paying the money. In his view the \$3000 plus GST had been paid only after compliance had been sought in the Authority and would not have been paid without the impetus that provided.

[13] Mr Hercus, when invited by the Authority's support staff to respond to the submissions made on behalf of Mr Flint, succinctly replied "Pointless. Im not paying regardless (sic)".

Issue

[14] The issue for determination is whether a penalty should be awarded against Network for breach of a term of a mediated settlement made under s.149 of the Act.

Section 149 of the Act

[15] Section 149(4) of the Act provides that:

A person who breaches an agreed term of settlement to which subsection (3) applies is liable to a penalty imposed by the Authority.

Discussion

[16] In this instance Network did breach an agreed term of a settlement to which subsection (3) applies by not paying the sum of \$3,000 plus GST within seven days of receiving an invoice from Mr Nutsford.

[17] Network did not respond to Mr Nutsford's communications regarding payment. This left the applicant in a position where he had to either forego the contribution to the advocacy fees he had incurred, which had been agreed in a binding and enforceable Record of Settlement, or incur more advocacy fees by seeking compliance with the mediated settlement in the Authority.

[18] The breach was not a sustained or repeated one but was a one-off occurrence which Mr Hercus says was caused by a lack of money. If that was the case, it would

have been prudent for him to respond to Mr Nutsford's request for payment. I accept Mr Nutsford's submission that he would have welcomed an explanation or an arrangement for time payment from Mr Hercus at that time and that such an approach would have avoided the cost and inconvenience of commencing compliance action in the Authority.

[19] A penalty is imposed for the purpose of punishment of a wrongdoing which will consist of breaching the Act or another Act or an employment agreement¹. Not all breaches will result in the imposition of a penalty and, as was noted by the (then) Chief Judge in *Xu*, the first question should be how much harm the breach has occasioned and how important it is to bring home to the party in default that such behaviour is unacceptable or to deter others from it.

[20] In this instance, Network breached the financial term of a mediated settlement made under s. 149 of the Act and inconvenienced the applicant. The imposition of a modest penalty is appropriate, both to indicate the breach of the settlement and to act as a deterrent to others who enter into such mediated settlement agreements.

Determination

[21] Network Plumbing Limited is ordered to pay a penalty of \$1,000, \$500 of that sum to be paid to the Crown and \$500 to be paid to Mr Flint.

Costs

[22] The applicant should not be out of pocket for having to file for compliance in the Authority. I accept Mr Nutsford's account of having spent one hour formulating the statement of problem and consider it fair that Network pay for that time and reimburse the applicant the cost of the filing fee.

[23] Network Plumbing Limited is to pay to Mr Flint the sum of \$250.00 plus \$71.56.

Trish MacKinnon
Member of the Employment Relations Authority

¹ *Xu v McIntosh* [2004] 2ERNZ 228 at464