

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2018] NZERA Auckland 38
3020453

BETWEEN GRAEME COLIN FULLER
Applicant

A N D INNOVATORS LIMITED
Respondent

Member of Authority: T G Tetitaha

Representatives: Applicant in person
D. Erickson, Counsel for Respondent

Investigation Meeting: 1 February 2018

Submissions Received: 1 February 2018 from Applicant
1 February 2018 from Respondent

Oral Determination: 1 February 2017

Written Record Issued: 2 February 2018

**ORAL DETERMINATION OF THE
EMPLOYMENT RELATIONS AUTHORITY**

- A. It is accepted there have been two breaches of the settlement agreement namely failure to pay the settlement amount on 20 October 2017 and failure following demand to immediately pay the entire amount due and owing under the default clause.**
- B. I order Innovators Limited to pay Graeme Fuller the amount of \$1,000 by way of penalty under s.135 of the Employment Relations Act 2000.**
- C. I order Innovators Limited to pay Graeme Fuller the sum of \$71.56 as a contribution to his legal costs.**

Employment Relationship Problem

[1] Graeme Colin Fuller has applied for compliance orders and penalties in respect of money owed under a s.149 settlement agreement with his former employer Innovators Limited.

Relevant Facts

[2] It is accepted there was a s149 settlement agreement between the parties (the agreement). The agreement provided for three payments totalling \$25,000 to Mr Fuller from Innovators Limited in settlement of his grievances. The first payment was to be made on 20 August 2017, the second payment was to be made on 20 September 2017 and the final payment was to be made on 20 October 2017. The agreement included a default clause that required payment in full in the event of default in payment upon the above dates.

[3] It is accepted that Mr Fuller received one payment of \$8,334 on or about 20 August 2017.

[4] On the due date of 20 September 2017, it is also accepted Innovators failed to make the payment to Mr Fuller of the amount owed under the agreement.

[5] Mr Fuller emailed John Lowey of Innovators Limited on 22 September 2017. He sought payment in full under the default clause. He received no reply.

[6] At that time Mr Lowey was dealing with an internal funding crisis at Innovators Limited due to an investor refusing to transfer funds as agreed. Unfortunately he did not communicate this to Mr Fuller.

[7] Mr Fuller having received no reply then filed proceedings in the Employment Relations Authority on or about 28 September 2017 paying a filing fee of \$71.56. He sought compliance orders and penalties for breaches of the agreement.

[8] It is accepted Innovators Limited paid Mr Fuller a further payment of \$8,334 on 29 September 2017.

[9] On 2 October 2017 Mr Lowy was served with Mr Fuller's statement of problem. He then emailed Mr Fuller stating:

Hi Graeme,

I was on the point of responding to your email when documents from the ERA arrived this morning. There seems little point in telling you at the start of last week that Innovators had no money to pay the amount due but that I was optimistic of clearing it by the week's end. I have done so, payment being instructed on Friday as soon as there were funds for it. Doubtless it is cleared by now. I remind you that, repeatedly during this process, I advised that payments might well be late but that they would be made before the end of the relevant month (i.e. up to eleven days late) and asked for your forbearance.

Pressing for full payment will achieve nothing, as we do not have the money and I don't imagine that Innovators ongoing and easily demonstrated financial hardship and willingness to pay when possible, is a basis from which the ERA will impose punitive costs. I invite you to withdraw this statement of problem.

I will of course comply with the requirement to complete the statement of reply within the fourteen-day window from date of receipt (that is by 16th October) the October (final) payment will again be made before month's end, with the best intentions to pay this on time on the 20th.

Thanks.

John.

[10] Mr Fuller replied that same day. He refused to withdraw his statement of problem and repeated his request for payment in full.

[11] It is accepted there was a statement in reply filed on or about 16 October 2017.

[12] It is further accepted Mr Fuller received his final payment under the settlement agreement of \$8,334 on 7 November 2017.

[13] The parties were directed to mediation. Unfortunately this was unable to resolve matters. The application for penalties is the only matter that now remains live before me.

Were there breaches?

[14] It is accepted there have been two breaches of the settlement agreement namely failure to pay the settlement amount on 20 October 2017 and failure following demand to immediately pay the entire amount due and owing under the default clause.

Should a penalty be issued?

[15] Breaches of settlement agreements are liable to penalties imposed by the Authority.¹ In respect of the two breaches here the maximum penalty that may be imposed is \$20,000 per breach or \$40,000 in total.

[16] The imposition of penalties under the Employment Relations Act 2000 (Act) is governed by 133A that sets out matters that I must have regard to when imposing a penalty. The respondent also refers to the decision of *Jeanie May Borsboom (Labour Inspector) v Preet Pvt Limited and Warrington Discount Tobacco Limited*² as being relevant.

[17] Section 133A is set out below:

133A Matters Authority and court to have regard to in determining amount of penalty

In determining an appropriate penalty for a breach referred to in section 133, the Authority or court (as the case may be) must have regard to all relevant matters, including—

- (a) the object stated in section 3; and
- (b) the nature and extent of the breach or involvement in the breach; and
- (c) whether the breach was intentional, inadvertent, or negligent; and
- (d) the nature and extent of any loss or damage suffered by any person, or gains made or losses avoided by the person in breach or the person involved in the breach, because of the breach or involvement in the breach; and
- (e) whether the person in breach or the person involved in the breach has paid an amount of compensation, reparation, or restitution, or has taken other steps to avoid or mitigate any actual or potential adverse effects of the breach; and
- (f) the circumstances in which the breach, or involvement in the breach, took place, including the vulnerability of the employee; and
- (g) whether the person in breach or the person involved in the breach has previously been found by the Authority or the court in proceedings under this Act, or any other enactment, to have engaged in any similar conduct.]

Section 3 of the Act

[18] The objects stated in s.3 of the Act make extensive references to good faith behaviour. Good faith behaviour includes the requirement for parties to an employment relationship to be active and constructive and responsive and

¹ s.149(4) of the Employment Relations Act 2000.

² [2016] NZEmpC 143.

communicative. This must infer when considering a penalty under a settlement agreement that similar expectations of behaviour must occur between parties to settlement agreements.

[19] There have been admitted failures in communication here. These include the failure by Innovators Limited to respond to Mr Fuller's requests for payment on or about 22 September 2017. This triggered Mr Fuller's filing proceedings in the Employment Relations Authority.

[20] There has also been a continuing failure to communicate the company's true financial position either at the time the default and subsequently. Although at hearing there has been substantial emphasis upon the inability of the company to pay, it was revealed through evidence that there are other sources it could have accessed which may have assisted in terms of its current position.

[21] I also was provided with copies of Innovators Limited's business bank accounts. I note there are some matters that do not appear to be expenses that I would expect a company in crisis to incur, although those matters were not the subject of examination during hearing. Unnecessary expenses may infer this company had other ways it could have met Mr Fuller's debt.

[22] This exemplified the necessity for better communication between the parties in respect of the company's financial position. It appeared to me that some of the objects of s.3 were not being met by the way these two parties were interacting.

Nature and extent of breach

[23] Breaches of settlement agreements are serious matters. The parties who enter into them are expected to comply.

Was the breach intentional, inadvertent or negligent?

[24] I find that this breach was in fact intentional. At the due date for payment Innovators Limited knew it could not make the payment but took no steps about this. It did not alert Mr Fuller to the possibility of non-payment, seek any variation to the settlement agreement in terms of extending the dates for payment nor did it seek to access alternative funding arrangements which I understand were available to it at that time. Despite its alleged financial crisis Innovators Limited could have taken steps to

prevent any damage from the breaches and the proceedings before me today. It did not.

Loss or damage suffered

[25] Mr Fuller's evidence was he suffered stress and some financial losses which he has not particularised. The evidence of his losses were that they were not significant. However I find they are not so insignificant as to warrant no penalty.

[26] I have determined a penalty as payable and at this stage I fix the severity of the penalty at 10% or \$2,000 per breach resulting in a total penalty of \$4,000.

Steps taken to mitigate or avoid loss

[27] The amounts due and owing under the settlement have now been paid. No other compensation or remedy has been paid to Mr Fuller. However, in my view that does justify some reduction in the penalty by at least 50% or \$1,000 per breach resulting in a total penalty of \$2,000.

Vulnerability of applicant

[28] I find Mr Fuller was in a vulnerable position. He had no information about payment including when it would be made. He was given incorrect information it would be paid by 30 October and it was not.

[29] Innovators non-payment of his settlement was effectively using him as some form of credit which he had no information about or control over when he may be paid at all. His only option would have been to seek enforcement.

Inability to pay

[30] Although this is a matter more relevant to minimum code breaches, it is also relevant to the circumstances in which the breach took place. The respondent's inability to pay due to a financial crisis has some relevance to the level of penalty awarded. Innovators Limited remains in a precarious financial position.

[31] Submissions were made that the level of penalty may assist Innovators in making sure it is paid in a timely manner. A further reduction of 50% can be justified based on the evidence of ability to pay. The penalty to be imposed as \$1,000 in total or \$500 per breach.

Paid to Crown or Applicant or both?

[32] I have also determined that penalty ought to be paid to Mr Fuller in full. There is little to justify payment to the Crown. It is Mr Fuller who has been directly affected by the breaches of a private settlement agreement between the parties.

[33] I order Innovators Limited to pay Graeme Colin Fuller the amount of \$1,000 by way of penalty under s.135 of the Employment Relations Act 2000.

Costs

[34] Mr Fuller also seeks payment of his filing fee. I order Innovators Limited to pay Graeme Fuller the sum of \$71.56 as a contribution to his legal costs.

TG Tetitaha
Member of the Employment Relations Authority