

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE**

[2020] NZERA 150
3089592

BETWEEN FUSION PROPERTY GROUP
LIMITED
Applicant

AND JENNIFER GOWER
Respondent

Member of Authority: Marija Urlich

Representatives: Georgie Todd, counsel for the applicant
The Respondent in person

Investigation Meeting: On the papers

Date of determination: 15 April 2020

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Fusion Property Group Limited ('FPG') says Jennifer Gower is in breach of obligations to pay settlement monies as contained in a record of settlement ('the record of settlement') agreed between them pursuant to s 149 of the Employment Relations Act.

[2] FPG seeks a compliance order, an award of interest on the settlement monies, costs towards legal fees incurred in bringing this application and a penalty.

The Authority's investigation

[3] In a case management conference held between FPG's representative and Ms Gower on 20 February 2020 the parties' agreed FPG's claims could be decided on the papers. A timetable for filing of affidavits and submissions was also agreed.

[4] On 21 March 2020 the applicant filed written evidence in the form of an unsworn affidavit under the name of Mr Jeremy Scantlebury, a director of FPG and submissions in support of the application. On 27 March 2020 Ms Gower filed an unsworn affidavit.

[5] On 7 April 2020, by telephone, I took the affirmations of Mr Scantlebury and Ms Gower having satisfied myself as to their identity. They confirmed the contents of their unsworn affidavits.

[6] As permitted by s 174E of the Act this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submission received.

The settlement agreement

[7] Clause 2.1 of the record of settlement provided that Ms Gower would pay \$144,637.82 into the trust account of FPG's solicitor within two calendar months of the date both parties signed the record of settlement. The record of settlement records Ms Gower accepted the sum of \$144,637.82 represented losses incurred by FPG as a result of her conduct.

[8] The record of settlement was signed by both parties on 31 May 2019 and certified by a mediator pursuant to s 149 of the Act on 12 June 2019. The settlement monies were due to be paid on 31 July 2019.

[9] Clause 2.4 provided the terms and conditions of the record of settlement were to remain confidential between the parties except in circumstances including Ms Gower not paying the settlement monies.

[10] To date Ms Gower has not paid the settlement monies or any part of the settlement monies.

Compliance order

[11] Section 137(1)(iii) of the Act empowers the Authority to order a party to comply with any terms of settlement which s 151 of the Act provides may be enforced by a compliance order. Section 151 applies to any agreed terms of settlement enforceable by the parties under s 149(3) of the Act.

[12] Ms Gower does not dispute she is in breach of the record of settlement in the terms outlined above.

[13] FPG's application for a compliance order is granted.

Penalties

[14] Section 149(4) of the Act enables a party to seek the imposition of a penalty in respect of any established breach of a corresponding settlement agreement. The imposition of a penalty is discretionary and is generally imposed for the purpose of punishment as well as discouragement of others. A single breach of a settlement agreement by an individual may attract a penalty up to \$10,000; for a company a penalty not exceeding \$20,000 may be awarded for a solitary breach¹.

[15] Ms Todd submits a penalty should be imposed and paid to FPG given Ms Gower's breach of the record of settlement undermines the integrity and security of s 149 settlement agreements which are intended to give parties certainty and finality, that Ms Gower is solely responsible for a knowing and repeated breach of the record of settlement, the nature and extent of the loss and damage suffered by FPG and the benefit to Ms Gower of retaining the settlement monies over an extended period.

[16] Ms Gower's evidence makes no mention of FPG's application for a penalty. She says she wants to repay the settlement monies but her financial situation is complicated and she would like to make instalment payments.

[17] As a matter of public policy, in this case a penalty is necessary to uphold the integrity of the full, final, binding and enforceable agreements allowed under s 149 of the Act.

[18] The level of penalty is determined by an assessment of the factors set out in s 133A of the Act. Having regard to the statutory criteria alongside the guidance provided in judgments of the Employment Court² I make the following comments.

[19] There is no basis on which I can reasonably conclude that Ms Gower's breach of the record of settlement was inadvertent, minor or technical.

[20] Ms Gower signed the record of settlement. The record of settlement records she had the opportunity to take independent legal advice as to its meaning and terms. She must be taken to have been aware of her obligations under the record of settlement.

[21] Since the date the settlement monies were due under the record of settlement Ms Gower has made repeated assurances to FPG that she would pay the settlement monies. She has made no payments. The assurances Ms Gower failed to honour have contributed to the adverse effects of the breach.

[22] Ms Gower has described in broad terms financial difficulties she says have impacted her ability to pay the settlement monies. She has provided no evidence to support this claim. Without a credible basis on which to assess any such financial difficulties I cannot weigh this as a factor relevant in assessing the appropriate level of penalty.

[23] I am unaware of any previous proceedings for similar breaches involving Ms Gower.

¹ Section 135(2)(a) and (b) respectively.

² For example *Borsboom (Labour Inspector) v Preet PVT Ltd* [2016] NZEmpC 143; *Nicholson v Ford* [2018] NZEmpC 132; *A Labour Inspector v Daleson Investment Limited* [2019] NZEmpC 12

[24] Taking all the factors into account I find Ms Gower is liable for a penalty of \$6,000, which is within the range of penalties currently imposed for failure to pay monies due under a record of settlement and is proportionate to the seriousness of the breach and harm caused³.

[25] In the circumstances of this matter it is just for half the penalty sum (\$3000) to be paid to FPG by Ms Gower, the remainder must be paid to the Authority for payment into a Crown bank account.

Interest

[26] FPG seeks interest on the settlement monies. The Authority has the power to award interest under clause 11 of the Second Schedule of the Act. Interest is to reimburse someone for the loss of use of monies to which there is an established entitlement.

[27] It is appropriate where a person has been deprived on the use of money to make an award for interest. Ms Gower is ordered to calculate and pay interest within 28 days of the date of this determination on the sum of \$144,637.82.

[28] Interest is to be calculated from the date of this determination until the sum is paid in full.

[29] Interest is payable in accordance with Schedule 2 of the Interest on Money Claims Act 2016. A calculator to assist in the calculation of interest is available on the Ministry of Justice website.

Costs and reimbursement of fee

[30] FPG is entitled to a contribution to the costs of representation incurred in seeking compliance with the record of settlement. Ms Gower is to pay FPG \$1000 as a contribution towards those costs and the filing fee of \$71.56.

[31] In making this award I have taken into account the Authority's usual daily tariff for costs and that this matter was determined on the papers.

Summary of Orders

[32] By no later than 28 days from the date of issue of this determination Jennifer Gower must pay Fusion Property Group Limited \$144,637.82 due under their record of settlement.

[33] By no later than 28 days from the date of issue of this determination Jennifer Gower must pay Fusion Property Group Limited \$1000 as a contribution to its costs of representation and \$71.56 in reimbursement of the fee paid in lodging its application in the Authority.

³ See for example, *A Labour Inspector v Vishnu Hospitality Limited* [2018] NZERA Auckland 383 (\$2000), *High v Mighty Rocket Properties Limited* [2018] NZERA Wellington 111 (\$6000), *Mangos v Metrofloor Contracting Limited* [2018] NZERA Christchurch 46 (\$1500), *Masjedi v Phoenix Publishing Ltd* [2018] NZERA Auckland 161 (\$10,000), *Elliot v All Coat Painters Limited* [2019] NZERA 165 (\$3,000)

[34] By no later than 28 days from the date of issue of this determination Jennifer Gower must pay the Authority \$6,000 as a penalty under s 137 and s 149(4) of the Act for breach of an agreed record of settlement. On recovery of that penalty the Authority is to pay \$3000 to Fusion Property Group Limited and \$3000 to the Crown Account.

[35] Interest is to be paid on the sum of \$144,637.82 calculated from the date of this determination until paid in full.

[36] Imposition of a compliance order is a serious matter. Should Ms Gower fail to comply with the compliance order as set out in [32], FPG 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 impose a sentence of imprisonment not exceeding 3 months⁴. Alternatively, a certificate of determination may be obtained from the Authority and enforcement obtained under the *District Courts Act 1946* and *District Courts Rules 2014*.

Marija Urlich
Member of the Employment Relations Authority

⁴ Section 139 and 140(6) Employment Relations Act 2000