

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2018] NZERA Wellington 111
3039533

BETWEEN AMANDA HIGH
 Applicant

AND MIGHTY ROCKET PROPERTIES
 LIMITED
 Respondent

Member of Authority: Trish MacKinnon

Representatives: Greg Lloyd, counsel for the Applicant
 Aaron Gilmore for the Respondent

Investigation Meeting: On the papers

Submissions and
affidavits received: 23 October and 15 November 2018 from the Applicant
 13 November 2018 from the Respondent

Determination: 6 December 2018

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Amanda High seeks a compliance order in relation to a record of settlement entered into under s 149 of the Employment Relations Act 2000 (the Act). She also seeks the imposition of a penalty on her former employer and asks that the penalty be paid to her. Ms High seeks full indemnity costs.

[2] The statement in reply lodged by Mighty Rocket Properties Limited (Mighty Rocket) does not directly address the compliance matters raised in the statement of problem. It makes assertions about Ms High's beliefs concerning the financial and trading situation of Mighty Rocket and raises issues about her actions during her employment. It asserts that Mighty Rocket has paid significant sums already and has “made commitments to find the rest when able”.

[3] In the course of a telephone conference convened by the Authority, which the respondent did not attend, it was decided the application would be determined on the papers by way of affidavits and submissions from the parties. Aaron Gilmore, sole director and 50 percent shareholder of Mighty Rocket,¹ subsequently advised the Authority of his acceptance of that process.

Relevant facts

[4] Ms High signed a record of settlement (the settlement agreement) with Mighty Rocket on 29 March 2018 after raising personal grievances and commencing proceedings in the Authority against her former employer. Mr Gilmore signed the settlement agreement for Mighty Rocket and it was certified by a mediator employed by the Ministry of Business, Employment and Innovation (MBIE) on 16 April 2018.

[5] Ms High commenced proceedings in the Authority on 19 June 2018 seeking a compliance order, the imposition of a penalty, and an application for indemnity costs. The basis of the claim was that Mighty Rocket had not complied with the 16 April 2018 settlement agreement.

[6] In the course of a telephone conference with the parties it was decided Ms High's compliance order application would be heard by way of affidavits and submissions. A timetable was put in place for receiving those documents.

[7] Before the first scheduled submissions and affidavit evidence were due Mr Lloyd, counsel for Ms High, advised the Authority the parties had been in discussion about a settlement and had reached agreement on terms. Mr Lloyd requested the matter be adjourned for the time being. The parties subsequently entered into a new settlement agreement which was certified by a mediator employed by MBIE on 14 August 2018.²

[8] Ms High's current application refers to the 14 August 2018 settlement agreement. While it is not necessary to disclose all details of it, relevant clauses from settlement agreement are:

¹ Mr Gilmore is the sole shareholder of the registered company that holds the other 50 percent of the respondent company.

² The mediator signed, but omitted to date, the settlement agreement. She has since provided an affirmation confirming the date of signing as 14 August 2018.

5. The parties wish to replace the record of settlement referred to in paragraph 3 with a new record of settlement on the following terms:
 - (a) The employer agrees to pay to the employee, within seven days, \$13,100 pursuant to section 123(1)(c)(i) of the Employment Relations Act, being the balance owing from a total of \$19,000 minus \$5,900 already paid by the employer, and
 - (b) The employer agrees to pay, within seven days, a contribution towards the legal costs of the employee in the sum of \$10,000 plus GST upon receipt of an appropriate invoice, and to be paid directly to the employee's lawyer, Greg Lloyd.
7. The employee will advise the Authority that the parties have reached agreement on a new record of settlement and that the live proceedings currently before the Authority will be withdrawn once the payments referred to in paragraph 5 above have been made in full.
8. Neither party shall speak ill of the other.

[9] Mighty Rocket has not complied with paragraph 5(a) and 5(b) of the settlement agreement. Instead, Mr Gilmore has made random partial payments to Ms High and Mr Lloyd respectively. Between the commencement of the current proceedings on 18 September 2018 and the date final submissions were filed in the Authority on 15 November 2018, Mighty Rocket had made partial payments totalling \$3,200 to Ms High and \$1,500 to Mr Lloyd.

Relevant law in relation to compliance orders

[10] Section 137(1) of the Act provides that the Authority may order compliance in a number of specified situations which include where any person has not observed or complied with—

- (a) any provision of -
 - (i) N/A
 - (ii) N/A
 - (iii) Any terms of settlement or decision that s 151 provides may be enforced by compliance order; ...

[11] Section 149 provides in relation to Settlements:

- (1) Where a problem is resolved, whether through the provision of mediation services or otherwise, any person—
 - (a) who is employed or engaged by the chief executive to provide the services; and
 - (b) who holds a general authority, given by the chief executive, to sign, for the purposes of this section, agreed terms of settlement,—

may, at the request of the parties to the problem, and under that general authority, sign the agreed terms of settlement.
- (2) Any person who receives a request under subsection (1) must, before signing the agreed terms of settlement,—
 - (a) explain to the parties the effect of subsection (3); and
 - (b) be satisfied that, knowing the effect of that subsection, the parties affirm their request.
- (3) Where, following the affirmation referred to in subsection (2) of a request made under subsection (1), the agreed terms of settlement to which the request relates are signed by the person empowered to do so,—
 - (a) those terms are final and binding on, and enforceable by, the parties; and
 - (ab) the terms may not be cancelled under sections 36 to 40 of the Contract and Commercial Law Act 2017; and
 - (b) except for enforcement purposes, no party may seek to bring those terms before the Authority or the court, whether by action, appeal, application for review, or otherwise.
- (3A) N/A
- (4)
- (5) A person who breaches an agreed term of settlement to which subsection (3) applies is liable to a penalty imposed by the Authority.

[12] Section 151 provides that any agreed terms of settlement that are enforceable by the parties under s 149(3) may be enforced by compliance order under s 137 or, in the case of a monetary settlement, either by compliance order or by using the procedure under s 141. The latter section provides for enforcement through the District Court.

Submissions and discussion

[13] Ms High provided a duly sworn affidavit and comprehensive submissions from Mr Lloyd on her behalf. She seeks a compliance order in relation to two aspects of the settlement agreement, the first of which is Mighty Rocket's failure to pay in full both the agreed compensatory sum to Ms High and the agreed contribution to legal fees to her legal representative.

[14] The second aspect of the settlement agreement for which compliance is sought is the provision at paragraph 8 regarding neither party speaking ill of the other. She submits that comments made about her in Mighty Rocket's statement in reply are disparaging and therefore in breach of the settlement agreement.

[15] Ms High's allegation of a breach of paragraph 8 of the settlement agreement arose after she had commenced these proceedings and formed no part of her initial claim for compliance, which focussed on the non-payment of agreed sums. The allegation relates specifically to comments made in the statement in reply.

[16] I do not intend to consider the claim of a breach of paragraph 8 further for the following reasons. Firstly, submissions are not the place to raise further grounds for a compliance order and penalty. Secondly, the statement in reply is covered by privilege under s 121 of the Act. Thirdly, there is no allegation, and no evidence, that the statements have been made in any other forum.

[17] Mr Gilmore provided what he referred to as an affidavit on behalf of Mighty Rocket, although it was unsworn and unsigned. He also provided a document relating to the financial situation of the company which I will return to shortly.

[18] Mr Gilmore claimed he had, on many occasions, offered a payment solution that did not require recourse to a legal process. In his view the current proceedings were unnecessary. The evidence to support Mr Gilmore's contention was not compelling.

[19] The bulk of his submissions related to the substantive matter that led to Ms High's departure from Mighty Rocket and to the first settlement agreement being agreed by the parties in April 2018. They also stated that Mr Gilmore had agreed to the settlement agreement while under stress from his wife's serious illness.

[20] They referred to Mr Gilmore having, at the time of signing the settlement agreement, advised that Mighty Rocket would pay the agreed amounts "as when able". It is not known to whom Mr Gilmore gave that advice as he did not specify. What is known is that he, on behalf of Mighty Rocket, entered into a settlement agreement requiring payment of monies in full to Ms High within seven days, and to Mr Lloyd on production of an invoice.

[21] It seems Mr Gilmore had already decided not to comply with the payment terms specified in the settlement agreement at the time he entered into it on behalf of Mighty Rocket despite it being a legally binding and enforceable document. In entering the settlement agreement, Mr Gilmore recorded his understanding of various matters, the first of which was that:

(1) The settlement is final and binding on and enforceable by us; ...

[22] I do not accept Mr Gilmore's explanations for his failure to abide by the payment terms he had agreed to in entering into the settlement agreement. His attempted revisiting of the substantive matter was inappropriate and has no relevance to the current matter. Mr Gilmore's expressed intention to continue to pay Ms High the sums owing as and when he sees fit is unacceptable and in breach of the agreed terms of settlement.

[23] Mr Gilmore has also submitted that \$8,000 of the amount agreed to be paid to Ms High under the settlement agreement relates to a Privacy Act matter over which the Authority has no jurisdiction. I reject that submission and note there is nothing in the settlement agreement linking the payment of any monies to a complaint Ms High made to the Privacy Commissioner.

[24] Mighty Rocket has breached paragraphs 5(a) and 5(b) of the certified settlement agreement. It is appropriate to order compliance and I do so. It is relevant at this point to consider Mr Gilmore's submissions regarding the financial state of Mighty Rocket.

[25] Mr Gilmour provided a heavily redacted Profit and Loss report for the period 1 October 2017 to 30 September 2018. It also contains data for the previous two years. In supplying the report Mr Gilmore noted it illustrated that "the financial trading differs immeasurably from that which the applicant believes." While he has not specifically requested payment by instalments, the tenor of his submissions suggests that would be his preference.

[26] The Authority has the discretion, when making a compliance order relating to the payment of money to an employee, to order payment to the employee by

instalments. This applies only where the financial position of the employer requires it.³

[27] The profit and loss report provided by Mr Gilmore provides insufficient information, due to the redactions that comprise approximately 50 percent of the document, to allow any meaningful assessment of the company's finances. Accordingly I make no provision for payment by instalment in the compliance order.

[28] Mighty Rocket is ordered to pay to the applicant and her legal representative the sums outstanding from paragraph 5(a) and 5(b) of the settlement agreement, in full, by 20 December 2018. Any sums paid by Mighty Rocket to Ms High or her legal representative on or after the date of commencement of these proceedings (18 September 2018) are to deducted from the amounts specified in paragraph 5(a) and 5(b).

[29] Failure by Mighty Rocket to comply with the compliance order may result in Ms High applying to the Employment Court. The court's powers under s 140 (6) of the Act include ordering that the person in default be sentenced to a term of imprisonment not exceeding 3 months and/or a fine not exceeding \$40,000.

Penalty

[30] The breach of the 16 August 2018 settlement agreement renders Mighty Rocket liable to the imposition of a penalty.⁴ Penalties are at the discretion of the Authority and are generally imposed for the purpose of punishment as well as discouragement to others. The maximum penalty for a breach is \$20,000.⁵

[31] Mr Lloyd submits a penalty should be imposed on Mighty Rocket, with some, or all, of it being awarded to Ms High. He has identified three discreet breaches of the settlement agreement, being the failure to pay compensation, the failure to pay costs, and the making of disparaging remarks about Ms High. I have already rejected the last of the three, for the reasons given above, leaving two breaches with a maximum of \$20,000 each.

³ Section 137(4A) of the Act.

⁴ S 149(4) of the Act

⁵ S 135(2)(b) of the Act.

[32] Mr Gilmore's submissions for Mighty Rocket made no reference to Ms High's application for a penalty. His silence is more likely to arise from a failure to turn his mind to the subject than from his acquiescence to a penalty.

[33] Section 133A of the Act sets out factors the Authority and Court are to take into account when considering penalties. The section is reproduced below:

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

- (1) 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.

[34] The Employment Court has provided guidance over the application and weighting of these factors in *Borsboom v Preet*.⁶

[35] The relevant part of s 3 of the Act focuses on the promotion of good faith in all aspects of the employment environment and the employment relationship. By implication, the reference to s 3 in s 133A requires the Authority to consider this in relation to the behaviour of the person or party in breach.

[36] Mr Gilmore's acknowledgement that he entered into the settlement agreement with the intention of paying monies agreed in that document "as when able" rather than in accordance with the agreed timeframes demonstrates a lack of good faith.

⁶ *Borsboom (Labour Inspector) v Preet PVT Limited & Warrington Discount Tobacco Limited* [2016] NZEmpC 143 at [137] to [151].

[37] Any breach of a mediated settlement is serious and, in this instance I have no doubt the two breaches were intentional. They demonstrate a disregard for good faith, and a cavalier attitude towards legal process. I find it appropriate that a penalty is imposed on Mighty Rocket and, as the breaches are similar in nature I will consider one global penalty rather than two separate penalties.

[38] In Mr Lloyd's submission the payment of compensation and costs were important components of the settlement agreement as they would allow Ms High some financial security. Ms High's affidavit referred to the difficulty she has in moving on with her life because of Mighty Rocket's failure to abide by the settlement agreement and by being unable to put the entire matter out of her mind.

[39] In noting these factors I assess the starting point for a global penalty in respect of the two breaches to be \$25,000.

[40] I turn next to an assessment of any aggravating or mitigating circumstances. I consider Mr Gilmore's continued re-raising of matters that became irrelevant once Mighty Rocket and Ms High entered into a settlement agreement to be a minor aggravating factor. The partial payments the respondent has made since proceedings were commenced on 16 August 2018 in respect of the agreed compensation and costs are mitigating factors. Taking those factors into account I arrive at a provisional penalty of \$12,500.

[41] I am obliged next to consider the means and ability of the respondent to pay the provisional penalty. For the reason given in paragraph 27, I have insufficient information, despite making inquiry, to assess the financial situation of Mighty Rocket. As no financial or other hardship has been established, there is no reason to adjust the provisional penalty amount on that score.

[42] I am unaware of any previous involvement by Mighty Rocket in proceedings for similar breaches. Taking that into account it is appropriate to adjust the penalty further by 40 percent resulting in a penalty of \$7,500. The final step is to assess whether a penalty in that amount is proportionate to breaches of the settlement agreement.

[43] The amount owed under that settlement agreement at 15 November was approximately \$18,000. I find a penalty of \$7,500 to be out of proportion and make a

further deduction of \$1,500, resulting in a final penalty amount of \$6,000. I accept Mr Lloyd's submission that it would be just to award part of the penalty to Ms High. Accordingly 50 percent of the penalty is to be paid to MBIE for depositing in a Crown account and 50 percent is to be paid directly to Ms High.

Costs

[44] Mr Lloyd submits that indemnity costs are appropriate or, in the alternative, an uplift to the Authority's daily tariff. He provided information regarding the costs incurred by Ms High in relation to the compliance order.

[45] Mr Gilmore's submissions for Mighty Rocket questioned the amount of costs incurred by Ms High and commented that those costs "were out of the ordinary".

[1] The principles applicable to the award of costs in the Authority were expounded in *PBO Limited (formerly Rush Security Limited) v Da Cruz*⁷ and revisited and confirmed 10 years later by a full Court of the Employment Court in *Fagotti v Acme & Co Limited*.⁸

[2] The principles are well known and it is unnecessary to repeat them all here. Amongst them are:

- There is a discretion as to whether costs would be awarded and what amount;
- The discretion is to be exercised in a principled manner and not arbitrarily;
- costs generally follow the event;
- costs are frequently judged against a notional daily tariff;
- Costs are not to be used as a punishment or as an expression of disapproval of the unsuccessful party's conduct although conduct that increased costs unnecessarily can be taken into account in inflating or reducing an award.

[46] I accept counsel's submission that Ms High has been put to considerable expense in seeking the enforcement of terms of a settlement agreement and that an award of costs is appropriate but do not accept that indemnity costs or an uplift to the daily tariff is justified.

⁷ [2005] ERNZ 808 (EmpC).

⁸ [2015] EmpC 135.

[47] I have described Mr Gilmore's conduct in committing Mighty Rocket to a settlement agreement when he had no intention of adhering to all the terms of it as lacking good faith and demonstrating a cavalier attitude to legal process. I am mindful, however, that a compliance order has been awarded and a penalty imposed for the breaches of the settlement agreement. It would not be appropriate to reflect in a costs award disapproval of the respondent's conduct unless its conduct increased costs unnecessarily. Mighty Rocket's conduct did not do so in the course of these proceedings.

[48] Exercising my discretion under clause 15, Schedule 2 of the Act, I find it appropriate to award costs on the basis of the Authority's notional daily tariff. Accordingly, I order Mighty Rocket to pay Ms High costs in the amount of \$4,500. I also order Mighty Rocket to reimburse Ms High the Authority filing fee of \$71.56.

Summary of orders

[49] Mighty Rocket Properties Limited is ordered to:

- (1) Comply with the Record of Settlement it entered into with Ms High in August 2018, which was certified by a mediator of MBIE on 14 August 2018, by paying the amounts specified at paragraph (5)(a) and (5)(b) of the Record of Settlement less the amounts paid since 18 September 2018. Payment is to be made in full by 20 December 2018. This order is made pursuant to ss 151(2) and 137(1)(a)(iii) of the Act; and
- (2) Pay a penalty of \$6,000 by 31 January 2019 pursuant to s 149(4) of the Act. \$3,000 of the penalty is to be paid to the Employment Relations Authority for depositing in a Crown account and the remaining \$3,000 is to be paid directly to Ms High; and
- (3) Pay Ms High \$4,500 as a contribution to her costs of bringing these proceedings; and
- (4) Reimburse her the Authority filing fee of \$71.56.