

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2021] NZERA 161
3117974

BETWEEN STEVEN HEFFERNAN
Applicant

AND BRIAN STANAWAY
ROADING LIMITED
Respondent

Member of Authority: Eleanor Robinson

Representatives: Dave Cain, advocate for the Applicant
Michael McAleer, advocate for the Respondent

Investigation Meeting: On the papers

Submissions and/or further evidence: 19 February 2021 from the Applicant
24 February 2021 from the Respondent

Determination: 21 April 2021

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Applicant, Mr Steven Heffernan, claims that the Respondent, Brian Stanaway Roding Limited (BSRL) failed to adhere to clause 3 of a mediated settlement agreement (the Record of Settlement) by the payment of the agreed settlement sum outside of the agreed settlement date.

[2] On 3 August 2020 the Record of Settlement was entered into under s 149 of the Employment Relations Act 2000 (the Act). The Record of Settlement was signed by the Applicant and by Mr Brian Stanaway, sole director and shareholder, on behalf of BSRL. The Record of Settlement was also counter-signed by a Mediator employed by the Ministry of Business, Innovation and Employment (MBIE).

[3] Under clause 3 of the Record of Settlement (ROS) Mr Heffernan was to be paid a total sum of \$9,000,00 pursuant to s 123(1)(c)(i) of the Act within 14 days of the date of settlement.

[4] The Record of Settlement stated at clause 3:

On a denial of liability basis BSRL will pay Steven, within 14 days of the date of this settlement, the sum of \$9,000.00 such sum paid pursuant to s. 123(1)(c)(i) of the Employment Relations Act 2000. The payment referred to in this paragraph will be paid by way of direct credit to Steven's nominated bank account.

[5] The Record of Settlement was certified under s 149 of the Act by the Mediator. That certification confirmed that before making the agreement, the parties were advised and accepted they understood the agreed terms:

- a. were final, binding and enforceable; and
- b. could not be cancelled; and
- c. could not be brought before the Authority or the court for review or appeal, except for the purposes of enforcing those terms.

Note

[6] The parties agreed to the Authority determining this issue based on the Statement of Problem and the Statement in Reply, and submissions by the parties.

Issues

[7] The issue for determination is whether or not BRSL should be penalised for its failure to comply with clause 3 of the Record of Settlement.

Background

[8] The payments set out in clause 3 of the Record of Settlement were to be paid to Mr Heffernan within 14 days of the date of signing the ROS, i.e. by 17 August 2020.

[9] On the morning of 20 August 2020 Mr Heffernan called Mr Cain to advise that he had not been paid the agreed sum in accordance with the ROS. Mr Cain duly emailed BSRL's representative, Mr McAleer requesting that the breach be remedied by 5.00 p.m. that day.

[10] Mr Heffernan called Mr Cain the following morning in some distress at the continued non-payment which was causing him financial difficulty.

[11] There followed further communications between Mr Cain and Mr McAleer on 21 and 25 August 2020 but no payment was forthcoming.

[12] On 4 September 2020 a statement of problem was lodged with the Authority, however no statement in reply was lodged by the due date.

[13] On 28 September 2020 BSRL made a payment of \$3,150.00 into Mr Heffernan's bank account. Further payments followed:

- \$3,050.00 on 29 October 2020
- \$2,080.00 on 25 November 2020
- \$550.00 and \$170.00 on 25 November 2020

[14] BSRL is a roading contractor, building roads into forestry blocks that are about to be harvested. It submits that as a result of Covid-19 which resulted in a substantially reduced export tonnage of logs particularly into the Chinese market.

[15] It is submitted that BSRL had invested considerable capital and acquired substantial debt, and that Mr McAleer spent time working with BSRL's financial administrator to ensure monies were able to be drip fed to Mr Hefferman.

Compliance Order

[16] The Record of Settlement refers in clause 3 to the date when the agreed payment should be made. I find that the payment has been made, but not by the date as agreed by the parties and as set out in the Record of Settlement.

[17] From the evidence available to the Authority, I am satisfied that BSRL failed to comply with clause 3 of the Record of Settlement.

[18] **However as payment in full has now been received by Mr Heffernan, I make no order for compliance.**

Penalty

[19] BRSL is liable for a penalty for breaching the ROS pursuant to s149 of the Employment Relations Act 2000 (the Act).

[20] It is important that parties can resolve matters between themselves without the need for litigation. The Act includes provisions encouraging parties to resolve their employment

relationship issues and the ROS represents such a resolution. Accordingly the failure by one party to honour the terms of any resulting agreement is a serious matter.

[21] Public confidence in s 149 settlements will be undermined if it is perceived that parties are permitted to breach these settlements with impunity, and it is important that the parties can have confidence in the enforceability of the terms of agreed settlements.

[22] Not all breaches will result in a penalty being imposed and for that reason it is relevant to assess how much harm the breach has occasioned, to impress upon the party in default the fact that such behaviour is not acceptable, and to act as a deterrent to others.

[23] Factors the Authority and court are to take into account when considering penalties are set out in s 133A of the Act, as summarised below:

- (a) The object stated in s.3 of the Act;
- (b) The nature and extent of the breach or involvement in breach;
- (c) Whether the breach was intentional, inadvertent or negligent;
- (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;
- (e) Whether the person in breach or the person involved in the breach has paid an amount of compensation, reparation, or restitution, and has taken other steps to avoid or mitigate any actual or potential adverse effects of the breach;
- (f) The circumstances in which the breach, or involvement in the breach, took place, including the vulnerability of the employee;
- (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;

[24] Guidance over the application and weighting to be attributed to the factors has been provided by a Full Court of the Employment Court in *Borsboom (labour Inspector) v Preet PVT Limited* and as refined *Nicholson v Ford*.¹

¹ *Borsboom (Labour Inspector) v Preet PVT Ltd and Warrington Discount Tobacco Ltd* [2016] NZEmpC 143 ; *Nickolson v Ford* [2018] NZEmpC

[25] I consider that a penalty is warranted in this case. BSRL entered freely into the ROS and were advised that its terms were: “final and binding on and enforceable by us”.

[26] There was no agreement to make payment by way of instalments, and although I accept that BSRL may have suffered financially itself as a result of the Covid-19 situation, it entered into the ROS on 3 August 2020, with payment due just 14 days later on 17 August 2020. It is therefore reasonable to consider that the financial and economic pressures affecting its ability to pay would have been known to it at the time of agreeing to the terms of the ROS.

[27] Moreover it was only after Mr Heffernan was compelled by the non-compliance to file a statement of problem with the Authority that BSRL started to make payment, and then only by instalments.

[28] It is submitted on behalf of Mr Heffernan that although the monies have now been paid in full, he suffered distress and financial difficulties as a result of the failure of BSRL to make payment in the amount and on the date agreed between them.

[29] Having considered the circumstances of this case and the principles which should govern the imposition of a penalty, I determine that a penalty of \$1,500.00 is appropriate given the intentional nature of the breach of a term of a Record of Settlement freely entered into by the parties.

[30] I order that BSRL is to pay a penalty of \$1,500.00, to be paid to Mr Heffernan. Payment is to be made within 14 days of the date of this Determination.

Filing Fee

[31] BSRL is also ordered to pay Mr Heffernan the filing fee of \$71.56 within 14 days of the date of this Determination.

Costs

[32] Mr Heffernan has applied for costs.

[33] Costs are at the discretion of the Authority. The principles applicable to awards of costs in the Authority are well established. It is a principle set out in *PBO Limited (formerly Rush Security Ltd) v Da Cruz*² that costs are modest. Costs are also reasonable as observed by the

² [2005] 1 ERNZ 808

Court of Appeal in *Victoria University of Wellington v Alton-Lee*³ at para [48] “As to quantification, the principle is one of reasonable contribution to costs actually and reasonably incurred.”

[34] The matter was considered on the papers with no investigation meeting taking place, and I take this into consideration in assessing costs.

[35] **Accordingly, BSRL is ordered to pay to Mr Heffernan the sum of \$750.00 as a contribution towards costs within 14 days of the date of this Determination.**

Eleanor Robinson
Member of the Employment Relations Authority

³ [2001] ERNZ 305