

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2014] NZERA Wellington 63
5456267

BETWEEN TARA HIGGS
 Applicant

AND LITC LIMITED
 Respondent

Member of Authority: Michele Ryan

Representatives: Graham Ogilvie, Counsel for the Applicant
 No attendance by the Respondent

Investigation Meeting: 21 May 2014

Determination: 12 June 2014

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] On 17 January 2014 Ms Tara Higgs, and the director of LITC Limited (LITC) Mr Craig Relph, engaged in mediation. The parties agreed to terms in full and final settlement of all matters arising out of their employment relationship and those terms were set out terms in a settlement agreement.

[2] Amongst other things, the settlement agreement recorded that Ms Higgs would withdraw her claim of a personal grievance and LITC would, within 7 days of settlement, pay \$1,000 as compensation pursuant to s.123(1)(c)(i) of the Employment Relations Act (the Act). In addition, LITC undertook to pay all outstanding wages and holiday pay owed Ms Higgs and further agreed to contribute \$1,000 towards Ms Higgs' costs within 7 days of receipt of an appropriate invoice from her representative.

[3] The agreement was signed pursuant to s.149 of the Act by a mediator employed by the Ministry of Business, Innovation and Employment. The mediator certified that the parties each understood and accepted that the settlement agreement was binding and enforceable.

[4] On 15 April 2014 Ms Higgs lodged a statement of problem with the Authority. She says none of the sums agreed in the settlement agreement have been paid despite repeated requests to LITC to comply with the settlement agreement or advise the cause for delay in payment. Ms Higgs says LITC has been unresponsive to any of that correspondence.

[5] Ms Higgs now seeks an order that LITC comply with the settlement agreement and make payment of the sums owed to her. She requests that the Authority order a penalty of \$2,000 against LITC for its failure to comply with the settlement agreement, and asks for orders for costs and the filing fee associated with her claim for compliance.

[6] No response to Ms Higgs' claims was forthcoming from LITC until 20 May 2013, the day before the investigation meeting, whereby Mr Relph emailed the Authority and advised the following:

I am in receipt of the documents that were delivered to the Lodge.

...

There is no point in attending the investigation meeting;

LITC was set up as the employment arm of Lodge in the city (sic) in 2009.

The company has no assets or cash flow. Therefore the company LITC limited (sic) does not have any funds available to settle the debt.

We have ceased operating under that company. We suggest [Ms Higgs] or her representative put that company into liquidation.

We continue to operate under a separate company; LODGE IN THE CITY LIMITED (1278856), which has different directors and was set up in 2003.

...

[7] The Authority responded and advised that the investigation meeting set down for the following day would go ahead. Mr Relph quickly replied stating Ms Higgs was "welcome" to place LITC in liquidation.

[8] Neither Mr Relph, nor any other representative of LITC attended the investigation meeting on 21 May 2014.

[9] I do not consider that Mr Relph's email correspondence establishes sufficient good cause to excuse LITC's failure to attend the Authority's investigation. Pursuant

to clause 12 of Schedule 2 of the Act, the Authority proceeded with its investigation as if LITC had duly attended or been represented.

Is LITC in breach of the settlement agreement?

[10] In the absence of any statement in opposition to, or denial of, Ms Higgs' claims I am satisfied that LITC has not complied with the settlement agreement. As a consequence, under s.151(2) and s.137 of the Act I order LITC to comply with the terms of the settlement agreement within 14 days of this determination.

Should a penalty against LITC be ordered?

[11] Section 149(4) of the Act states:

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

[12] In *Xu v McIntosh* [2004] 2 ERNZ 488 the Employment Court provided guidance to the Authority when considering imposing penalties. It made the following observations:

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 agreement. Not all such breaches will be equally reprehensible. The first question ought to be, how much harm has the breach occasioned? How important is it to bring home to the party in default that such behaviour is unacceptable or to deter others from it?

The next question focuses on the perpetrator's culpability. Was the breach technical and inadvertent or was it flagrant and deliberate? In deciding whether any part of the penalty should be paid to the victim of the breach, regard must be had to the degree of harm that the victim suffered as a result of the breach.

[13] Ms Higgs is a young woman of relatively limited means. She gave evidence that she had relied on payment of the monies set out in the settlement agreement LITC and that she had difficulties in meeting her financial commitments as a consequence of the non-payment. I accept she has been disadvantaged by LITC's failure in this regard.

[14] Mr Relph's statement that LITC is unable to meet its financial obligation to Ms Higgs was not supported by any additional corroborating information. If Mr Relph's assertions that LITC's has no "assets and cashflow" and that LITC has "ceased operating" is to be believed it remains unclear when these circumstances

materialised. There is no evidence that the LITC has gone into liquidation nor were these matters able to be further examined in circumstances where LITC did not attend the investigation. I note also the very short time period of 7 days between the date on which the parties executed the settlement agreement and when LITC became in breach of that agreement by its failure to pay the sums agreed. I am unwilling to accept Mr Relph's explanation as to why LITC has failed to comply with the settlement agreement and regard the failure as serious and flagrant. I am also unable to accept Mr Relph's claim that another entity '*Lodge in the City Limited*' now operates the business. The Register of Companies indicates that company is in the process of being removed from the register.

[15] I consider the circumstances of this matter warrant a penalty against LITC of \$1,000 for its failure to comply with the terms of settlement agreement certified under s.149. The Act provides that penalties are to be paid to the Crown. However s.136(2) allows the Authority to order payment of a penalty to any person. I find Ms Higgs has been directly and negatively affected by LITC's actions and I order the whole of the penalty be paid to Ms Higgs.

Costs

[16] The investigation meeting lasted a little over an hour and Ms Higgs was assisted by her representative. I consider Ms Higgs is entitled to costs associated with obtaining a compliance order and to acknowledge that these would not have occurred had LITC honoured its original obligations. LITC is ordered to pay Ms Higgs \$500 as contribution towards the cost of this application and \$71.56 for the filing fee.

Orders

[17] Pursuant to s.151(2) and s.137 of the Employment Relations Act LITC Limited is ordered to comply with the settlement agreement within 14 days of this determination. In particular LITC Limited must pay:

- (i) \$683.85 (gross) in accordance with clause 3¹ the settlement agreement; and

¹ Clause 3 of the settlement agreement did not quantify the sum equal to wages and holiday pay owed. Pursuant to s.132(2) of the Act I accept Ms Higgs' calculations as being \$683.85.

(ii) \$1,000 in accordance with clause 4ⁱ of the settlement agreement; and

(iii) \$1,000 in accordance with clause 6ⁱⁱ of the settlement agreement; and

[18] Pursuant to s.149(4) of the Employment Relations Act LITC Limited must pay a penalty of \$1,000 for breaching agreed terms of settlement; and

[19] Pursuant to s.136(2) of the Employment Relations Act LITC Limited must pay the penalty directly to Ms Higgs; and;

[20] LITC Limited must also pay Ms Higgs the sum of \$500 as contribution to costs associated with this application and \$71.56 for the filing fee.

Michele Ryan
Employment Relations Authority Member

ⁱ Compensation pursuant to s.123(1)(c)(i) of the Act.

ⁱⁱ Contribution towards Ms Higgs' costs