

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2020] NZERA 42
3081640

BETWEEN NELSON JOLIN
 Applicant

AND BF7 HOLDINGS LIMITED
 Respondent

Member of Authority: Jenni-Maree Trotman

Representatives: Grace Liu, counsel for the Applicant
 No appearance for the Respondent

Investigation Meeting: On the papers

Further Information
Received: 24 January 2020 from the Applicant

Date of Determination: 31 January 2020

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Nelson Jolin and BF7 Holdings Limited entered into a Record of Settlement on 8 November 2019. The terms of that agreement included the payment of various sums by BF7 to Mr Jolin.

[2] Mr Jolin claims that BF7 has failed to make payment of any of the sums agreed in the Record of Settlement. He asks the Authority to make a compliance order and order BF7 to pay a penalty for its breaches.

[3] No Statement in Reply was filed by BF7. Nor was leave sought by BF7 to file a statement in reply out of time or to respond to Mr Jolin's application.

[4] By minute dated 17 December 2019 the Authority proposed that Mr Jolin's claim be heard on the papers. A proposed timetable was set that included a timetable

for the filing of evidence. The parties were provided with 5 days to oppose the proposed procedure to be followed by the Authority. Neither party notified the Authority of any objection to the proposals made in its minute. Affidavits were filed by Mr Jolin, and from Greg Fitzpatrick, FIRST Union's Operations Manager, on 24 January 2020.

[5] As provided for in clause 12 of Schedule 2 of the Employment Relations Act 2000 (the Act) I have proceeded to act as fully in the matter before me as if BF7 had duly attended or been represented.

[6] As permitted by 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 but has not recorded all evidence and submissions received.

Issues

[7] The issues identified for investigation and determination are:

- a) Has BF7 breached the Record of Settlement dated 8 November 2019?
- b) If so,
 - i) Should the Authority make a compliance order?
 - ii) Should the Authority order BF7 to pay a penalty?
- c) What costs are payable to the successful party?

Background against which issues are to be determined

[8] The material terms of the record of settlement were these:

2. BF7 will pay Nelson a sum of \$5,000.00 (five thousand), without deduction, as compensation pursuant to s123(1)(c)(i) of the Employment Relations Act 2000 in accordance with payment schedule A attached to this settlement agreement.
3. BF7 will pay Nelson a sum of wage arrears, being \$5,528.60 less tax in accordance with payment schedule B attached to this settlement agreement.
4. The sums referred to at paragraphs 2 and 3 above shall be paid to Nelson's nominated bank account [number withheld].

[9] The payment schedules attached to the Record of Settlement called for payments to be made on a weekly basis from 8 November 2019 to 17 January 2020.

[10] The Record of Settlement was certified under s 149 of the Act by a 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.

Issue one: Has there been a breach of the Settlement Agreement?

[11] BF7 failed to make any of the payments it agreed to pay to Mr Jolin in the Record of Settlement. I am satisfied that the failures amount to a breach of Clauses 2 to 4 of the Record of Settlement.

Issue two: Should a compliance order be made under s137 of the Act?

[12] 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 includes any agreed terms of settlement that are enforceable by the parties under s 149(3) of the Act.

[13] Having found BF7 breached Clauses 2 to 4 of the Record of Settlement, I agree that a compliance order is necessary.

[14] I make an order pursuant to s 137 (2) of the Act that BF7 comply with Clauses 2 to 4 of the Record of Settlement. As the payments under those provisions have all fallen due it is appropriate that I order BF7 to do the following within 7 days of the date of this determination:

- a) Pay Mr Jolin the sum of \$5,000 being the agreed sum payable under clause 2 and of the Record of settlement.
- b) Pay Mr Jolin the sum of \$5,528.60 less PAYE being the agreed sum payable under clause 3 of the Record of settlement.

Issue 3: Should a penalty be imposed under s 149(4) of the Act?

[15] Section 149 (4) of the Act provides that a person who breaches an agreed term of settlement is liable to a penalty imposed by the Authority.

[16] The legal framework for assessing and fixing a penalty, having regard to the statutory requirements in s 133A of the Act and the full Court's judgment in *Borsboom v Preet*, were recently summarised by the Court in *Nicholson v Ford* and *A Labour Inspector v Daleson Investment Limited*.¹

[17] The Court in those cases confirmed the considerations as:

- a) The object of the Act as stated in s 3 of the Act (statutory consideration 1)
- b) The nature and extent of the breach (statutory consideration 2)
- c) Whether the breach was intentional, inadvertent, or negligent (statutory consideration 3)
- d) The nature and extent of any loss or damage suffered by any person or gains made or losses avoided by the person because of the breach or involvement in the breach (statutory consideration 4)
- e) Whether the person or entity in breach has paid an amount in compensation, reparation or restitution, or has taken other steps to avoid or mitigate any actual or potential adverse effects of the breach (statutory consideration 5)
- f) The circumstances of the breach, or involvement in the breach, including the vulnerability of the employee (statutory consideration 6)
- g) Previous conduct (statutory consideration 7)
- h) Deterrence, both particular and general (*Preet* additional consideration 1)
- i) Degree of Culpability (*Preet* additional consideration 2)
- j) Consistency of penalty awards in similar cases (*Preet* additional consideration 3)

¹ *Nicholson v Ford* [2018] NZEmpC 132 at [18]; *A Labour Inspector v Daleson Investment Limited* [2019] NZEmpC 12 at [19]; *Borsboom v Preet PVT Ltd* [2016] NZEmpC 143.

- k) Ability to pay (*Preet* additional consideration 4)
- l) Proportionality of outcome to breach (*Preet* additional consideration 5)

[18] Having considered those factors I reach the following findings:

- a) The non-payment of monies to Mr Jolin was sufficiently interrelated such that it is appropriate to deal with them as one breach.
- b) The maximum total penalty available in respect of this breach is \$20,000.²
- c) The nature of the breach is serious. Mr Jolin compromised his entitlement to have his employment relationship problem determined by the Authority in exchange for an early resolution and modest compensation. BF7's failure to comply with that arrangement has eroded those benefits.
- d) It is likely, from my review of email correspondence from Mr Jolin's representative reminding BF7 of its obligation to pay the monies agreed in the Record of Settlement, and its failure to respond to Mr Jolin's statement of problem, that the breach was intentional.
- e) BF7's failure to make payment of the agreed settlement amounts has resulted in Mr Jolin losing the use of the money he was entitled to at the time it became due and him suffering financial hardship. BF7 on the other hand has gained financially by retaining use of these monies.
- f) I am aware of no steps taken by BF7 to mitigate its breach.
- g) BF7 has breached a record of settlement in another case which facts are nearly identical to the present.³
- h) Deterrence is high. It is important that parties to s149 records have confidence that terms agreed will be complied with. Amongst other things, the imposition of a penalty under s 149(4) is to punish a party who reneges on such agreements.

² Employment Relations Act, s 135 (2)(b).

³ *Elmer Isidro v BF7 Holdings Limited* [2020] NZERA 43.

- i) There are several aggravating factors. For example, the intentional nature of the breach, Mr Jolin's loss of use of the money he was entitled to at the time it became due and BF7's financial gain by retaining the funds.
- j) I am aware of no ameliorating factors or any inability by BF7 to pay a penalty.

[19] Taking into account the foregoing, I order BF7 to pay a sum of \$3,000 by way of penalty for its breach of the Record of Settlement. This sum is proportionate to the seriousness of the breaches; the harm occasioned by them, and is just in all the circumstances. In addition, this sum is consistent with penalties imposed by the Authority in similar cases.⁴

[20] Payment of the sum of \$3,000 must be made within 28 days of the date of this determination to the Employment Relations Authority.

[21] I consider it appropriate that part of this penalty be paid to Mr Jolin. By order under s 136(2) of the Act one half of the penalty is to be paid to Mr Jolin once the full amount of the penalty has been recovered by the Employment Relations Authority. The other half is to be transferred to the Crown account.

Costs

[22] In light of his success in bringing this application, Mr Jolin is entitled to an order for a contribution to his costs of representation and for reimbursement of the fee of \$71.56 paid to lodge his application in the Authority.

[23] Taking into account the shared attendances between this matter and that in a parallel investigation, *Isidro v BF7 Holdings Limited*, I consider an appropriate contribution towards Mr Jolin's costs to be \$750.

[24] I order BF7 pay to Mr Jolin the sum of \$750 towards his costs pursuant to clause 15 of Schedule 2 of the Act. In addition, BF7 is ordered to pay Mr Jolin the

⁴ See, for example, *A Labour Inspector v Vishnu Hospitality Limited* [2018] NZERA Auckland 383 (\$2,000); *High v Mighty Rocket Properties Limited* [2018] NZERA Wellington 111 (\$6,000); *Mangos v Metrofloor Contracting Ltd* [2018] NZERA Christchurch 46 (penalty \$1,500); *Masjedi v Phoenix Publishing Ltd* [2018] NZERA Auckland 161 (\$10,000), *Elliot v All Coat Painters Limited* [2019] NZERA 165 (\$3,000), *Singh v Mega Civil Limited* [2020] NZERA 21 (\$3,000), *Elmer Isidro v BF7 Holdings Limited* [2020] NZERA 43.

Authority's filing fee of \$71.56. Both of these amounts are to be paid within 14 days of the date of this determination.

Outcome

[25] The overall outcome that I have reached is:

- a) BF7 Holdings Limited breached clauses 2 to 4 of the Record of Settlement.
- b) BF7 Holdings Limited is ordered to comply with the Record of Settlement by doing the following within 7 days of the date of this determination:
 - i) Pay Nelson Jolin the sum of \$5,000, being the agreed sum payable under clause 2 of the Record of settlement.
 - ii) Pay Nelson Jolin the sum of \$5,528.60 less PAYE, being the agreed sum payable under clause 3 of the Record of settlement.
- c) BF7 Holdings Limited is ordered to pay \$3,000 by way of penalty for its breach of the Record of Settlement. Payment is to be made within 28 days of the date of this determination to the Employment Relations Authority. The Employment Relations Authority is then to pay one half of the penalty to Nelson Jolin and the other half is to be transferred to the Crown Bank account.
- d) BF7 Holdings Limited is ordered to pay to Nelson Jolin the combined sum of \$821.56 towards his costs within 14 days of the date of this determination.

Jenni-Maree Trotman
Member of the Employment Relations Authority