

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2016] NZERA Auckland 152  
5622839

BETWEEN            CLAIRE LAVELLE  
                                 Applicant  
  
A N D                    EB FRANCHISE LIMITED  
                                 Respondent

Member of Authority:     Rachel Larmer  
  
Representatives:           Ashley Ayton, Counsel for Applicant  
                                 Richard Kelly, General Manager of Respondent  
  
Investigation Meeting:     19 May 2016 at Auckland  
  
Written Record of Oral     20 May 2016  
Determination:

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**DETERMINATION OF  
THE EMPLOYMENT RELATIONS AUTHORITY**

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**Employment relationship problem**

[1] The parties entered into a Record of Settlement under s.149 of the Employment Relations Act 2000 (the Act). The parties signed the Record of Settlement on 07 April 2016 and it was then signed off by a mediator from Ministry of Business Innovation & Employment - Mediation Services on 11 April 2016.

[2] Clause 3 of the Record of Settlement provided for moneys to be paid to Ms Lavelle within seven working days of the mediator signing it. This meant that the amounts due were to have been paid by EB Franchise Limited (EB Franchise) to Ms Lavelle on or before 20 April 2016.

[3] Ms Lavelle seeks:

- a. An order that EB Franchise complies with clause 3 of the Record of Settlement;
- b. That a penalty of \$500 be imposed on EB Franchise;
- c. Interest at rate of 5% be awarded on the amount she is owed;
- d. Reimbursement of her filing fee.

[4] There is no dispute that EB Franchise has not complied with clause 3 of the Record of Settlement or that Ms Lavelle has not been paid any of the money she is due.

[5] EB Franchise's position is that it needs more time to pay Ms Lavelle. It accepts the amounts specified in clause 3 of the Record of Settlement are owing. It asks the Authority to order that it be permitted to pay Ms Lavelle the amounts she is owed by five instalments of \$750 per week cumulating with a lump sum payment of the remaining balance to be paid in full in week six.

[6] Mr Richard Kelly, who is the General Manager for the respondent, indicated to the Authority that he thought there was "*a good chance the respondent can pay the balance in full before the six week period concludes*".

[7] Ms Ashley Ayton, counsel for the applicant, requested the Authority order that the Record of Settlement obligations be complied with immediately or failing that within 28 days of the date of this determination at the latest.

### **The issues**

[8] The issues to be determined by the Authority are:

- (a) Should a compliance order be imposed on EB Franchise?
- (b) If so, should EB Franchise be permitted to pay the amount owing by way of instalments?
- (c) Should a penalty be imposed on EB Franchise for its breach of the Record of Settlement?

(d) Should Ms Lavelle be awarded interest?

(e) What if any costs should be awarded?

**Should a compliance order be imposed on EB Franchise?**

[9] The parties have entered into a final binding and enforceable Record of Settlement under s.149 of the Act. Pursuant to s.137(2) of the Act, the Authority may order EB Franchise to comply with all of its obligations under the Record of Settlement within a specified time.

[10] The issuing of a compliance order is discretionary with the discretion to be exercised judicially. I consider the principles relating to the exercise of the discretion in relation to compliance orders to be well established and I do not need to set them out in detail here.

[11] The respondent entered into the Record of Settlement voluntarily in the full knowledge of its obligation to pay Ms Lavelle the agreed amounts by no later than 20 April 2016. In consideration of that Ms Lavelle settled her employment relationship problem.

[12] Despite knowing of its obligations in this regard, the respondent did not take steps on or before 20 April 2016 to meet its obligations. Ms Lavelle tells the Authority that EB Franchise failed to inform her that it would not be making payments on the scheduled date and she says this has caused her some financial distress and embarrassment.

[13] The parties have differing views on the communications that occurred between them following the respondent's failure to meet its obligations under the record of settlement.

[14] Ms Lavelle disputes that there has been any attempt to "*negotiate*" a different arrangement. She feels that the respondent unilaterally presented an alternative solution whereby it would pay \$400 a week to her as an ultimatum or as a final outcome.

[15] Ms Lavelle declined to agree with that on the basis that she was expecting the money she was owed to be paid as per the agreed timeframe, she was relying on that money so wanted it paid.

[16] Mr Kelly said that no money was paid to Ms Lavelle pending the outcome of today's investigation meeting. I consider that is unsatisfactory. The respondent's own representation was that it could have paid Ms Lavelle \$400 per week, so I consider that should have occurred.

[17] What has in fact subsequently happened is that money that should have been paid to Ms Lavelle has been disbursed to other creditors and used for other business reasons. There is some evidence to suggest that over \$2,000 was paid to a related company (Wax Lyrical Limited) after EB Franchise had breached the Record of Settlement. Full details of this have not been disclosed.

[18] Mr Kelly admits that other creditors have been paid instead of Ms Lavelle because they apparently "*co-operated*" with EB Franchise. Mr Kelly said he was not in a position to advise the Authority of exactly what amounts had been paid to which other creditors, when that occurred or why they were paid and Ms Lavelle has not been.

[19] I consider this is an appropriate matter in which to exercise the Authority's discretion to order compliance. I am not satisfied that in the absence of a compliance order the respondent will meet its obligations to Ms Lavelle.

**Should EB Franchise be permitted to pay Ms Lavelle by instalments?**

[20] The Authority has the discretion under s.138(4A) of the Act to order the respondent to pay the amounts it owes Ms Lavelle by instalments if its financial position requires it.

[21] The Authority has previously adopted a strict approach to such requests. There are many respondents that appear before the Authority whom seek additional time in order to meet obligations that they have entered into under a Record of Settlement.

[22] However that should not be allowed to occur in order to facilitate the payment of amounts to creditors who have voluntary payment arrangements in place at the expense of a party who has entered into a Record of Settlement.

[23] There is a strong public policy imperative to ensure that parties which enter into Record of Settlements understand that this is statutory arrangement which must

be complied with. It is not appropriate for a party to reprioritise its spending in a way that prevents the other party to the Record of Settlement being paid what it or they are owed.

[24] This was a relatively recent Record of Settlement and payment was to have been made in full within 7 working days. If EB Franchise had any concerns about its ability to meet its financial obligations to Ms Lavelle then it could have addressed those in mediation and arranged for the Record of Settlement to reflect a different payment arrangement that it knew it could meet.

[25] Instead, the parties specifically turned their minds to when and how the amounts to be paid would be paid and agreed that that was to occur within seven working days. The Authority pressed Mr Kelly about what if anything had changed in the limited time between entering into the Record of Settlement and failing to meet the respondent's obligations as set out in clause 3.

[26] Mr Kelly says that expected funding did not come through. However that does not satisfactorily explain why EB Franchise paid other creditors (including possibly a related company) at Ms Lavelle's expense. I consider it more likely than not that EB Franchise decided not to meet its obligations to Ms Lavelle as it did not see those as a priority. That sort of approach needs to be strongly discouraged.

[27] On 18 April 2016, the respondent closed its Ponsonby store. The items and equipment for that store have not yet been sold. Mr Kelly says that these items are being held while the company decides whether to open a new store in a similar location in a few months.

[28] Mr Kelly acknowledged that money would be realised if the items from the closed Ponsonby store were sold but it was considered uneconomic to sell those items at a fire sale. I consider this is another example of EB Franchise prioritising its possible expansion plans that are a number of months away at best over its obligations to Ms Lavelle.

[29] The financial information presented to the Authority shows that the respondent has book assets of around \$75,000. Mr Kelly was unable to give specific details of these but did state that he believed these would not reach that amount if sold. However, Mr Kelly did agree that if the company was placed in liquidation, then

Ms Lavelle would be in a position to realise the full amount that she was owed because there were sufficient remaining assets to enable her to be paid in full.

[30] I am not satisfied that the high threshold set by s.138(4A) of the Act has been met. I consider this is a case where the respondent simply has a desire but no real need to pay by instalment.

[31] I am not satisfied it is appropriate to delay Ms Lavelle from receiving what she is owed for any longer which is effectively what EB Franchise's suggestion involves.

[32] I consider that EB Franchise is in a position to take steps to sell the items from the Ponsonby store. It can also use the surplus funds from its other two profitable stores to pay Ms Lavelle.

[33] Ms Kelly hinted that there may also be a likelihood of directors and/or shareholders applying more funds into the business to satisfy not only the amounts that Ms Lavelle is owed but also the amounts owed to the other creditors and amounts required to extend the business. However he was not prepared to give any undertakings about that occurring.

[34] Mr Kelly also expressed optimism to the Authority in terms of the respondent's ability to trade its way out of its current difficulties. He said he had been employed to turn the respondent's profitability around over the last three months and believed he was on track to do so.

[35] EB Franchise had until last month been operating four retail stores, two of which are running at a profit, one of which was recently closed and one of which has its ongoing operation under reconsideration.

[36] I consider that this is a situation where the respondent does have funds available or the ability to obtain funds but is making decisions to prioritise the application of such funds elsewhere over its obligations to Ms Lavelle.

[37] I consider that the respondent's obligations to Ms Lavelle now need to be made priority one. The respondent's obligations to her arise under a Record of Settlement which is part of a statutory regime to assist parties in resolving employment relationship issues in a speedy and cost-effective manner.

[38] These obligations need to be taken seriously and parties to them need to understand that they will be held to the obligations that they voluntarily enter into.

[39] For those reasons, I decline the respondent's request for an order that it pay the amounts owed by way of instalment. Instead, I order EB Franchise Limited to pay Ms Lavelle in full the amounts she is owed under clause 3 of the Record of Settlement within 28 days of the date of this determination.

### **Should a penalty be imposed?**

[40] The Authority has the discretion under s.149(4) of the Act to impose a penalty for a breach of a Record of Settlement.

[41] I consider that this is an appropriate matter in which to impose a penalty on the respondent to punish it for its wrongdoing and to set an example to other parties who may be tempted to breach their obligations under a Record of Settlement.

[42] It is important that the Authority sends a strong message that such behaviour is not acceptable and will not be tolerated. Those parties who breach a Record of Settlement can expect to face financial consequences for doing so.

[43] I have regard to the principles expressed by the Employment Court in its decision of *Zhu v. McIntosh*<sup>1</sup>. These principles are well known so I do not need to set them out again here.

[44] Ms Lavelle has sought a penalty of \$500. That is what appears in the Statement of Problem and what was recorded in Ms Ayton's written submissions to the Authority. I find that the amount set out in the Statement of Problem sets a ceiling on the amount of penalty that the Authority can impose in this particular case.

[45] The respondent was been put on notice by way of the Statement of Problem about the level of penalty being sought which was \$500. Whilst that is considerably less than the level of penalty that the Authority would normally impose for a breach of a Record of Settlement, I consider that in these circumstances (in order to comply with the requirements of natural justice) that sets a cap in this particular matter.

[46] Accordingly, EB Franchise Limited is ordered to pay a \$500 penalty for breaching the Record of Settlement. I consider that this is an appropriate case within

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<sup>1</sup> [2004] 2 ERNZ 488.

which to award the penalty to Ms Lavelle personally on the basis that she is the one who has suffered by being deprived of the use of money that she was expecting to have received by 20 April 2016 and which she may need to wait up to another 28 days to receive.

[47] EB Franchise Limited is therefore ordered to pay the full \$500 penalty that has been imposed on it directly to Ms Lavelle instead of to the Crown bank account.

### **Should interest be awarded?**

[48] The Authority has discretion under the Judicature Act 1908 to impose interest. I consider this is an appropriate matter in which to award Ms Lavelle interest.

[49] Ms Lavelle has been deprived of the use of money that should have been paid to her by 20 April at the latest. EB Franchise Limited has received the benefit of the use of that money in the interim and so it is appropriate to award interest to Ms Lavelle to reflect that.

[50] Accordingly, EB Franchise Limited is ordered to pay Ms Lavelle interest at the current prescribed rate of 5% on the full amount owing under clause 3 of the Record of Settlement from 20 April 2016 until that amount has been paid in full.

### **Costs**

[51] A party may only claim a contribution towards its legal costs if it has actually incurred costs. Ms Ayton told the Authority that Ms Lavelle was not being charged for the legal assistance that she had received in respect of this compliance order application. Therefore, there is no ability to award her costs in such circumstances.

[52] I am satisfied that Ms Lavelle has incurred the expense of a filing fee so it is appropriate that she be reimbursed for that. EB Franchise Limited is ordered to pay Ms Lavelle the sum of \$71.56 within 28 days of the date of this determination to reimburse her filing fee.

### **Orders**

[53] The Authority makes the following orders:

- (a) EB Franchise Limited is ordered to comply with clause 3 of the Record of Settlement within 28 days of the date of this determination;

- (b) EB Franchise Limited is ordered to pay to Ms Lavelle personally the \$500 penalty within 28 days of the date of this determination;
- (c) EB Franchise Limited is ordered to pay Ms Lavelle interest at the rate of 5% on the amount owed under clause 3 of the Record of Settlement until the has been paid in full. This interest is to be paid within 28 days of the date of this determination;
- (d) EB Franchise Limited is ordered to pay Ms Lavelle \$71.56 to reimburse her filing fee within 28 days of the date of this determination.

**Rachel Larmer**  
**Member of the Employment Relations Authority**