

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2013] NZERA Auckland 506
5432882

BETWEEN DA-SOM LEE
 Applicant

A N D MOVING HAIR AND BEAUTY
 LIMITED
 Respondent

Member of Authority: Rachel Larmer

Representatives: Cameron Fraser, Counsel for Applicant
 No appearance by Respondent

Investigation Meeting: 08 November 2013 at Auckland

Date of Determination: 08 November 2013

DETERMINATION OF THE AUTHORITY

- A. Moving Hair and Beauty Limited (Moving Hair) is ordered to comply with the Record of Settlement entered into by the parties on 14 August 2013. In particular it must within 28 days of the date of this determination provide Ms Lee with a Certificate of Service which records her position and dates of employment and pay her:**
- (a) \$18,000 as per the terms of settlement;**
 - (b) \$1,000 towards her legal costs;**
 - (c) \$71.56 to reimburse her filing fee.**
- B. A penalty of \$5,000 is imposed on Moving Hair for its breach of the Record of Settlement which is also to be paid to Ms Lee within 28 days of the date of this determination.**

Employment relationship problem

[1] The parties attended mediation conducted by a Mediator from the Ministry of Business Innovation and Employment, Mediation Services on 14 August 2013. Both parties were assisted at mediation by counsel.

[2] As a result of mediation the parties entered into under s.149 Employment Relations Act 2000 (the Act) Record of Settlement dated 14 August 2013 which provided for Moving Hair to make certain payments to Ms Lee by specified dates. None of these payments have been made. It was also required to provide her with a certificate of service which recorded her position and dates of employment.

[3] Ms Lee provided Moving Hair with bank account details the reference which was to accompany the payment of the settlement amounts and an electronic copy of a deposit slip for the settlement amounts to be paid. Moving Hair has not done anything to comply with its obligations under the Record of Settlement.

[4] Ms Lee through counsel has demanded payment of the amounts she is owed but has received no response to such requests. She now seeks:

- a. an order from the Authority that Moving Hair comply with the terms of the Record of Settlement;
- b. that a penalty be imposed on Moving Hair for its breach of the Record of Settlement;
- c. that any penalty be paid to her rather than the Crown;
- d. to recover her legal costs of this application;
- e. reimbursement of her filing fee.

No appearance by respondent

[5] The Statement of Problem was served on Moving Hair at its registered office by the Authority via track and trace courier on 20 September 2013. The Notice of Hearing was served in the same way on 21 October 2013.

[6] Moving Hair has not filed a Statement in Reply and it has not sought leave to file a Statement in Reply out of time. Moving Hair did not attend the Authority's investigation meeting today.

Outcome

[7] I am satisfied that Moving Hair has breached its obligations under the Record of Settlement and that it is appropriate to issue a compliance order requiring it to comply with those obligations within 28 days of this determination. In particular Moving Hair must provide Ms Lee with a certificate of service which confirms her position and dates of employment and it must pay her \$18,000.

[8] I am satisfied that Moving Hair's breach of the record of settlement is a flagrant breach and that it ignored Ms Lee's requests to comply with its obligations under the record of settlement.

Penalty

[9] I find that Moving Hair's breach of the Record of Settlement was a flagrant breach. It has failed to take any steps to comply with its legal obligations to Ms Lee and it failed to respond to her attempts to get it to do so.

[10] I consider Moving Hair's actions warrant a penalty to express disapproval of its conduct and to act as a deterrent to others who may be inclined to ignore their Record of Settlement obligations.

[11] A penalty of \$5,000 is imposed on Moving Hair. Usually penalties are paid to the Crown but under s.136(2) of the Act there is discretion to award some or all of a penalty to any person. This is an appropriate case to do so. Ms Lee provided evidence about the adverse effects Moving Hair's breaches have had on her in a multitude of ways. She has also incurred legal fees in excess of what can be recovered by her by way of a costs award.

[12] Moving Hair is ordered to pay Ms Lee the \$5,000 penalty within 28 days of the date of this determination.

Costs

[13] Ms Lee says her legal costs associated with this application are \$3,500 and she claims that full amount. I do not consider this is an appropriate case to award indemnity costs because the high threshold required for doing so has not been established on the evidence before me.

[14] I therefore adopt the Authority's usual notional daily tariff based approach to costs. The starting point for assessing costs is \$500 (being pro rata the current daily tariff of \$3,500). This must then be adjusted in a principled way to reflect the particular circumstances of this case.

[15] I am not aware of any factors which warrant a decrease in the notional daily tariff.

[16] In terms of factors which increase the notional daily tariff Ms Lee is young and cannot speak or understand English. She required the assistance of a Korean translator today. She therefore engaged counsel to assist her in recovering what she was owed under the Record of Settlement.

[17] I consider that Moving Hair's complete failure to engage with Ms Lee and her counsel regarding its obligations under the Record of Settlement is a factor which should increase an award of costs because I am satisfied that such failure to engage unnecessarily and inappropriately increased Ms Lee's legal costs.

[18] I order Moving Hair to pay Ms Lee \$1,000 towards her legal costs. It is also order to reimburse Ms Lee \$71.56 for her filing fee.

Rachel Larmer
Member of the Employment Relations Authority