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Lennon v Phoenix Publishing Limited (Wellington) [2018] NZERA 2087; [2018] NZERA Wellington 87 (1 October 2018)

Last Updated: 10 October 2018

IN THE EMPLOYMENT RELATIONS AUTHORITY WELLINGTON

[2018] NZERA Wellington 87
3035931

BETWEEN JULIE LENNON Applicant

AND PHOENIX PUBLISHING LIMITED

Respondent

Member of Authority: Trish MacKinnon

Representatives: Graeme Ogilvie, Advocate for Applicant

No appearance for Respondent Investigation Meeting: 1 October 2018 at Wellington Submissions Received: On the day from the Applicant Determination: 1 October 2018

ORAL DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant, Julie Lennon, seeks a compliance order, a penalty and costs against her former employer, Phoenix Publishing Limited (Phoenix Publishing).

[2] In my determination of 29 May 2018 I accepted Ms Lennon's claim for wage and holiday arrears and ordered Phoenix Publishing to make payment in respect of five itemised matters and to pay interest at 5% on the specified amounts calculated from 29 September 2017 to the date of payment.¹

[3] Ms Lennon says none of the payments ordered to be made to her have been made.

¹ [2018] NZERA Wellington 48.

[4] Phoenix Publishing has not filed a statement in reply. The statement of problem was served on it by courier post on 14 August 2018 at its then registered address for service. After the time for filing a statement in reply had passed, the Authority set the matter down for investigation on 1 October 2018 and informed the parties accordingly.

[5] Service of the Notice of Investigation Meeting was effected on Phoenix Publishing on 10 September 2018. When the Authority became aware that the respondent had changed its registered address for service on 7 September 2018, the Notice of Investigation Meeting was re-served on the respondent at its new address for service on 17 September 2018.

[6] I am satisfied the respondent has been properly served and has received all relevant notification in relation to the 1 October 2018 investigation meeting scheduled to commence at 9.30 am.

[7] No representative of Phoenix Publishing attended the Authority's investigation meeting. I delayed the commencement of the meeting by 15 minutes to accommodate any delays caused by traffic. I also requested an Authority Office to attempt to contact the respondent's sole director, Bronwyn Ivy Rawson, on the only contact number provided to the Authority for her. The mobile phone number appeared to have been disconnected. I then proceeded with the investigation meeting in the

respondent's absence, in accordance with clause 12 Schedule 2 of the [Employment Relations Act 2000](#).

[8] After questioning Ms Lennon I accept her evidence that she has not received any of the payments ordered to be paid to her in my determination of 29 May 2018. I also accept her evidence that Phoenix Publishing has not responded to Ms Lennon's attempts, through her representative, to contact it about the monies owing.

[9] I am satisfied it is appropriate to issue a compliance order in these circumstances. Accordingly Phoenix Publishing Ltd is ordered under [s 137](#) of the Act to comply with the payments ordered to be paid to Ms Lennon in my determination of

29 May 2018. Those payments are:

a. \$2,115.41 gross, being remuneration for 11 days' unpaid

wages;

b. \$169.23 gross, being holiday pay at 8% on those wages;

c. \$333.33 gross, being holiday pay at 8% on wages paid for the period 23 August to 22 September;

d. \$125.00 gross, being the amount deducted from Ms Lennon's pay of 28 September 2017;

e. \$24.00 nett, being reimbursement of courier expenses incurred at the request of the employer;

f. Interest at 5% on the amounts at (a) to (e), calculated from 29

September 2017 to the date of payment.²

g. Costs in the sum of \$1,125; and

h. Reimbursement of the Authority's filing fee of \$71.56.

[10] Payment of the above amounts is to be made in full within seven days of the date of this determination.

[11] Failure by Phoenix Publishing to comply with these orders may result in Ms Lennon applying to the Employment Court to exercise its powers under [s 140\(6\)](#) of the Act. Those powers include ordering that the person in default be sentenced to a term of imprisonment not exceeding three months and/or imposing a fine not exceeding \$40,000.

Penalty

[12] Ms Lennon seeks the imposition of a penalty on Phoenix Publishing because of its egregious behaviour in not paying her monies to which she is entitled and which is now well overdue.

[13] A penalty may be imposed at the discretion of the Authority and is generally imposed for the purpose of punishment as well as discouragement to others. The maximum penalty for a breach is \$20,000³. A consideration in assessing the amount of any penalty is the severity of the breach. This is required to establish a provisional

starting point for the penalty including an adjustment for aggravating and mitigating

² In accordance with clause 11 of Schedule 2 of the Act.

³ S 135(2)(b) of the Act.

factors in accordance with the multi-step approach of a Full Court of the Employment

Court in *Boorsboom v Preet PVT Ltd & Warrington Discount Tobacco Ltd*.⁴

[14] There has been a complete absence of engagement by Phoenix Publishing with Ms Lennon over the monies she is owed and it has not participated in the Authority's processes over her claims. Ms Lennon has, through no fault of her own, been deprived of remuneration to which she was entitled, and on which she was relying, for more than 12 months. I regard the respondent's failure to comply with its contractual and statutory obligations as a very serious matter and find a penalty is warranted under [s 134](#) of the [Employment Relations Act 2000](#) and [ss 4](#) and [13](#) of the [Wages Protection Act 1983](#). The starting point for that penalty will be \$20,000.

[15] Applying the guidelines set out by the Employment Court in *Preet* I have taken into account aggravating factors such as

the length of time of non-payment and failure to engage at all with the applicant. A result of Phoenix Publishing's lack of engagement in the Authority's processes is that no evidence has been provided of any ameliorating circumstances for the respondent's failure to pay the remuneration due to Ms Lennon.

[16] I have also considered the history of this respondent. I understand this is at least its seventh appearance in front of the Authority, most of which have involved or included wage arrears. I have also considered the proportionality of the outcome including a consideration of penalties imposed in similar situations by the Authority. Taking all circumstances into account I find a penalty of \$10,000 to be appropriate. Phoenix Publishing is ordered to pay that sum within 14 days of the date of this determination.

[17] Ms Lennon has been significantly inconvenienced by having to pursue claims in the Authority because of her employer's failure to pay her that to which she is entitled. I find it reasonable that one half of the penalty be paid to her.

Costs

[18] Ms Lennon has incurred advocacy costs in bringing this application to the

Authority, and has provided evidence of that. She seeks costs in the sum of \$575.00 as well as the reimbursement of the Authority filing fee. The award of costs she seeks

4 [\[2016\] NZEmpC 143](#).

sits comfortably within the Authority's notional daily tariff for a hearing lasting half a morning. I am satisfied it is appropriate for that sum to be paid by the respondent and I order it to do so. The respondent is also directed to pay the Authority filing fee of

\$71.56 for today's hearing.

[19] These sums are to be paid within seven days of the date of this determination.

Summary of orders

[20] Phoenix Publishing Limited is ordered to pay:

- a. the sums set out in this determination at paragraphs 9 (a) to (h);
- b. a penalty of \$10,000;
- c. costs of \$575.00; and
- d. reimbursement of the Authority filing fee of \$71.56.

[21] The sums in (a), (c) and (d) are to be paid to Ms Lennon, within seven days of the date of this determination. The penalty in (b) is to be paid to the Authority within fourteen days of the date of this determination. Upon receipt of payment the Authority is to transfer \$5,000 to the Crown Account and \$5,000 to Ms Lennon.

Trish MacKinnon

Member of the Employment Relations Authority

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