

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2021] NZERA 523
3139081
3140981

BETWEEN HAMISH MADDEN
Applicant

AND BAY HOLDINGS LTD
Respondent

Member of Authority: Peter Fuiava

Representatives: Michael Richard Harrison, advocate for the Applicant
Louise Foley, counsel for the Respondent

Investigation Meeting: 17 September 2021 (By audio visual link)

Determination: 25 November 2021

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] This is an application (3139081) brought by Hamish Madden and a counterclaim (3140981) by Bay Holdings Ltd (BHL) concerning alleged breaches of a record of settlement that both parties entered into on 29 March 2021 in full and final settlement of all matters between them and arising out of their employment relationship.

Relevant facts

[2] Prior to entering into the record of settlement, Mr Madden had lodged a Statement of Problem in the Authority against BHL. However, before an investigation meeting into the matter could take place, Mr Madden withdrew his claim as a result of reaching the above record of settlement which was certified by a Ministry of Business, Innovation and Employment mediator under s 149 of the Employment Relations Act 2000 (the Act).

[3] According to the record of settlement, BHL agreed to pay Mr Madden the sum of \$16,000 pursuant to s 123(1)(c) of the Act for humiliation, loss of dignity, and injury to feelings. The amount was to be paid by way of direct credit into Mr Madden's bank account in three instalments: \$5,500 within seven days of the date of the record of settlement, \$5,500 on or before 30 April 2021, and \$5,000 on or before 31 May 2021. In case of a default in payment, the remaining balance became payable in full with interest to be charged at the rate of five percent per annum.

[4] In addition to reaching a financial settlement, the parties agreed for all matters discussed in mediation to remain confidential and that neither would speak ill of the other verbally or in any medium, including social media.

[5] On 6 April 2021, BHL paid Mr Madden \$5,500 by way of a bank transfer into his personal bank account. However, its bank transfer details recorded the words 'Mental Stress'. Mr Harrison emailed BHL's counsel, Ms Foley, later that same day advising her that the company had spoken ill of Mr Madden contrary to the record of settlement. BHL denied that it had done so as it could not be determined to whom it was referring.

[6] Payment of the second and third instalments fell due and presently remain outstanding. Mr Harrison subsequently emailed Ms Foley and made a formal demand for the remaining balance otherwise enforcement proceedings would be commenced in the Authority.

[7] Mr Harrison subsequently received an email in response (it is not clear from whom) alleging that Mr Madden had breached the confidentiality clause of the record of settlement by telling Terry Andrews (a former work colleague) that he had won his court case and that Mr Andrews had since disclosed that information to at least one other person known by Janeen Tipping, the business owner of BHL. The email warned that any proceedings commenced against the company would result in a counterclaim being lodged against Mr Madden.

[8] On 14 May 2021, Mr Madden lodged a Statement in Problem in the Authority to enforce the record of settlement. In response BHL lodged a Statement in Reply and

a Counterclaim against Mr Madden, who in turn filed a Statement in Reply to the counterclaim.

The Authority's investigation

[9] A case management conference was held with the parties on 30 July 2021 during which time timetabling directions were made for the filing of written statements and the matter set down for an investigation meeting at 9.30 am Friday 17 September 2021 at Taupo.

[10] Written statements from Mr Madden and his witness, Mr Andrews, were duly lodged with the Authority. However, no written statements were submitted by BHL because Ms Foley subsequently advised that the company had sold its business (settlement taking place on or about 31 August 2021) and that it no longer wished to participate any further with the process. The Authority requested further supporting information and documents regarding the sale of the business which was provided and forwarded to Mr Harrison.

[11] On 17 August 2021 at 11.59 pm, all of New Zealand moved to COVID-19 Alert Level 4. As the date for the investigation meeting approached and, it becoming increasingly apparent that I would not be able to travel to Taupo because of the border restrictions then in place, arrangements were made for the parties to attend the investigation meeting remotely via audio-visual link (AVL).

[12] Mr Harrison and Mr Madden advised that they were amenable to participating by AVL via Zoom, and consistent with its earlier advice of non-participation with the process, the Authority received no further communication from BHL. That being said, the details of the Zoom link were sent to both parties. Mr Madden, Mr Harrison and Mr Andrews attended the virtual investigation meeting. There was no appearance by BHL or its representative and as such, I proceeded with my investigation pursuant to clause 12 Schedule 2 of the Act, which enables the Authority to act fully in the matter before it as if BHL had duly attended or been represented.

[13] A direct consequence of there being no appearance by BHL or its representative was that its counterclaim against Mr Madden was inevitably dismissed. I note that no written statements or supporting documents were filed in support of the counterclaim

and Mr Andrews, a former policeman and therefore someone knowledgeable regarding the importance of maintaining confidentiality, gave evidence that at no stage, had Mr Madden given him any detailed information about his employment case.

[14] For the above reasons, I dismiss BHL's counterclaim against Mr Madden in its entirety. I turn to consider his claim against BHL for enforcement of the record of settlement. As permitted by s 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. It has not recorded all evidence and submissions received.

The issues

[15] The issues requiring investigation and determination were:

- (i) Did BHL breach the terms of the record of settlement?
- (ii) If so should a compliance order be made?
- (iii) Should a penalty also be imposed?
- (iv) Should BHL contribute to Mr Madden's costs?

BHL breached the terms of the record of settlement

[16] BHL breached the terms of the record of settlement in two ways. First, it spoke ill of Mr Madden by recording in his bank account the words "Mental Stress" when it transferred \$5,500 into his account on 6 April 2021. I consider the words to be derogatory and targeted at Mr Madden because the bank transfer was made to his bank account. It is difficult to imagine who else BHL could have been referring to other than its intended recipient.

[17] The second breach is not contestable. The two instalment payments owed to Mr Madden amounting to \$10,500 in total remain outstanding. The entire amount is now payable in full under clause 5.3 of the record of settlement plus interest at the rate of five percent per annum until the total amount is paid in full.

Appropriate to make a compliance order

[18] There is a public interest in ensuring that parties who formally agree to a certified record of settlement under s 149 of the Act take their obligations seriously. BHL have not and I therefore order the company, pursuant to s 137(2) of the Act, to

pay Mr Madden \$10,500 immediately plus interest of five percent per annum from 1 May 2021 until the date payment is made in full.

Penalty warranted

[19] A person who breaches an agreed term of settlement under s 149 of the Act is liable to a penalty.¹ Certified agreements are the primary mechanism by which most employment relationship problems are resolved every year. It is important that public confidence in such agreements are not undermined and that parties have certainty with which to structure their affairs around such agreements.

[20] It is both just and reasonable that I impose a penalty against BHL for its two breaches of the record of settlement; speaking ill of Mr Madden and the non-payment of the remaining balance of funds. In assessing quantum, I take into account also the relevant statutory factors set out in s 133A of the Act, the range of penalties awarded in similar cases, and the guidance provided by the Employment Court in *Borsboom (Labour Inspector) v Preet PVT Limited* and as refined in *Nicholson v Ford*.²

[21] Having considered the circumstances of this case and the relevant statutory factors and case law, a penalty of \$3,000 penalty is warranted. It is appropriate that the whole amount of the penalty be paid to Mr Madden to compensate him for the inconvenience and added emotional stress he has had to endure as a consequence of BHL's non-compliance with a certified record of settlement.

Costs

[22] The investigation meeting took place by audio visual link with Mr Madden, Mr Harrison and Mr Andrews all present. Clause 15 Schedule 2 of the Act enables the Authority to order any party to a matter to pay to any other party such costs and expenses it considers reasonable.

[23] Costs generally follow the event and there is no reason for that not to be the case here. The current tariff for a one-day investigation meeting is \$4,500. I observe that this employment problem was needlessly protracted by BHL who put Mr Madden

¹ Employment Relations Act 2000, s 149(4).

² *Borsboom (Labour Inspector) v Preet PVT Ltd and Warrington Discount Tobacco Ltd* [2016] NZEmpC 143; *Nicholson v Ford* [2018] NZEmpC.

through the added trouble of responding to a counterclaim which *prima facie* was vexatious. The company has made each and every step of the process that much more difficult for him. I consider it appropriate to make a costs award of \$1,000 as a contribution towards Mr Madden's legal costs.

[24] BHL must also pay \$71.56 for the filing fee on the statement of problem.

Summary of orders

[25] The Authority makes the following orders. Bay Holdings Ltd is ordered to pay Hamish Madden the following sums with immediate effect and without delay:

- (i) \$10,500 pursuant to clause 5.3 of the record of settlement;
- (ii) interest on the sum of \$10,500 at five percent per annum from 1 May 2021 until the date payment is made in full;
- (iii) a penalty of \$3,000 against BHL with the whole amount to be paid directly to Mr Madden;
- (iv) costs of \$1,000 for the investigation meeting; and
- (v) the filing fee of \$71.56 for this matter.

Peter Fuiava
Member of the Employment Relations Authority