

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2018] NZERA Christchurch 46
3024054

BETWEEN SIMON WILLIAM MANGOS
Applicant

A N D METROFLOOR
CONTRACTING LIMITED
Respondent

Member of Authority: David Appleton

Representatives: Applicant in person
No appearance from the respondent

Investigation Meeting: 16 April 2018 in Christchurch

Date of determination : 17 April 2018

DETERMINATION OF THE AUTHORITY

- A. The respondent is ordered to comply with the terms of the record of settlement between the parties dated 1 December 2017 and to pay to the applicant the sum of \$2,139.28. Interest is payable on the sum owed to the applicant.**
- B. A penalty in the sum of \$2,000 is imposed upon the respondent for breach of the record of settlement, 75% of which is payable to the applicant, and 25% to the Crown.**
- C. The applicant is entitled to reimbursement of his lodgement fee of**

\$71.56. No further costs are due.**Employment Relationship Problem**

[1] Simon Mangos (the applicant) seeks a compliance order against the respondent for a breach of a record of settlement (ROS), as well as the imposition of a penalty. Philip Mangos, the director of the respondent company, admitted that the respondent had breached the record of settlement, and says that it has not been in a financial position to pay the sum due to the applicant under the terms of the ROS.

The respondent's non-appearance at the investigation meeting

[2] Philip Mangos took part in the Authority's case management conference call on 1 March 2018. He was therefore aware of the date of the Authority's investigation meeting as it was agreed between the parties on that call. In addition, the Authority sent a Notice of Investigation Meeting to the registered office of the respondent by courier. This Notice stated the date, time and venue of the investigation meeting and warned, inter alia that, if the respondent did not attend, the Authority may, without hearing evidence from the respondent, issue a determination in favour of the applicant. Despite this, no representative of the respondent turned up at the Authority's investigation meeting on 16 April 2018.

[3] Prior to me commencing the investigation meeting, Ms Allan, Senior Authority Officer attempted to call Philip Mangos on his mobile and land line numbers. She obtained no response on either line. Accordingly, being satisfied that the respondent was well aware of the date and time of the investigation meeting, and had been warned of the risk of not appearing, I decided to continue with the investigation without the respondent being represented.

[4] Later in the day on 16 April the Authority received an email from the respondent, sent on behalf of Philip Mangos to say that he had not been aware of the time the meeting was to start as he had failed to diarize it. The email said that Mr Mangos had tried to find out the start time on the previous Friday but had been unable to reach the Authority Officer with conduct of the matter. However, the Notice of Investigation Meeting had stated clearly what the start time was, and Mr Mangos could have called the Authority's offices first thing on 16 April to check. If he had done so, I would have waited until he had arrived. As it was,

whilst he did call the Authority later in the day, he only did so after the investigation meeting had concluded.

The material facts

[5] On 1 December 2017 the parties entered into the ROS. The key part of that agreement, apart from the fact that it was expressed to be in full and final settlement of all matters between the parties arising out of their employment relationship, was an agreement that the respondent would pay to the applicant a total of 68 hours of holiday pay within 14 days of the date of settlement. The applicant states that 68 hours of holiday pay amounts to the net sum of \$2,139.28.

[6] The Authority saw evidence that the applicant chased payment of the holiday pay by email on 22 December 2017, and that he warned Philip Mangos that “As the next stage of escalation will involve penalties for you, I suggest you comply with the settlement and pay up”.

[7] During the case management conference call Philip Mangos stated that he hoped that the respondent would pay the outstanding sum by the end of March 2018. However, the applicant gave evidence that he had had no payment from the respondent, and that he had heard nothing from Philip Mangos since the case management call.

[8] On 5 April the Authority emailed the parties to ask that Philip Mangos bring to the investigation meeting copies of financial information relating to the company. No reply was received from Philip Mangos.

[9] In his evidence before the Authority the applicant said that he believed that the respondent company was able financially to pay the sum owing and had had significant turnover when he had worked for the company. My own investigation shows that the respondent company is still trading, that it appears to have completed some major commercial projects and appeared to be up to date with its company register filings.

Determination

Compliance Order

[10] It is clear that there has been a failure to comply with a record of settlement. Section 137 of the Employment Relations Act 2000 (the Act) applies, inter alia, to any terms of settlement that section 151 provides may be enforced by compliance order. Section 137 (2) of the Act provides that the Authority may, in addition to any other power it may exercise, by order require a party to do any specified thing or to cease any specified activity, for the purpose of preventing further non-observance of or non-compliance with a provision, order, determination, direction, or requirement.

[11] Section 151 of the Act applies, inter alia, to any agreed terms of settlement that are enforceable by the parties under section 149(3). I am satisfied that the ROS in question is enforceable under s 149(3) as it has been appropriately certified by a mediator employed by the Chief Executive of the Ministry of Business, Innovation and Employment to provide mediation services under the Act.

[12] Being satisfied that the ROS has been breached and that I have the power to issue a compliance order in respect of that breach, I order that the respondent pay to the applicant, by way of the applicant's bank account that it has on its records, the net sum of \$2,139.28, by no later than 14 days of the date of this determination.

Interest

[13] The applicant seeks interest to be paid by reference to the overdue sum. Clause 11(1) of Schedule 2 of the Act provides as follows:

In any matter involving the recovery of any money, the Authority may, if it thinks fit, order the inclusion, in the sum for which judgment is given, of interest, calculated in accordance with Schedule 2 of the Interest on Money Claims Act 2016, on the whole or part of the money for the whole or part of the period between the date when the cause of action arose and the date of payment in accordance with the determination of the Authority.

[14] I am satisfied that it is appropriate to order the respondent to pay interest on the outstanding sum of the holiday pay due. The respondent entered into a binding ROS in which it agreed to pay that sum. The applicant is entitled to that sum, and has been deprived of the benefit of it. Therefore, it is just for interest to be charged.

[15] Section 13 of the Interest on Money Claims Act 2016 provides that an internet site calculator must be established which calculates interest for civil proceedings. This has been established and is available at www.justice.govt.nz/fines/civil-debt-interest-calculator.

[16] Applying that calculator, between 16 December 2017, when the payment became due, and 16 April 2018, the date of the Authority's investigation meeting, interest in the sum of \$24.18 has accrued. I order the respondent to pay that sum to the applicant within 14 days of the date of this determination.

[17] In addition, interest will continue to accrue on the outstanding sum, or any outstanding part thereof, until payment in full. Accordingly, the respondent is directed to use the internet site calculator to calculate what further interest is due on the outstanding sum on the day of payment of the sum due, and to include with the payment the further interest indicated.

Penalty

[18] The applicant seeks the imposition of a penalty upon the respondent for failing to abide by the terms of the ROS. Section 149(4) of the Act provides that a person who breaches an agreed term of an enforceable settlement agreement is liable to a penalty imposed by the Authority.

[19] In assessing whether a penalty should be imposed, and if so, in what amount, the principles of *Jeanie May Borsboom (Labour Inspector) v Preet PVT Limited and Warrington Discount Tobacco Limited*¹ should be applied. I shall therefore assess the question by adopting the key steps set out in *Preet*. First, though, I must consider whether a penalty should be imposed at all.

[20] I am satisfied that it should. The parties had entered into the ROS in order to settle proceedings in the Authority which were lodged by the applicant. The respondent therefore benefitted from its agreement to pay the applicant outstanding holiday pay in return for the applicant withdrawing his claim before the Authority. However, the respondent has not paid any part of the sum due, and has, according to the applicant, made no contact with him to explain why.

¹ [2016] NZEmpC 143.

[21] That is a blatant breach of an agreement which has benefitted the respondent. Settlement agreements serve an important role in resolving employment relationship problems, but they will lose their force and value if parties can get away with breaching their terms. That blatant breach is worthy of punishment, which is the primary purpose of a penalty². I am therefore satisfied that the imposition of a penalty is just and appropriate in this case.

[22] Step one of *Preet* requires an assessment of how many breaches have occurred. That is simple; there has been one breach, which is continuing. The maximum penalty faced by the respondent, being a company, is therefore \$20,000 (pursuant to s 135(2)(b) of the Act).

[23] Step two involves assessing the severity of the breach and whether any ameliorating factors exist. It is the first breach, affects just one employee and is not for a substantial sum. However, it appears to have been deliberate, and no attempt has been made to make payments by instalment, nor to contact the applicant to discuss the debt. Furthermore, the sum owed relates to minimum employment standards; namely holiday pay.

[24] The severity of the breach is moderate in my view, and justifies a starting point of 25% of the maximum. That is \$5,000. There appear to be no ameliorating factors. Although Philip Mangos had stated that the respondent was in financial difficulties, it has produced no evidence of that at all, despite being asked to by the Authority. The applicant also stated on oath that he did not believe that to be the case. I therefore do not reduce the penalty in respect of ameliorating factors.

[25] Step 3 involves assessing the financial position of the paying party. However, as I have already stated, I have not been given any evidence about this, so cannot take it into account.

[26] The final step, step 4, involves the ‘proportionality’ or ‘totality’ test being applied to the figure arrived at. This involves assessing the final provisional penalties by reference to all of the relevant circumstances together, to determine whether they are justly proportionate to the seriousness of the breaches and the harm done by them. Potentially, this discretionary final consideration may result in an increase to that provisional figure, a decrease to it or an affirmation of its appropriateness in all the circumstances.

² I refer, for example, to the recent judgement of Her Honour Judge Holden in *Lancom Technology Limited v Forman and Kang* [2018] NZEmpC 30, at [48].

[27] Reviewing other penalties imposed for single breaches of a settlement agreement the sum of \$5,000 is not disproportionate by reference to the penalties imposed in those other cases. However, on reflection, the sum of \$5,000 is disproportionate to the sum that is outstanding, which is a relatively small amount. I believe that it is appropriate to reduce the penalty, to reflect the relatively small amount owed. I therefore impose upon the respondent a penalty of \$2,000.

[28] Section 136 of the Act provides that the Authority may order that the whole or any part of any penalty may be paid to any person. In this case, the applicant has been owed holiday pay, which he was already entitled to under the Holidays Act 2003, for several months. The respondent then agreed by way of a settlement agreement to pay a sum representing that holiday pay within 14 days. That was then not paid either. The applicant has been forced to make an application to the Authority in order to recover what he was entitled to in law, and then attend an investigation meeting which the respondent has not attended.

[29] I believe that this is a situation where it is appropriate to order that part of the penalty be paid by the respondent to the applicant directly. I assess that that sum should be \$1,500, and is to be paid within 14 days of the date of this determination. The remainder of the penalty is to be paid to the Crown within 14 days of the date of this determination.

[30] I will conclude by repeating what I said to Philip Mangos during the case management telephone conference call. If the respondent does not comply with a compliance order of the Authority, the applicant may seek to bring proceedings in the Employment Court. The powers of the Court are serious and are set out at s 140 (6) of the Act, a copy of which has already been sent to the respondent by the Authority. The applicant may also seek enforcement of this determination in the District Court.

Lodgement fee

[31] The Applicant is also entitled to recovery of the lodgement fee of \$71.56, which should also be paid within 14 days of the date of this determination.

Summary of orders

[32] I order that the respondent make the following payments within 14 days of the date of this determination:

- a. To the applicant directly:
 - i. The net sum of \$2,139.28, together with any interest calculated from 17 April 2018 until payment in full as provided for in this determination;
 - ii. Interest up to 16 April 2018 in the sum of \$24.18;
 - iii. A penalty payment in the sum of \$1,500; and
 - iv. Reimbursement of the \$71.56 lodgement fee incurred by the applicant. No further costs are due to the applicant as a result of his application to the Authority.
- b. To the Crown, the sum of \$500. This is to be paid to the Authority, which will then pay the sum into a Crown Bank Account.

David Appleton
Member of the Employment Relations Authority