

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2024] NZERA 611
3278459

BETWEEN DANIEL O'DONNELL
Applicant

AND POWERTEC
TELECOMMUNICATIONS
PTY LTD
Respondent

Member of Authority: Sarah Kennedy-Martin

Representatives: Andrew Bell, counsel for the Applicant
John Johnson for the Respondent

Investigation meeting: On the papers

Submissions received: 21 June 2024 from the Applicant
16 July from the Respondent

Date: 11 October 2024

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Daniel O'Donnell was employed by Powertec Telecommunications Pty Ltd (Powertec). On 30 November 2023, the parties entered into a record of settlement ("the settlement agreement") in accordance with s 149 of the Employment Relations Act 2000 ("the Act").

[2] On 5 December 2023, a Ministry of Business, Innovation and Employment (MBIE) mediator certified their agreement. The effect of certification is that the terms agreed were final and binding and could only be brought before the Authority for the purposes of enforcement.

[3] Mr O'Donnell says two terms of the settlement agreement were breached and should attract penalties. Powertec accepts its payments under the settlement agreement were late but says this was not intentional and for a variety of reasons should not attract a penalty.

The Authority's investigation

[4] The parties agreed the matter could be heard on the papers. In addition to the statement of problem, statement in reply, settlement agreement and attached communications between the parties, they both provided written legal submissions.

Has there been a breach of the settlement agreement?

[5] There is no dispute there was a breach of clauses 1(a) and (b) of the settlement agreement between the parties.

[6] The relevant clauses provide the following:

1. Powertec will pay to Daniel the following sums:
 - a. The sum of \$15,000 without deduction pursuant to section 123(a)(c)(i) of the Act; and
 - b. Payment for any contractual entitlements due to Daniel as at the termination date. For the avoidance of doubt, this includes any salary or any accrued and untaken annual leave as at the termination date.
2. Daniel confirms that once payment is made to him pursuant to clause 1 above, all contractual and statutory entitlements owed to him as at the termination date will have been paid.
3. Powertec will provide a payslip containing a breakdown of Daniel's final pay within 7 days of the execution of the Record of Settlement by the Parties and a mediator.
4. The Payment referred to in clause 1 above are to be made to Daniel's nominated bank account within 7 days of a Mediator from the Ministry of Business, Innovation and Employment (MBIE) signing this Record of Settlement.

[7] The payments in cl 1 (a) and (b) were due to be paid no later than 13 December 2023. Mr O'Donnell was also due a payslip containing a breakdown of his final pay by the same date.

[8] Mr O'Donnell also says John Johnson's evidence on behalf of Powertec is untrue and misleading. The documents Mr O'Donnell received show the payment planned for 13 December was never authorised so the payment was never going to be paid on time and that payment did not include Mr O'Donnell's accrued annual holiday pay.

[9] While it accepts the payments were not made on 13 December 2023 Powertec says this was not intentional because it resulted from a genuine oversight by the accounts team. It says this period was marked by an unusually high volume of transactions and administrative tasks and this contributed to the error. Once it was realised a mistake had been made, Powertec acted promptly to ensure it was corrected.

[10] The first amount due under the settlement agreement was paid on 19 December 2023 and Mr O'Donnell's holiday pay was processed and paid to him on 15 February 2024.

[11] In relation to Mr O'Donnell's claim for costs, reimbursement of the filing fee and penalties under section 133 and 149(4) of the Act, Powertec says these costs were incurred unilaterally by Mr O'Donnell and given Powertec addressed the non-payment promptly once notified, the situation could have been resolved without the need for proceedings being commenced.

Payments

[12] There is evidence in the emails of payroll at Powertec setting up the payment for 13 December in advance of the payment date. An email was sent to Mr O'Donnell's representative on 13 December confirming payment was made and attaching the payslip and confirmation of the transfer. That payment was for the amount due under cl 1(a) and Mr O'Donnell never received that payment.

[13] Two issues arise from Powertec's actions around 13 December. The payslip does not refer to holiday pay that Powertec was obligated to pay on termination of employment so it appears there was no intention to pay holiday pay by the due date. Secondly, the confirmation of transfer document records the payment as unauthorised.

[14] There is an assertion of dishonesty on Mr Johnson's part, that he made representations to Mr O'Donnell's counsel and the Authority that the payment was on track and then secondly that it was a clerical error that prevented it from going through. The submission is that this misrepresents the position because the confirmation of payment from Powertec shows the payment was never authorised so it was not possible it could have been paid on 13 December.

[15] There was also an issue with the bank account number being incorrect and it is unclear whether Mr O'Donnell contributed to this. Nonetheless payment for the amount

due under clause 1(a) of the settlement agreement was made on seven days late on 19 December 2023.

[16] However, clause 1(b) also required that all contractual entitlements were to be paid by 13 December. The Holidays Act 2023 also requires that annual holiday entitlements are paid on termination of employment, which by virtue of clause 1(b) of the agreement, was by 13 December 2023.

[17] Mr Johnson says he was unaware the annual holiday entitlement remained unpaid until he received Mr O'Donnell's statement of problem. I note however Mr O'Donnell's representative alerted Powertec to the fact the holiday pay was outstanding after Powertec failed to make any payment on 13 December 2023.

[18] Mr O'Donnell's statement of problem was lodged on 14 February 2024. Powertec paid Mr O'Donnell the outstanding annual holiday leave accrual the next day on 15 February 2024.

[19] There were two breaches. Two payments were due on 13 December 2023. One was paid on 19 December 2023 and the other was paid on 15 February 2024.

Should a penalty be awarded?

[20] Mr O'Donnell seeks penalties for both breaches and given my finding above that Powertec breached the settlement agreement by not paying monies by the due date, Powertec is liable to a penalty.¹

[21] The maximum penalty for a single breach in the case of a company is \$20,000.² The standard of proof for the imposition of a penalty in this jurisdiction is on the balance of probabilities.³ The primary purpose of a penalty is to punish the wrongdoing and act as a deterrent to further breaches.⁴ Penalties can be appropriate for breaches of settlement agreements in order to protect the finality and integrity of s 149 agreements.

[22] Given the issue with the bank account number, and the fact the first payment was made on 19 December for monies due under cl 1(a) of the agreement that was seven days late, I do not consider a penalty appropriate for this breach.

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

² Above n1, s135(2)(b).

³ *Xu v McIntosh* [2004] 2 ERNZ 448 at [29].

⁴ *Borsboom v Preet PVT Ltd* [2016] NZEmpC 143 at [51] – [52].

[23] It is important that parties ought to have confidence in settlement agreements under s 149 of the Act and in this case, the annual holiday pay breach is the one that is significant. Payment was made nine weeks late.

[24] Taking into account the relevant matters the Authority must have regard to when awarding penalties⁵ a penalty is appropriate in order to protect the finality and integrity of s 149 agreements.

Orders

[25] Powertec Telecommunications Pty Ltd must pay a penalty of \$1,000.00 payable to the Crown.

Costs

[26] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[27] If the parties are unable to resolve costs, and an Authority determination on costs is needed, Mr O'Donnell may lodge, and then should serve, a memorandum on costs within 28 days of the date of this determination. From the date of service of that memorandum Powertec will then have 14 days to lodge any reply memorandum. On request by either party, an extension of time for the parties to continue to negotiate costs between themselves may be granted.

[28] The parties can anticipate the Authority will determine costs, if asked to do so, on its usual "daily tariff" basis unless circumstances or factors, require an adjustment upwards or downwards.⁶

Sarah Kennedy-Martin
Member of the Employment Relations Authority

⁵ Above n1, s 133A.

⁶ www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1