

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

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

[2023] NZERA 452  
3188220

BETWEEN

PATHWAYS HEALTH  
LIMITED  
Applicant

AND

YOVANH RADOVANOVICH  
Respondent

Member of Authority: Rachel Larmer

Representatives: Andrea Twaddle, counsel for the Applicant  
No engagement by the Respondent

Investigation Meeting: On the papers

Submissions and other information received: 27 February 2023 and 10 August 2023 from the Applicant

Date of Determination: 17 August 2023

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

*The parties*

[1] Pathways Health Limited (“the Applicant”), is an incorporated company within the Wyse Group, which operates under the Wyse Trust. Wyse Management Services Limited operates shared services for organisations within the Wyse Group, such as the provision of human resources support.

[2] Pathways is a national provider of community-based mental health, addiction and wellbeing services. It employed Yovanh Radovanovich (“the Respondent”), as a Youth Worker from 4 August 2020 to 12 November 2021.

*The overpayment*

[3] The parties agreed that the Respondent would take unpaid leave from 28 June 2021 to 18 September 2021, meaning he would not be paid his salary over that period. However, the Applicant mistakenly paid the Respondent the sum of \$10,296 gross, which he was not entitled to receive.

[4] The Applicant advised the Respondent that he had been overpaid. He acknowledged that the debt was owing and agreed to repay it by having repayments deducted from his wages.

[5] However, the Respondent resigned from his employment before the full overpayment had been repaid. He agreed that a partial repayment of \$1,426.85 could be deducted from his final pay, and that occurred.

*Record of Settlement*

[6] The parties attended mediation to resolve repayment of the outstanding debt the Respondent owed the Applicant. As a result the parties entered into a Record of Settlement (“RoS”) dated 10 May 2022, pursuant to s 149 of the Employment Relations Act 2000 (“the Act”).

[7] Clause 2 of the RoS said:

The parties agree that the total amount owing by Yovanh Radovanovich is \$6,115.47 and that this will be paid by regular fortnightly instalments, with 24 payments of \$250 per fortnight and in the fortnight after the last payment a final payment of \$115.47. The first payment starting on May 26 2022 by direct credit to Pathways account as provided for in the deposit slip attached as Appendix A.

[8] Clause 3 of the RoS required that on or before 17 May 2022 the Respondent would provide written confirmation that he had set up an automatic payment to make the required payments.

*Application for compliance order and penalty*

[9] The Respondent has not made any repayments and he failed to set up an automatic payment so that repayments could be made.

[10] The Applicant sought:

- (c) That penalties be imposed on the Respondent for his breaches of the RoS.
- (d) A compliance order requiring the Respondent to comply with the RoS, by repaying the money he owes; and
- (e) An award of costs and disbursements.

### **The Authority's investigation**

#### *Service issues*

[11] The Applicant lodged the Statement of Problem (“SoP”) with the Authority on 8 September 2022. Because the Authority was unable to serve the Respondent by using its normal process of a track and trace courier, the Applicant therefore took responsibility for doing so.

[12] The delay between the lodging of the SoP and this determination has resulted from the delays in locating the Respondent, arranging and effecting service and then obtaining an affidavit of service from the process servers involved.

[13] The SoP was served on the Respondent by a process server who is based in Hamilton. The process server provided an affidavit of service dated 20 January 2023 that confirmed they had personally served the Respondent, Yovanh Radovanovich, on Tuesday 17 January 2023 at 5.05 pm with a copy of the following documents, which are collectively referred to as “*the first service documents*”:

- (a) The Statement of Problem dated 8 September 2022;
- (b) The Statement of Problem dated 14 September 2022 (as the 8 September version had contained an incorrect attachment); and
- (c) The Record of Settlement dated 10 May 2022.

[14] Service occurred at the identified address (recorded in the affidavit of service) in Fairview Downs, in Hamilton, New Zealand when the process server handed the service documents to the Respondent personally.

[15] The process server in their affidavit of service stated: “*I believe it was the Respondent Yovanh Radovanovich that I served because Yovanh Radovanovich acknowledged he was Yovanh Radovanovich and accepted service of the documents.*”

*No Statement in Reply*

[16] The Respondent’s Statement in Reply (SiR) was due to be lodged with the Authority by 31 January 2023. That did not occur. Although the Authority attempted to engage the Respondent, that was unsuccessful.

*Directions of the Authority*

[17] This matter was allocated to an Authority Member on 14 February 2023 and directions were issued to the parties that day.

[18] The Directions of the Authority (“DoA”) recorded that the Respondent had not lodged a SiR, so he was informed that he had to seek leave to lodge a SiR out of time if he wanted to defend the Applicant’s claims.

[19] The Authority gave the Respondent seven days from the date of service of the DoA (which was served on him on 31 July 2023) within which to seek leave to file a SiR out of time, meaning it was due by 7 August 2023. The DoA set out the process for him to seek leave, however no leave application was made.

*Second service documents*

[20] Because the Authority was unable to engage the Respondent at all, the Applicant arranged for personal service on him of the following documents, which are referred to as “*the second service documents*”:

- (a) The DoA dated 14 February 2023;
- (b) The affidavit of Sally Ann Pitts-Brown dated 27 February 2023; and
- (c) The Applicant’s submissions and costs application dated 27 February 2023.

[21] Personal service of the second service documents occurred on 31 July 2023 at 11.15am, when a process server based in Hamilton served the Respondent, Yovanh Radovanovich, with the following documents:

- (a) Cover letter to Mr Yovanh Radovanovich dated 27 February 2023;
- (b) Letter and Directions of the Employment Relations Authority (the DoA) dated 14 February 2023;
- (c) Affirmed affidavit of Ms Pitts-Brown (the Chief Executive of Pathways Health Limited), together with annexures, dated 27 February 2023;
- (d) Legal submissions dated 27 February 2023 by Pathways Health Limited.

[22] The second service documents were personally served on the Respondent at his place of work in Hamilton, New Zealand (at the address in the affidavit of service) when the process server handed the documents to him personally.

[23] The process server provided a sworn affidavit of service dated 7 August 2023 which said: *“I believe it was the Respondent, Yovanh Radovanovich that I served because I have been provided with copies of his identification, including photographs, and the Respondent confirmed he was Yovanh Radovanovich and accepted service of the documents.”*

[24] The process server reported that when the Respondent was asked for his current address he initially gave the previous address at which he had been served with the SoP. The process server in his affidavit of service noted that was incorrect and that when the process server raised that with the Respondent he confirmed his current address in Ngaruawahia.

*‘On the papers’ investigation*

[25] The Authority was satisfied that the Applicant had been personally served with all relevant documents (the SoP, the DoA, the RoS, the affidavit of Ms Pitts-Brown, and the Applicant’s submissions regarding its claims).

[26] This matter was therefore investigated and determined ‘on the papers’.

[27] The Respondent had until 14 August 2023 within which to seek leave to lodge a Statement in Reply out of time, but he failed to do so. The Respondent has therefore elected not to participate in the Authority’s investigation meeting.

[28] The DoA included a section that addressed *“Non-engagement of the Respondent”*. This noted that while it was preferable for the Authority to hear from both parties before it

issued a substantive determination, failure of the Respondent to engage in the Authority's investigation would not prevent it from issuing a substantive determination.

[29] The DoA also included a section which set out a "*Preliminary indication*", which noted that based on the currently available evidence (as at 14 February 2023) it was the Authority's preliminary view that the Applicant's claims for a compliance order, interest, a penalty and an award of costs and disbursements in its favour were likely to be successful.

[30] The Authority therefore invited the Respondent to advise it if he had paid any of the money that had been sought by the Applicant in the SoP, and if so to provide proof of that. The Authority also invited the Respondent to explain why the RoS had not been complied with, because that would be relevant to an assessment of the penalty claim and to provide any costs related information he wanted the Authority to consider.

*Ms Pitts-Brown's affidavit*

[31] The Authority determined this matter based on the affidavit evidence lodged by the Applicant's Chief Executive, Ms Sally Pitts-Brown, which was affirmed on 27 February 2023.

[32] Ms Pitts-Brown deposed in her affidavit that clauses 2 and 3 of the RoS had been breached by the Respondent. He had not set up the required direct debit to make the first payment, nor had he set up the automatic payment authority that was required to make the subsequent repayments. That meant the full amount in the RoS was still owed by the Respondent.

[33] The Applicant instructed its lawyers to follow up with the Respondent after he failed to set the first direct debit and the automatic payments.

[34] On Friday 20 May 2022 the Applicant received an email from the mediator that said she had spoken to the Respondent who said he had set up a direct credit. The Applicant instructed its lawyers to follow that up with the Respondent, because he had been required to set up an automatic payment and not a direct credit, because the latter could be stopped at any time.

[35] The first automatic payment due on 26 May 2022 was not received.

[36] On 30 May 2022 the Applicant's lawyers received an email from the mediator saying the Respondent assumed he had set up the payments and had made the first payment, but that he would change the payment type to an automatic payment, with the first payment to be made within 24 hours. That response failed to acknowledge or address the actual problem.

[37] The Applicant's lawyers wrote to the mediator and the Respondent on 31 May 2022 recording that the Applicant had still received no payment and expressing concerns that the Respondent was not taking his legal obligations under the RoS seriously. It was made clear that the Applicant would seek costs from the Respondent if it was forced to pursue legal action regarding his breaches of the RoS.

[38] By 8 June 2022 the Applicant had still not received any payments from the Respondent, or on his behalf. The Applicant's lawyers contacted the Respondent asking him to remedy his breaches of the RoS and advising him that it would be pursuing the matter to the Employment Relations Authority if the payments were not made and the RoS was not complied with, exposing the Respondent to additional penalties and costs.

[39] On 10 June 2022 the mediator emailed the Respondent, copied to the Applicant's lawyers, asking for an urgent response from him in terms of setting up automatic payments and providing confirmation that the missing payments had been made. The mediator repeated that the Applicant could go ahead with seeking penalties and costs regarding his breaches of the RoS and he was asked to contact the Applicant's lawyers about the issue.

[40] The Applicant has lodged with the Authority copies of communications regarding its attempts to engage the Respondent in the Authority process and attempting to get him to pay the money that he owed it under the RoS. Ms Pitts-Brown said that the Respondent's failure to engage in the Authority's investigation has put the Applicant to additional cost, which it sought to recover from him.

[41] Ms Pitts-Brown deposed that the Applicant had made all reasonable efforts, both through its Human Resources team and via legal support, to engage with the Respondent and to try and contact him to remedy his breaches of the RoS. It had also engaged the support of the mediator who had signed the Record of Settlement to raise the breaches with the Respondent before it embarked on lodging these Authority proceedings.

[42] Ms Pitts-Brown pointed out that these issues about non-payment of the amounts owed were first raised with the Respondent in October 2021 and that despite his repeated assertions of an intention from early on to make payments to Pathways, that has still not occurred.

### **Issues**

[43] The following issues are to be determined:

- (a) Did the Respondent breach the Record of Settlement?
- (b) If so, should a compliance order be issued?
- (c) Should a penalty be imposed on the Respondent for breaches of the RoS?
- (d) Should some or all of any penalty imposed be paid to the Applicant instead of, or as well as, the Crown?
- (e) Should Pathways be awarded interest on the money it is owed? and
- (f) What costs and disbursements should be awarded?

### **Did the Respondent breach the Record of Settlement?**

[44] The Respondent has made none of the payments he was required to make under clause 2 of the RoS. Nor did he set up the automatic payment that he was required by clause 3 of the RoS to put in place by 17 May 22.

[45] It is clear that the Respondent breached clauses 2 and 3 of the RoS by failing to make a first payment by direct debit and then by failing to set up an automatic payment to make the regular fortnightly payments by instalments of the money that he owed the Applicant.

[46] The Respondent was on notice of his obligations, because a mediator from Mediation Services signed the RoS under s 149(1) of the Act. Pursuant to s 149(2) of the Act the mediator explained to the parties that the RoS was final, binding and enforceable and the effect of that.

[47] The Respondent signed that he has understood and accepted the RoS.

[48] The mediator's signoff confirmed that she had explained the effect of the agreed terms of settlement to the parties before she had signed it. The mediator also emailed the parties afterwards, repeating that she had made it clear to the Respondent what his obligations were and the consequences if those were not met.

**Should a compliance order be issued?**

[49] The Authority has the jurisdiction under s 137 of the Act to issue a compliance order. This is a discretionary power, that is to be exercised on a principled basis.

*Background to the breaches*

[50] In the more than nine months that have elapsed since the first breach that occurred in May 2022 of the RoS, there has been no communication from the Respondent to suggest that he will meet his obligations under it.

[51] The original non-payment issues regarding the amount owed were raised with the Respondent back in October 2021. The first overpayments made to him in error occurred in June 2021, but because he did not raise that with the Applicant it was unable to immediately rectify the error before a significant overpayment had occurred.

[52] Ms Pitts-Brown recorded in her affidavit that it was unusual for the Applicant to take action against employees, including enforcement action such as this or to seek a penalty against a former employee.

[53] Ms Pitts-Brown pointed out that the nature of the work being undertaken by the Applicant in mental health support services meant that the organisation worked on a high degree of trust with its employees. She said that she took the Respondent at his word when he said he would repay the outstanding debt he owed the Applicant, but has been let down by him.

[54] However, because of the failure to make any payments, and then the lack of communication and engagement by him, she viewed the breaches of the RoS that occurred as serious and believed that no money would be paid unless a compliance order was made.

[55] The terms of the RoS are clear. The Applicant has made numerous attempts to get the Respondent to meet his obligations under the RoS, and he has continued to fail to do so. The intervention of the mediator to encourage him to comply with his obligations was also unsuccessful.

[56] The Respondent has had an opportunity to participate in the Authority's investigation, but elected not to do so. Accordingly, there is no evidence as to why the Respondent has failed to comply with the RoS obligations. Nor has he disputed any of the information filed by the

Applicant in support of its claims for a compliance order, interest and penalties. Ms Pitts-Brown's affidavit dated 27 February 2023 was unchallenged.

[57] The Respondent has failed to take his legal obligations under the RoS seriously, so unless a compliance order was issued it appeared unlikely that the Respondent would pay the Applicant the money he has admitted he owes it.

*Compliance order*

[58] It is therefore necessary and appropriate to order the Respondent to fully comply with all of the terms of the s 149 Record of Settlement the parties signed on 10 May 2022 within 28 days of the date of this determination.

[59] This compliance order means that the full amount of the money owing under clause 2 of the RoS is now payable within 28 days of the date of this determination, because according to the payment schedule in that clause the full amount should have already been paid by now.

[60] The Respondent is also ordered to comply with clause 3 of the RoS by providing the Applicant (meaning the person at the email address recorded in clause 3) with an automatic payment form that provides for the full amount owing under clause 2 of the RoS to have been fully repaid within 28 days of the date of this determination.

*Breach of this compliance order*

[61] If the Authority's compliance order is breached, then the Applicant may apply to the Employment Court to exercise its powers under s 140(6) of the Act. That could include one or more of the following:

- (a) Sentencing the person in default for a term of imprisonment not exceeding three months;
- (b) Ordering a fine not exceeding \$40,000; and/or
- (c) Sequestering property of the person in default.

**Should a penalty be imposed on the Respondent for his breaches of the RoS?**

[62] Section 149(4) of the Act allows the Authority to impose a penalty on a person who breaches a s 149 mediated agreed terms of settlement.

[63] Penalties are imposed to signal disapproval to the party in breach and to others more generally to discourage that type of conduct occurring in future. Parties entering into mediated settlements need to be able to rely on the agreed terms of settlement being fully complied with, and if not then on them being enforced.

[64] The imposition of a penalty is necessary and appropriate in these circumstances where the Respondent has deliberately breached his obligations under the RoS and has failed to remedy those breaches when asked by the mediator, the Applicant and its lawyers to do so.

[65] Penalties are necessary to punish the Respondent and to deter him from continuing to fail to comply with his legal obligations. There is also the need to maintain the confidence of the general public in mediation as an effective problem resolution mechanism, and to deter others who may be inclined to breach their settlement obligations.

#### *The law*

[66] Section 133A of the Act sets out the matters that the Authority must have regard to when assessing penalties. These include:

- (a) The object in s 3 of the Act;
- (b) The nature and extent of the breach or involvement in the breach;
- (c) Whether the breach was intentional, inadvertent or negligent;
- (d) The nature and extent of any loss or damage suffered by any person, or gains made or losses avoided by the person involved in the breach, because of the breach or involvement in the breach;
- (e) Whether the person in breach or the person involved in the breach has paid an amount of compensation, reparation or restitution or has taken other steps to avoid or mitigate any actual or potential adverse effects of the breach;
- (f) The circumstances in which the breach, or involvement in the breach, took place, including the vulnerability of the employee; and
- (g) Whether the person in breach or the person involved in the breach has previously been found by the Authority or Court to have engaged in similar conduct.

[67] The Authority also has regard to the guidance given by the full bench of the Employment Court in *Borsboom v Preet PVT Limited*.<sup>1</sup> This recommended a four step framework for fixing penalties, which has been further expanded on and developed by the Employment Court in *Nicholson v Ford*<sup>2</sup> and *Labour Inspector v Daleson Investment Limited*.<sup>3</sup>

*Preet four step process*

[68] The Employment Court in *Borsboom* set out a four step framework for assessing penalties that consisted of the following:<sup>4</sup>

- (a) Step 1 – identify the nature and number of statutory breaches. Identify each one separately. Identify the maximum penalty available for each breach that may be subject to a penalty. Consider whether global penalties should apply, whether at all or at some stages of this stepped approach.
- (b) Step 2 – assess the severity of the breach in each case and establish a provisional penalty starting point. Consider both aggravating and mitigating features.
- (c) Step 3 – consider the means and ability of the person in breach to pay the provisional penalty arrived at in Step 2.
- (d) Step 4 – apply the proportionality or totality test to ensure that the amount of each final payment is just in the circumstances.

*Nature and extent of the breaches*

[69] The breaches relate to non-payment of an agreed sum that the Respondent acknowledged was outstanding.

[70] The RoS represented full and final settlement between the parties, and was signed by the parties and a mediator from Mediation Services on 10 May 2022. No payments have been made since that time.

[71] The first payment was due to occur on 26 May 2022 by direct credit to the Applicant's bank account, as provided for in a deposit slip that was attached to the Record of Settlement as Appendix A. That did not occur.

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<sup>1</sup> [2016] NZEmpC 43.

<sup>2</sup> [2018] NZEmpC 132.

<sup>3</sup> [2019] NZEmpC 12.

<sup>4</sup> Above n1.

[72] Given that clause 2 of the Record of Settlement provided for 24 equal payments of \$250 per fortnight and the last payment following that, a final payment of \$115.47 the full amount owing should have been repaid by now.

[73] There were 25 breaches which involved the failure to pay the amounts agreed as per the agreed payment schedule in clause 2 of the RoS. There was a further 26<sup>th</sup> breach which involved the Respondent's failure to arrange a for a first direct debit to occur for the first payment which was due by 26 May 2022.

[74] In addition to the 26 breaches of clause 2 that occurred, the Respondent also breached clause 3 of the RoS by failing to set up an automatic payment (which was in addition to the first direct credit which was to have occurred on 26 May 2022) with the named person whose email address was recorded in clause 3 of the RoS. That therefore represents another breach.

[75] In total there have been 27 breaches of the RoS which started from 26 May 2022 and have continued to date. These represent serious and sustained breaches which have extended for a lengthy period of almost 15 months.

*Were the breaches intentional, inadvertent or negligent?*

[76] The breaches were intentional and deliberate.

[77] The Respondent had the effect of the RoS explained to him by the mediator, who certified that she had explained the effect of the RoS to the parties, and that they understood that before signing the RoS. The Respondent also subsequently had his legal obligations pointed out to him again by the mediator, the Applicant and its lawyers after he breached the RoS.

[78] The Respondent entered into the RoS on 10 May 2022 and only seven days later (on 17 May 2023) he had breached it, by failing to set up the automatic payments with the person named in clause 3 of the RoS.

[79] There is no evidence that the breaches arose from financial hardship. The Respondent has failed to make any payments or to engage in any sort of communication with the Applicant, Mediation Services or with the Authority regarding these breaches. There is no information that he is unable to pay the money he is owed, which resulted from overpayments to him.

*Section 3 – object of the Act*

[80] The object of the Act is to build productive employment relationships through the promotion of good faith. Other relevant objects in s 3 of the Act include promoting mediation as the primary problem solving mechanism (s 3(a)(v)) and reducing the need for judicial intervention (s 3(a)(vi)).

[81] The Respondent's actions in entering into the RoS on 10 May 2022 and then breaching it by 17 May 2023, and continuing to breach it to date, fundamentally undermined these objects in s 3 of the Act.

*Loss or damage suffered*

[82] The Respondent's actions have deprived the Applicant of the use of money it should have had available to it in order to provide its services to vulnerable members of the community. By retaining the use of money that he was not legally entitled to, he has effectively deprived vulnerable service users in the community of the benefits that would otherwise likely have been available to them.

*Mitigating/aggravating factors*

[83] The Respondent has taken no steps to mitigate his breaches or the Applicant's loss. He has remained uncommunicative and the breaches have extended well past any reasonable period within which he could have taken good faith steps to resolve matters, or even to make the payments required to the Applicant.

[84] The Respondent has done nothing to meet his obligations, to seek to vary the payment terms by making part-payment of any of the instalments, or to compensate the Applicant or mitigate the adverse effects of his ongoing breaches.

[85] These failures meant the Applicant has had to commit time and resources in applying to the Authority for a compliance order and penalty to recover what it is owed. This is an aggravating factor because the Applicant has therefore not just been inconvenienced by not receiving the payments that were due to it under the RoS.

*Circumstances of the breaches*

[86] These circumstances of the breaches that occurred involved a compromise of the parties' potential legal issues/claims on the basis of an agreed outcome, which the Respondent

immediately breached. Although the Applicant is not a vulnerable employee, it does provide services to vulnerable members of the community, so they have potentially been harmed by these breaches.

*Previous penalties?*

[87] There was no evidence the Respondent has previously had a penalty imposed on him, or has previously breached a RoS.

(i) Application of the Preet four step penalty assessment process

*Step 1 – Nature and number of statutory breaches*

[88] The Respondent has engaged in 27 breaches of a Record of Settlement. The maximum penalty for each breach is \$10,000, because he is an individual.

[89] It is appropriate for penalties to be globalised to reflect that they all involve breaches of a Record of Settlement.

[90] Accordingly, the Respondent's failure to make any payments in accordance with the payment schedule will be treated as one breach, instead of 25 breaches, while the Respondent's failure to set up the payment arrangements (the first direct credit payment due on 26 May 2022 and the automatic payment that was to follow that) will be treated as one breach for the purposes of imposing penalties.

[91] On that basis, after globalisation, this matter involves two penalties, both involving breaches of the Record of Settlement, and both which attract a maximum potential penalty of \$10,000 per breach or up to a maximum total penalty of \$20,000.

*Step 2 – severity of the breaches*

[92] The breaches were serious and sustained. They were deliberate and have continued unmitigated.

*Preet Step 2 – establish a starting point by assessing the severity of the breaches*

[93] The aggravating features include that the first breach occurred so soon after the parties entered into the RoS and that attempts by the Applicant and the mediator to address the breaches went unheeded.

[94] The Respondent's actions were the antithesis of good faith conduct and undermined one of the primary objectives of the Act, which is to encourage the use of mediation to solve employment problems. There are no mitigating features.

[95] The appropriate starting point for assessing penalties is \$6,000.

*Step 3 – means and ability to pay*

[96] There was no evidence the Respondent was unable to pay penalties.

*Step 4 – is the anticipated outcome proportionate to the breaches that have been penalised?*

[97] Step 4 of the *Preet* penalty assessment process requires the Authority to apply the proportionality or totality test to ensure that the penalty imposed is just in all the circumstances.<sup>5</sup>

[98] The Authority considered that a globalised total penalty of \$6,000 should be imposed on the Respondent for all of his breaches of the Record of Settlement.

**Should part of the penalty be paid to the Applicant?**

[99] Penalties are normally payable to the Crown. However, the Authority has a discretion under s 136(2) of the Act to order that some or all of any penalty imposed may be paid to “*any person*”.

[100] It is appropriate to recognise that the Applicant has been adversely affected by the Respondent's breaches. It has had to bring these breaches to the Authority's attention and has had the costs of engaging legal counsel to assist it in addressing the breaches that have occurred.

[101] The Applicant has also had to take on responsibility for arranging for personal service on the Respondent, both two lots of service documents.

[102] The Applicant is not able to be compensated for the stress and inconvenience or any of the adverse effects the Respondent's breaches have had on it. It is therefore appropriate to recognise that by awarding most of the penalty imposed to the Applicant, instead of the Crown.

[103] Accordingly, the Respondent is ordered to pay \$4,000 of the penalty imposed on him to the Applicant, within 28 days of the date of this determination, to recognise the time and

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<sup>5</sup> Above n1, at [151].

effort the Applicant has had to apply to pursuing these breaches, and the fact that it has been harmed by the breaches. The balance of the \$2,000 penalty is to be paid directly to the Crown bank account.

**Should interest be awarded?**

[104] The Authority has the power under clause 11 of Schedule 2 of the Act to order that interest be paid on the whole or part of any money owed.

[105] The Authority is satisfied that there has been longstanding and repeated non-compliance by the Respondent with his obligation to repay the Applicant the money that he was overpaid. It is therefore appropriate for the Respondent to be ordered to pay interest on the money that is outstanding.

[106] The Applicant has been deprived of the use of money that it should have been receiving since 26 May 2022. This has had a detrimental financial impact on its funding and therefore likely services, because the money that was overpaid to the Respondent has not been available to pay the salary of other mental health support workers. The Respondent was put on written notice of his breaches and various attempts were made to obtain payment.

[107] The Applicant's submission that interest should be awarded on the penalties imposed did not succeed. Nor will interest be awarded on costs, although if the costs awarded are not paid then it is open to the Applicant to seek a compliance order and it may seek interest on unpaid costs at that stage.

[108] The Respondent is ordered to pay interest under the Interest on Moneys Claim Act 2016, which is to be calculated in accordance with the Civil Debt Interest Calculator on the Ministry of Justice website.

[109] Interest is ordered to run from 26 May 2023 (being the date by which all of the payments under the Record of Settlement should have been completed) until the full amount outstanding has been repaid, including all interest.

**What costs and disbursements should be awarded?**

[110] The Applicant as the successful party is entitled to an award of costs in its favour.

[111] Costs are assessed in accordance with the Authority's usual notional daily tariff-based approach to costs, which is currently \$4,500 for the first day of an investigation meeting. The Authority will treat this matter as involving a half-day investigation.

[112] The notional starting point for assessing costs is therefore \$2,250.

[113] In its DoA dated 14 February 2023 the Authority invited the Applicant to address the matter of costs. Ms Pitts-Brown addressed costs in her affidavit dated 27 February 2023.

[114] The Authority is not aware of any factors that should result in the notional starting tariff being reduced, and the parties did not identify any. Accordingly, there is no grounds on which to reduce the notional starting tariff.

[115] The Applicant said it has incurred total legal costs of \$7,492.65 excluding GST. This covered the costs associated with addressing the first breach that occurred on 26 May 2022 by raising that with the Respondent and Mediation Services, and instructing its lawyers to pursue the matter. It also included the costs associated with communicating with the Authority and process server to ensure that these proceedings were brought to the Respondent's attention.

[116] The Applicant submitted that the notional starting tariff should be increased to reflect the fact that the Respondent's non-engagement in the Authority's process increased its actual legal costs. That submission was accepted.

[117] The notional starting tariff is increased by \$1,250 to reflect the fact that the Applicant was required to personally serve these proceedings on the Respondent, which resulted in it incurring additional legal costs because its counsel facilitated that for it.

[118] Accordingly, the Respondent is ordered to pay the Applicant \$3,500 towards its actual legal costs. This amount is to be paid within 28 days of the date of this determination.

*What disbursements should be awarded?*

[119] The Applicant is entitled to be fully reimbursed \$377.74 for the disbursements it has incurred in connection with these proceedings. These consist of:

- (a) \$71.55 – Authority filing fee;
- (b) \$176.53 – process server cost of personally serving Statement of Problem; and

- (c) \$129.66 – process server invoice for serving the second lot of service documents.

**Outcome**

[120] Within 28 days of the date of this determination, the Respondent is ordered to:

- (a) Comply with the RoS, which includes paying the full amount owing;
- (b) Pay the Applicant interest on the amount owing from 26 May 2023 until all money owing, including interest, has been fully repaid;
- (c) Pay a total penalty of \$6,000, apportioned as follows:
  - (i) \$4,000 to the Applicant; and
  - (ii) \$2,000 to the Crown bank account;
- (d) Pay a contribution of \$3,500 towards the Applicant's actual legal costs; and
- (e) Pay the Applicant \$377.74 to reimburse it for its disbursements.

Rachel Larmer  
Member of the Employment Relations Authority