



Employment Court of New Zealand

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Phoenix Publishing Limited v Thompson [2019] NZEmpC 185 (12 December 2019)

Last Updated: 17 December 2019

IN THE EMPLOYMENT COURT OF NEW ZEALAND AUCKLAND

I TE KŌTI TAKE MAHI O AOTEAROA TĀMAKI MAKĀURAU

[\[2019\] NZEmpC 185](#)

EMPC 86/2019

IN THE MATTER OF a challenge to a determination of
the Employment Relations
Authority
BETWEEN PHOENIX PUBLISHING LIMITED
Plaintiff
AND JOY THOMPSON
Defendant

Hearing: On the papers
Appearances: No appearance for Phoenix Publishing
Ltd G Ogilvie, advocate for J Thompson
Judgment: 12 December 2019

JUDGMENT OF JUDGE K G SMITH

[1] On 4 March 2019 the Employment Relations Authority considered an application for a compliance order and penalty by Joy Thompson against Phoenix Publishing Ltd. The Authority held that Phoenix Publishing had breached the employment agreement with Ms Thompson by underpaying her salary to the amount of \$4,383.52.1

[2] Compounding that underpayment, the Authority concluded that the company had not paid Ms Thompson her holiday pay in breach of [s 27](#) of the [Holidays Act 2003](#).

1 *Thompson v Phoenix Publishing Ltd* [\[2019\] NZERA 117](#).

PHOENIX PUBLISHING LIMITED v JOY THOMPSON [\[2019\] NZEmpC 185](#) [12 December 2019]

[3] As a result of those findings the Authority imposed a penalty on Phoenix Publishing of \$15,000 payable within seven days.2 Half of that amount was payable to Ms Thompson.

[4] On 29 March 2019 Phoenix Publishing challenged the determination. It did not seek a full hearing, confining its case to whether the Authority had jurisdiction to impose a penalty.

[5] Two reasons were pleaded in the statement of claim to support the challenge. The first of them was a claim that, at the time the Authority made its decision, there was no breach of any employment agreement because the defendant's "cause of action had merged with the Authority's earlier oral determination...". The second reason was a claim that the Authority confused non-compliance with the employment agreement and non-compliance with its own determination. The relief sought was to set aside the Authority's determination and costs.

[6] At the time the challenge was filed Phoenix Publishing was represented by a firm of solicitors. On 4 October 2019 an order was made declaring that the solicitors had ceased to be the solicitors on the record for Phoenix Publishing. No progress at all was made in advancing Phoenix Publishing's challenge to a hearing before the company's solicitors withdrew and none has been made since then. The activity has been confined to telephone directions conferences, conducted on 25 July 2019 and 20 September 2019, concerned with the application by Phoenix Publishing's then solicitors seeking to

withdraw.

[7] A further telephone directions conference was convened on 21 November 2019 to deal with this proceeding, and related proceedings by Ms Thompson against Phoenix Publishing as well as another proceeding brought by a former employee against the company.³ Phoenix Publishing was notified about that conference but did not participate in it and has not subsequently taken any steps in the proceeding.

² By reference to *Labour Inspector v Preet PVT Ltd* [2016] NZEmpC 143, [2016] ERNZ 514.

³ EMPC 189/2019 and EMPC 120/2019.

[8] On 21 November 2019 a minute was sent to Phoenix Publishing recording that it had not appeared at the telephone directions conference and drawing to its attention that the proceeding had not progressed beyond the filing of the statement of claim in March 2019. The minute advised the company that, if it did not wish to proceed, prompt steps needed to be taken to bring the litigation to an end. The minute noted that, if the company intended to continue with the proceeding, action needed to be taken so that directions for a hearing could be made.

[9] The minute included an order for a further telephone directions conference to take place on Thursday 12 December 2019 at 2.15 pm. Phoenix Publishing was advised that if it did not participate in that conference it ran the risk that the proceeding would be struck out for want of prosecution.

[10] The conference was convened today at 2.15 pm. There was no appearance for Phoenix Publishing. The situation created by this unexplained inactivity over approximately nine months, with no indication that any steps are to be taken in future, is unsatisfactory. The defendant should not be burdened with continuing uncertainty about the litigation. I am satisfied that the appropriate course is for the proceeding to be struck out for want of prosecution and ordered accordingly.

[11] Costs are reserved. If an application is to be made that can be done by memorandum filed within 20 working days.

K G Smith Judge

Judgment signed at 3.30 pm on 12 December 2019