

[2] Mr Pietersen applied for a compliance order in early October 2010 when FFBL was nine weeks in arrears on those instalments and had paid less than half of the amount due by that time.

[3] In its statement of reply FFBL proposed varying the weekly instalments to a lesser amount due to “*a serious downturn in business and a loss of several staff members*”.

[4] The parties were directed to mediation but did not resolve the matter.

[5] After an Authority investigation meeting was notified, FFBL director Craig Draper wrote to the Authority advising that FFBL accepted Mr Pietersen was entitled to a compliance order as the time for paying the entire sum set out in the settlement agreement had expired.

[6] Further correspondence between the parties did not resolve the matter and I proceeded with the investigation meeting. No representative of FFBL attended and I had a support officer of the Authority telephone Mr Draper. I was advised that Mr Draper confirmed he understood the Authority could proceed to determine the application for a compliance order and costs, which is what I have done.

Compliance order

[7] Under affirmation Derick Pietersen told me \$10,000 remained due to him under the settlement agreement. He is entitled, as accepted by FFBL, to an order for compliance with that agreement. Accordingly FFBL is ordered, under sections 137 and 138 of the Act, to pay to Mr Pietersen within 14 days of the date of this determination the sum of \$10,000 in compliance with the terms of the agreement.

Interest

[8] Under the terms of the agreement Mr Pietersen should have received the last weekly instalment payment by 9 November 2010. From that date at the very latest he has been put out of the use of \$10,000 due to him. He sought an order for interest and

I think it fit that he should have interest on that amount from 9 November 2010 to the date of payment. The order for interest is made under clause 11 of Schedule 2 of the Act and the annual rate of interest is 5.19 per cent (being today's 90-day bill rate plus two per cent).

Costs

[9] Mr Pietersen, through his representative Ms Hartdegen, sought an order for costs above the usual daily tariff awarded by the Authority. Ms Hartdegen submitted the order for costs should be on a solicitor-client basis because of the seriousness of breaching a settlement agreement made under s149 of the Act and the extensive efforts made in pursuing the overdue payments. These efforts required time in dealing with Mr Draper, another person acting sometimes as a consultant for FFBL and a solicitor who had acted for FFBL for some purposes.

[10] Ms Hartdegen advised that Mr Pietersen's costs on the compliance matter from late July 2010 to 17 February 2011, based on her hourly rate of \$400 plus GST, totalled \$4953. He also sought costs for her attendance at the investigation meeting, which took less than one hour.

[11] In considering whether costs have been reasonably incurred the Authority does not include time taken in mediation and, usually, does not allow for hourly rates over \$250. Making those adjustments in this case I consider reasonably incurred costs total \$2500. Such an amount is more than would typically be awarded under the Authority's usual tariff however that notional daily rate is to be applied flexibly and may be adjusted upwards or downwards according to the particular circumstances of the case.¹

[12] I do not accept Ms Hartdegen's submission that FFBL's conduct in this matter warrants an award of costs on a solicitor-client basis but I do consider the following factors require an upward adjustment of the typical tariff (which would otherwise have resulted in an award of around \$1000 for this matter).

¹ *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808.

[13] Firstly, FFBL unnecessarily increased costs incurred by Mr Pietersen by seeking to have the agreed terms reviewed by the Authority with a proposal to vary the level of instalments required by the settlement agreement. It abandoned that proposal in a letter to the Authority in February 2011.

[14] Secondly, a breach of a settlement agreement made under s149 of the Act is a serious matter. Such an agreement is stated by statute to be final, binding and enforceable. Under s140(4) of the Act FFBL was liable to a penalty for its breach, which most likely would have been imposed if sought by Mr Pietersen. While costs cannot be a substitute for such a penalty, neither should Mr Pietersen have needed to incur further legal expenses to recover money due to him and thereby reduce the value of settlement to which he had, in good faith, previously agreed.

[15] In the particular circumstances I have made an upward adjustment of the usual tariff and ordered FFBL to pay \$2000 as a reasonable and modest contribution to Mr Pietersen's reasonably incurred costs in this matter.

[16] FFBL must also reimburse Mr Pietersen for the fee of \$70 incurred in lodging his application in the Authority.

Robin Arthur
Member of the Employment Relations Authority