

**NOTE: This determination
contains an order prohibiting
publication of certain
information**

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2024] NZERA 513
3297439

BETWEEN RBB
Applicant

AND BEANNCO THE PALMS
LIMITED
Respondent

Member of Authority: Helen Doyle
Representatives: RBB in person
No appearance by the Respondent
Investigation Meeting: 26 August 2024 in Christchurch
Determination: 27 August 2024

DETERMINATION OF THE AUTHORITY

Prohibition from Publication

[1] The applicant and their former employer Beannco The Palms Limited (Beannco) entered into a record of settlement under s 149 of the Employment Relations Act 2000 (the Act). The record of settlement was certified by a mediator employed by the Chief Executive of the Ministry of Business, Innovation and Employment (MBIE) and is dated 18 December 2023.

[2] Beannco is a duly incorporated company having its registered office at Christchurch and carrying on business as a coffee shop.

[3] Clause 1 of the record of settlement provided that the terms of settlement and all matters discussed in mediation would remain “strictly confidential” to the parties.

[4] The Authority discussed with the applicant whether he wanted an order for permanent non-publication of his name. He confirmed that he did. Such an order would accord with the strict confidentiality that the parties agreed attaches to the record of settlement.

[5] I make a permanent non-publication order in respect of the applicant's name and any identifying details. I shall refer to the applicant by way of a random computer-generated string of letters as RBB.

[6] The terms of the record of settlement are also prohibited from publication except to the extent referred to in this determination.

The Authority process

[7] Beannco has not participated in the Authority process.

[8] The Authority attempted to contact the sole director of Beannco, Abel Goremusandu, on a cell phone number that had been provided by RBB for the case management conference but there was no answer.

[9] I am satisfied that there has been service at the registered office of Beannco of the statement of problem, notice of directions and notice of investigation meeting. The registered office is the same address as the address for service.

[10] Photographs have been provided confirming that the documents referred to above were put under the door of the now vacant premises. I am satisfied that service of the investigation meeting notice took place on 9 August 2024 which is more than seven days before the investigation meeting.

[11] The Authority also attempted service on Mr Goremusandu at the address shown on the companies register but the documentation was returned to the Authority.

[12] The Authority delayed the start of the investigation meeting for ten minutes but there was no appearance on behalf of the company.

[13] In the absence of a good cause being shown as to why there was no appearance on behalf of Beannco the Authority proceeded to hear evidence from RBB.¹

¹ Employment Relations Act 2000 schedule 2 clause 12.

The Issues

[14] The Authority needs to determine the following issues.

- (a) Did Beannco breach the record of settlement?
- (b) If there is a breach established should an order for compliance be made?
- (c) Should a penalty be awarded?
- (d) If a penalty is ordered then who should it be payable to?
- (e) Should reimbursement of the filing fee be ordered.

Did Beannco breach the record of settlement?

[15] RBB says that there was a failure by Beannco to comply with clause 4 of the settlement agreement dated 18 December 2023.

[16] Clause 4 provides as follows:

Following this settlement being signed by both parties and the mediator, the Employer shall, without admission of liability, pay RBB the sum of \$7,000 without deduction in terms of the provisions of s 123(1)(c)(i) of the Employment Relation Act 2000. This amount will be paid in 4 instalments over 4 months as set out below and each instalment will be paid by way of direct credit into RBB's nominated bank account, bank account number

- (1) First payment of \$1,750 on 27 December 2023
- (2) Second payment of \$1,750 on 27 January 2024
- (3) Third payment of \$1,750 on 27 February 2024
- (4) Fourth and final payment of \$1,750 on 27 March 2024

[17] RBB said in his evidence there was compliance with clause 4 to the extent that the first payment of \$1,750 was made on 27 December 2023. When further payments were not received on the due dates RBB emailed the mediator who then emailed Mr Goremusandu on or about 2 February 2024. RBB said that there was agreement by Mr Goremusandu to make two payments to cover January and February on 27 February 2024 but the payments were not received on that date. The final payment due in March 2024 has not been received.

[18] RBB confirmed in his evidence that three payments of \$1,750 due on 27 January, 27 February and 27 March 2024 have not been made in accordance with the record of settlement as at the date of the investigation meeting.

[19] The record of settlement was breached by Beannco because payment was not made in accordance with clause 4 of the settlement agreement.

Should an order for compliance be made?

[20] The Authority has the power under s 137(1)(iii) of the Act to order compliance with any agreed terms of settlement that s 151 provides may be enforced by a compliance order. This includes agreed terms of settlement that are enforceable by the parties under s 149(3) of the Act as in this matter.

[21] It is appropriate to make an order for compliance by Beannco with clause 4 of the record of settlement and order payment of the balance of money owing in the sum of \$5250 within two weeks of the date of this determination.

Should a penalty be imposed?

[22] Section 149(4) of the Act provides that a person who has breached an agreed term of settlement is liable to a penalty imposed by the Authority.

[23] Section 135(2) of the Act provides that a company may be liable for a penalty not exceeding \$20,000. That is the maximum penalty for a breach.

[24] Section 133A of the Act sets out the matters the Authority must have regard to in determining the amount of a penalty if it decides a penalty should be imposed.

[25] In determining whether or not a penalty should be imposed I have had regard to the object of the Act which is to promote good faith in all aspects of the employment environment and relationship. This can be achieved in a number of ways but includes the promotion of mediation as a primary problem-solving mechanism. It is important to uphold the integrity of the records of settlement that are entered into using such a process. It is in the public interest that there is confidence in using the mediation service as a primary problem-solving mechanism. It is appropriate to impose a penalty in the circumstances where there has been a breach of a record of settlement. I shall now proceed to consider the amount of the penalty.

[26] I conclude the breach was deliberate. A considerable amount agreed to be paid in the agreement was not paid. There was no communication by Beannco about the failure to pay to RBB except to the extent that Mr Goremusandu promised the mediator

there would be payment of two amounts on 27 February 2024 but that promise was not adhered to.

[27] RBB had lodged proceedings with the Authority which were withdrawn in accordance with the record of settlement. RBB explained that he had experienced financial stress when the money was not paid. RBB's parents had paid some of the original legal fees in relation to pursuing the matter which resolved by way of settlement agreement and there are still amounts owing to them.

[28] RBB has also been impacted because the sense of validation he felt at the time the record of settlement was entered into has diminished because of the failure to pay.

[29] I accept that RBB has suffered hardship as a result of the breach.

[30] I am guided by awards made in similar circumstances. I award a penalty in the sum of \$5000.

Who should the penalty be paid to?

[31] Under s 136(1) of the Act the Authority must order the penalty payable to the Crown subject to subsection (2). Section 136(2) provides the Authority may order that the whole or any part of the penalty must be paid to any person.

[32] RBB has suffered harm as a result of breach that is not compensated for by ordering compliance alone.

[33] I conclude it appropriate for 75 percent of the penalty to be paid to RBB and 25 percent to be paid to the Crown.

Reimbursement of the filing fee

[34] RBB confirmed there had been no legal fees incurred with this matter but there has been payment of the filing fee which RBB is entitled to be reimbursed for.

Findings and orders made

[35] The following findings and orders have been made:

- (a) The Authority has found a breach of clause 4 of the record of settlement dated 18 December 2023 by Beannco The Palms Limited.

- (b) Beannco The Palms Limited is ordered to comply with clause 4 of the record of settlement and pay to RBB the sum of \$5250 within two weeks of the date of this determination. Payment is required by 10 September 2024.
- (c) The Authority has ordered a penalty payable of \$5000 for the breach of the record of settlement.
- (d) The Authority orders that Beannco The Palms Limited pay \$3750 of the penalty to RBB and \$1250 to be paid into the Crown bank account within 20 days from the date of this determination.
- (e) Beannco The Palms Limited is ordered to pay to RBB the sum of \$71.55 being reimbursement of the filing fee.

Helen Doyle
Member of the Employment Relations Authority