

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

[2012] NZERA Christchurch 56  
5371305

BETWEEN	REBECCA RAPSON Applicant
A N D	ASHBURTON HOSPITALITY LIMITED Respondent

Member of Authority:	David Appleton
Representatives:	Sam Guest, Counsel for Applicant Lesley Brook, Counsel for Respondent
Investigation meeting:	Determined on the papers by consent
Submissions Received	27 March 2012 from Applicant None received from the Respondent
Date of Determination:	3 April 2012

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1] Ms Rapson seeks a Compliance Order in respect of payment of monies due under the terms of a settlement agreement between the parties dated 18 November 2011.

[2] The settlement agreement had been entered into between the parties in order to settle an employment relationship problem and provided, inter alia, that the respondent would pay Ms Rapson two separate amounts; a compensatory sum within 7 days and a further amount of \$2,800 plus GST in respect of a contribution to legal costs incurred by Ms Rapson.

[3] Ms Rapson's claim is that she has been paid the compensatory sum, but not the sum of \$2,800 plus GST.

[4] The Statement of Problem was presented to the Authority on 20 February 2012. Ms Brook of Anderson Lloyd Lawyers communicated with the Authority by email on 9 March 2012 stating that her instructions from the respondent were not to file a Statement in Reply, but that the respondent did not consent to judgement being entered.

[5] A directions conference was held with the parties' representatives by way of telephone on 16 March 2012 in which Ms Brook confirmed that she had been instructed not to file a Statement in Reply and that she had no instructions as to whether the respondent had a defence to the claim.

[6] The parties agreed that the matter would be determined on the papers, and so the Authority directed Ms Rapson to lodge an affidavit in support, together with written submissions, by 23 March 2012, and the respondent to lodge an affidavit in reply, together with written submissions, by 30 March 2012. Ms Rapson's affidavit and written submissions from her counsel were received within the stipulated time but no affidavit or submissions were received from the respondent. Accordingly, I make the following findings on the evidence before me.

### **Findings**

[7] The settlement agreement is signed by Ms Rapson and the respondent, and has been endorsed by a mediator of the Department of Labour pursuant to s. 149 of the Employment Relations Act 2000.

[8] Ms Rapson deposes that she provided the Respondent with a tax invoice through her solicitor on 24 November 2011 in the sum of \$2,800 plus GST (totalling \$3,220). Ms Rapson received the compensatory sum from the respondent on 25 November 2011 and instructed her solicitor to deduct the firm's fee from that sum.

[9] The wording of the settlement agreement in respect of the payment of a contribution to Ms Rapson's legal costs states as follows:

*The respondent will pay legal costs in the amount of \$2,800 (two thousand eight hundred dollars) plus GST, upon receipt of an invoice.*

[10] The term of the agreement therefore stipulates that payment should have been made as soon as the invoice was received.

[11] Various email exchanges between Mr Guest, counsel for Ms Rapson, and Ms Brook were exhibited to Ms Rapson's affidavit. These show that, on 25 November 2011, Mr Guest asked Ms Brook by email to confirm that payment of the compensatory sum would be paid that day by the respondent. Ms Brook replied that it would, and stated *your costs will be paid on 20<sup>th</sup> of the month with other November invoices.*

[12] On 29 November, Mr Guest wrote to Ms Brook stating that her client's proposal to delay payment of the legal costs was not acceptable and that it was in breach of the settlement agreement. He asked Ms Brook to confirm that payment would be made before the end of the month, stating that, if it was not, he would enforce the terms of the settlement agreement on behalf of Ms Rapson. Ms Brook does not appear to have replied.

[13] On 6 December 2011, Mr Guest threatened to issue a statutory demand against the respondent. Again, Ms Brook appears not to have responded. On 20 December 2011, the date originally stated by Ms Brook as to when payment would be made, Mr Guest emailed Ms Brook asking her to ensure that her client attended to payment of the invoice that day. Again, no reply appears to have been made.

[14] On 21 December 2011 Mr Guest wrote to Ms Brook stating that no payment had been received, that he had no doubt that the Authority would impose a penalty and that her client's actions were adding to Ms Rapson's distress. He asked for her to tell him her client's intentions urgently. Again, no response appears to have been made by Ms Brook.

[15] On 17 January 2012, Mr Guest again emailed Ms Brook asking what her client's intentions were, and again stating that they were considering legal action to recover the sum owed. Ms Brook replied on 23 January 2012 as follows:

*I have just returned to work today and referred your email to my client. The company was expecting funds to be available in December from sale of a property but unfortunately settlement of that transaction was delayed until January so payment will be made this month instead.*

[16] No payment having been received, Ms Rapson then lodged her Statement of Problem.

[17] Section 137 of the Employment Relations Act 2000 empowers the Authority to order compliance where any person has not observed or complied with any provision of any terms of settlement. (S.137 (1) (a) (iii)). Where section 137 applies, the Authority may, by order, require a person to do any specified thing or to cease any specified activity, for the purpose of preventing further non-observance of or non-compliance with that provision.

[18] The respondent has not disclosed any reason for non compliance with the term of the settlement agreement requiring it to pay to Ms Rapson the sum of \$3,220. One may possibly infer from the email from Ms Brook, cited in paragraph 15 above, that the company may have been suffering financial difficulties, but without any direct evidence on the point, which the respondent has had ample opportunity to produce, I am not prepared to speculate on that. The only reasonable inference that I can draw is that the failure to pay the sum owed is deliberate and without reasonable excuse.

[19] Accordingly, I order the respondent to comply with the term of the settlement agreement under which the respondent must pay to Ms Rapson the sum of \$3,220. The respondent is to pay this sum to Ms Rapson within seven days of the date of this determination.

### **Interest**

[20] Ms Rapson did not originally ask in her statement of problem for interest to be ordered against the respondent, but seeks leave to amend it through Mr Guest's submissions to seek interest. Clause 11 of the second schedule of the Act states that, in any matter involving the recovery of any money, the Authority may, if it thinks fit, order the inclusion, in the sum for which judgment is given, of interest, at the rate prescribed under section 87(3) of the Judicature Act 1908, on the whole or part of the money for the whole or part of the period between the date when the cause of action arose and the date of payment in accordance with the determination of the Authority.

[21] Under the circumstances, where I can see no reasonable excuse for payment of the sum owing, and in the absence of any submissions to the contrary, I am persuaded to grant leave to amend the statement of problem, and further, to award the payment of interest at the rate of 5% per annum, payable on the sum of \$3,220, to run from 25 November 2011, the date following the day on which the invoice was provided to the respondent via its solicitor, until payment of the sum in full.

**Penalty**

[22] Ms Rapson seeks a penalty against the respondent for non payment of the sum owing. S. 149 (4) of the Act provides that a person who breaches an agreed term of settlement to which subsection (3) applies is liable to a penalty imposed by the Authority. I am satisfied that subsection 149 (3) applies to the settlement agreement in question. A penalty of up to \$20,000 may be ordered against a company.

[23] Counsel for Ms Rapson refers to the Employment Court case of *Xu v McIntosh* [2004] 2 ERNZ 448, which held that, in considering the appropriate penalty to impose:

*..the first question to ask is how much harm has the breach occasioned. Further, how important was it to bring home to the party in default that such behaviour was unacceptable, or to deter others from it? The next question, which focused on the perpetrator's culpability, was: was the breach technical and inadvertent, or was it flagrant and deliberate? In deciding whether any part of the penalty was to be paid to the victim of the breach, regard was to be had to the degree of harm that the victim suffered as a result of the breach.*

[24] Ms Rapson deposes that she settled at mediation at a level which was significantly less than she believed she may have been awarded through the Employment Relations Authority, but she made the concession thinking that everything would be settled and she could move on with her life. She also deposed that she had made travel arrangements at Christmas on the expectation of receiving the \$3,220 owed to her, having already paid her solicitor's fees, and as a result of the respondent's failure to pay her the contribution to her legal costs they had agreed to, she had to borrow money from friends and family. She also had to keep asking her solicitor to chase for payment. I am therefore satisfied that she was occasioned a reasonable level of harm by the non payment of the sum owed.

[25] Turning to the next question of the perpetrator's culpability, in the absence of any excuse tendered by the respondent, I am satisfied that the breach of the settlement agreement was flagrant and deliberate.

[26] I also take on board the submission of Ms Rapson's counsel that the public need to have confidence that mediated settlements are enforceable and will be abided by.

[27] Taking all these factors into account, I am satisfied that the award of a penalty against the respondent is justified. I believe that the sum of \$5,000 is a reasonable sum to reflect the degree of culpability, and that \$3,000 of this should be paid to Ms Rapson, the remaining \$2,000 to the Crown.

### **Summary**

[28] The respondent is ordered to pay:

- a.* To Ms Rapson, the sum of \$3,220 within 7 days of the date of this determination, together with interest upon that sum calculated at the rate of 5% per annum, accruing from 25 November 2011 until the date that the sum of \$3,220 is paid in full;
- b.* A penalty payment of \$5,000, of which \$3,000 is to be paid to Ms Rapson, the balance to the Crown.

### **Costs**

[29] I agree with Ms Rapson's counsel that it is appropriate for costs to be awarded against the respondent. Ms Rapson's counsel states that costs in the sum of \$1,720 plus GST have been incurred as a result of the respondent's non payment of the sum owing, together with disbursements in the sum of \$28.80. A filing fee will also have been incurred by Ms Rapson in the sum of \$71.56.

[30] However, counsel for Ms Rapson did not provide any breakdown of the \$1,720 costs or the \$28.80 disbursements, and so he should provide to the Authority and to counsel for the respondent within 14 days of the date of this determination a written breakdown of those costs claimed by reference to time spent and activities undertaken. The respondent will have a further 14 days from receipt of the breakdown to serve and lodge any submissions in opposition. I will then consider what amount it is reasonable to order be paid against the respondent.