**IN THE EMPLOYMENT RELATIONS AUTHORITY**
**CHRISTCHURCH**

[2012] NZERA Christchurch 194
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| | BETWEEN | COLIN STEVENSON<br>Applicant |
| | A N D | R R FISHER & COMPANY LIMITED<br>Respondent |

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| Member of Authority: | David Appleton |
| Representatives: | Phil Butler, Advocate for Applicant<br>Richard Fletcher, Advocate for Respondent |
| Investigation meeting: | 6 September 2012 at Christchurch |
| Submissions Received | 6 September 2012 |
| Date of Determination: | 7 September 2012 |

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**DETERMINATION OF THE AUTHORITY**

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**A. A penalty of $1,000 is awarded against the respondent, payable to the applicant.**

**B. Costs are reserved.**

**Employment Relationship Problem**

[1] Mr Stevenson seeks a penalty of $5,000 against the respondent in relation to an alleged failure to comply with the terms of a mediated settlement agreement, pursuant to s.149(4) of the Employment Relations Act 2000 (the Act).

**The evidence**

[2] The parties entered into a record of settlement dated 26 April 2012 which, inter alia, contained the following terms:

> *2 R R Fisher & Co Ltd shall pay Colin Stevenson within 7 days of the date hereof, the compensatory sum of $2,800.00 in*

*terms of s.123(1)(c)(i) of the Employment Relations Act 2000. This amount shall be paid by way of direct credit.*

*3* *R R Fisher & Co Ltd will pay legal costs of $2,200.00 plus GST on receipt of a tax invoice for the same.*

[3] The agreement was signed by Mr Stevenson and Mr Fletcher on behalf of the company and also by Mr Winchester, a mediator employed by the Chief Executive by the Department of Labour (as it was then known).

[4] The compensatory sum of $2,800 was due to be paid by direct credit by no later than 3 May 2012 in accordance with clause 2. The evidence of Mr Stevenson's wife, Jan, which was confirmed by a copy of Mr Stevenson's bank account, was that the sum was not received by Mr Stevenson until 24 May 2012. Mrs Stevenson said that, around 20 May, a cheque in the sum of $2,800 had been received from Mr Fletcher, the manager in charge of the Christchurch branch of the respondent company, in the sum of $2,800 but that no letter accompanied it and, as the record of settlement required payment by direct credit, Mr Stevenson declined to accept it.

[5] Evidence was given by Ms Genet, Mr Butler's office manager, that she raised an invoice in the sum of $2,200 plus GST in respect of the legal costs agreed by the respondent on 30 April 2012. She stated in evidence that she had emailed this invoice to the company and to the company's representative, Mr Macdonald. Ms Genet said that the company had not been finally paid until 5 June 2012. Mr Stevenson had already paid Mr Butler's fee and so Mr Stevenson did not receive reimbursement of the legal costs until shortly after 5 June.

[6] Ms Genet's evidence was that, when she was dealing with the company, Mr Fletcher had been abrupt and not willing to converse with her. She stated that she had been directed to the Auckland office of the company and that she had spoken to someone in *accounts payable* who had been confused and did not have authority to pay the sums due. Ms Genet had also spoken to the owner of the company, Mr Fisher, in Auckland who had told her that *the money was being sorted out* and that Mr Fletcher, from the Christchurch office, would be sending a cheque. Ms Genet said she had told Mr Fisher that a cheque was not to be sent as the record of settlement required payment by direct credit. Her evidence was that Mr Fisher did not listen to her.

[7] Mr Fletcher's evidence was that the company has no issues that the money was owing and understood that the compensatory sum was payable within seven days but that he had asked Auckland to deal with it (specifically, he had asked Mr Fisher) and that he had assumed that it would be sorted out. Mr Fletcher also gave evidence that the Christchurch office was very short staffed at the time with only 50% of its normal staff and that he simply did not have time to chase up the account. He also said that the late payments had been an oversight.

[8] The Authority saw copies of email correspondence between Mr Butler's office and the company's representative and it is clear that the company's representative was passing on messages to the company chasing payment. (The company's representative was copying Ms Genet into his emails with his client, the company, and so insofar as any issues of legal privilege arises from this evidence, I believe that they have been waived by Mr Macdonald copying in Mr Stevenson's representatives.)

[9] Mr Fletcher's evidence was that, as soon as he was reminded about payment of the compensatory sum, he in turn reminded Auckland. It is certainly clear from the copy email correspondence that Mr Fletcher did not ignore the messages.

[10] With respect to late payment of the legal fees, Mr Fletcher was unable to explain why the Auckland office took so long to pay them and said that he believed that, eventually, he had had to write a cheque in order to get them paid even though the responsibility lay with the Auckland office.

**Determination**

[11] Section 149(4) of the Act states:

> *A person who breaches an agreed term of settlement to which subsection 3 applies is liable to a penalty by the Authority.*

[12] Section 149 makes clear that its provisions relate to a settlement that has been signed by a mediator who is employed or engaged by the chief executive of the Department of Labour (now the Ministry of Business, Innovation and Employment). I am satisfied that the record of settlement between the parties comes within the scope of s. 149 and that the penalty provision therefore applies to it.

[13] It is clear that the terms of the settlement agreement dated 26 April 2012 between the parties were breached by the respondent. They were breached in two separate respects:

(a) The compensatory payment of $2,800 which was due to be paid by no later than 3 May 2012 was paid 21 days late;

(b) The legal costs of $2,200 plus GST were due to be paid *"on receipt of the tax invoice for the same"*. The invoice is likely to have been received by the company on 30 April 2012 but payment was not received by Mr Butler's office until 5 June 2012.

[14] Arguably, there was an attempted further breach when the company sought to pay the compensatory sum by cheque instead of direct credit.

[15] Whilst Mr Fletcher's evidence was that the breach was not wilful, he was not able to give a clear account of the reasons for the breaches as it was the responsibility of the Auckland office to make the payments and no representative of the Auckland office was present at the Authority's investigation. It appears to me that Mr Fletcher probably did what he reasonably could under the difficult circumstances he was facing in the Christchurch office to get payment made, but that his hands were tied because payment could only be practically made from the Auckland office. (Mr Fletcher had explained that the Christchurch office did not have the funds to make the payments required.)

[16] Overall, it is my conclusion that the company (as opposed to Mr Fletcher) did not make sufficient effort to ensure that it had complied with its obligations under the record of settlement and that, even after it had been reminded of its obligation on 17 May, it was not until 24 May that payment was finally received by Mr Stevenson. Therefore, it is my conclusion that there is no reasonable excuse for the late payment of the compensatory sum.

[17] Furthermore, there is no explanation at all before the Authority as to why the company failed to pay the legal costs until over a month after they had become due for payment.

[18] In conclusion, therefore, I determine that it is appropriate for a penalty to be paid by the respondent company.

[19] Mr Butler, on behalf of Mr Stevenson, asks that the penalty be in the sum of $5,000, all of which should be paid to Mr Stevenson. Section 135(4) of the Act states that, in any claim for a penalty, the Authority may give judgment for the total amount claimed, or any amount, not exceeding the maximum specified in subsection (2). Subsection (2) stipulates that, in the case of a company or other corporation being liable for a penalty, the maximum is $20,000.

[20] In his oral submissions, Mr Butler suggested that this case was similar to the cases where an employee breaches the duty of confidentiality in a record of settlement. With respect, I disagree, as a breach of confidentiality is irreversible. Once confidential information has been disclosed, it cannot be taken back. In this case, however, the breaches were finally rectified.

[21] I am also mindful that Mr Stevenson did not ask Mr Butler's office to chase the late payment of the compensatory sum until 17 May, two weeks after it had fallen due. Payment of the compensatory sum was then paid within seven days, with an attempt made to pay it earlier (by cheque).

[22] Payment of the invoice was just over one month late. These are not very significant lengths of time and I do not believe that a penalty of $5,000 is merited. However, I am mindful that any wilful breach of a settlement agreement has the potential to undermine the confidence that parties to mediated settlements have in the process. I am also mindful that one of the objects of the Act (in s.3(a)(v)) is to promote mediation as a primary problem-solving mechanism. Therefore, I believe that it is appropriate to award more than a nominal sum.

[23] Taking all these factors into account, I believe that it is appropriate to fix the penalty at $1,000, all of which should be payable to Mr Stevenson.

**Costs**

[24] The parties should seek to agree how Mr Stevenson's legal costs are to be dealt with. In the absence of an agreement within 28 days of the date of this determination, Mr Butler is to serve and lodge a memorandum in respect of the contribution to costs sought from the company and the company shall have a further 28 days from receipt of that memorandum to serve and lodge a reply.

David Appleton
Member of the Employment Relations Authority