IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

AA 392/08
5131151

	BETWEEN	ROGER (LUCKY) TE TUHI Applicant
	AND	SILVER FERN FARMS LIMITED Respondent

Member of Authority:	Marija Urlich
Representatives:	Helen White, for Applicant Tim Cleary, for Respondent
Investigation Meeting:	15 October 2008
Determination:	17 November 2008

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] On 11 June 2008 Mr Te Tuhi and Silver Fern Farms entered a record of settlement pursuant to section 149(1) and (3) of the Employment Relations Act 2000. Clause 3 provided that Silver Fern Farms would pay Mr Te Tuhi $6000 within seven days of that date.

[2] On 22 July Mr Te Tuhi filed an application in the Authority seeking compliance orders and a penalty in relation to the record of settlement, specifically failure to pay the $6000.

[3] The basis for the compliance order has fallen away; Silver Fern Farms paid the $6000 to Mr Te Tuhi in September. The issue for determination is whether a penalty should be imposed by the Authority pursuant to section 149(4) of the Act.

[4] Mr Te Tuhi says the breach of the record of settlement was flagrant and a penalty is warranted.

[5] Silver Fern Farms says a penalty is not appropriate because it was open to it to question the record of settlement and delay payment of the compensatory sum until that document was clarified or, in the alternative, Silver Fern Farms says there has been a common mistake.

Does seeking clarification of one clause in a record of settlement justify non-compliance with another clause?

[6] Silver Fern Farms does not say it was not bound by the whole record of settlement. Its actions demonstrate this; Mr Te Tuhi's work trial was implemented per clause 4 of the record of settlement. A party to a record of settlement cannot select which clauses it will comply with – either the agreement is valid and binding or it is invalid and does not bind the parties.

Was a common mistake made?

[7] In the alternative, Mr Clearly submits clause 4 of the record of settlement was the result of a common mistake[1] and in such circumstances imposing a penalty would not be appropriate. Section 6(1)(a)(ii) Contractual Mistakes Act provides:

> *All the parties to the contract were influenced in their respective decisions to enter into the contract by the same mistake.*

[8] Was a common mistake made? The parties attended mediation on 11 June 2008. Silver Fern Farms were represented by Gary Williams, group employment relations manager, and Laurie Davies, acting manager of the Dargaville plant. Mr Williams left the mediation at a point where he had perused a draft record of settlement which reflected, in his view, the agreement the parties had reached in mediation. After he left the mediation handwritten amendments were made to clause 4 of the draft record of settlement. Mr Davies said in evidence that the mediator and

[1] Section 6(1)(a)(ii) Contractual Mistakes Act 1977

the union representatives said they were minor amendments. Mr Davies signed the record of settlement on behalf of Silver Fern Farms.

[9] When Mr Williams later received a copy of the record of settlement he immediately contacted the mediator and expressed his concern that clause 4 did not reflect what had been agreed by the parties at mediation.

[10] Mr Williams says the handwritten amendments to the record of settlement (made after he left the mediation) fundamentally changed the agreement creating an obligation on Silver Fern Farms to employ Mr Te Tuhi at C Grade in the absence of a medical recommendation that he was fit for employment at B Grade.

[11] Paul Wintringham, the organiser representing Mr Te Tuhi at the mediation, said in evidence that he understood the agreement to be that if Mr Te Tuhi did not have a medical clearance to work on Grade B or C his employment with Silver Fern Farms would end.

[12] Evidence of a common mistake must be clear and convincing[2]. This is not the case here. The issue here concerns interpretation of the agreement between the parties.

Is a penalty warranted?

[13] Section 149(4) of the Act provides:

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

[14] Section 149(3) of the Act provides that where parties have entered a record of settlement the terms of that settlement are final and binding on, and enforceable by the parties. I am satisfied that the record of settlement is valid for the purposes of section 149 of the Act.

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[2] *Merbank Corp Ltd v Cramp* [1980] 1 NZLR 721

[15] In *Xu v McIntosh*[3] Goddard CJ made the following observations relevant to a consideration of whether a penalty should be imposed:

> *A penalty is imposed for the purpose of punishment of a wrongdoing which will consist of breaching the Act…. Not all such breaches will be equally reprehensible. The first question ought to be, how much harm has the breach occasioned? How important is it to bring home to the party in default that such behaviour is unacceptable or to deter others from it?*
>
> *The next question focuses on the perpetrator's culpability. Was the breach technical and inadvertent or was it flagrant and deliberate? In deciding whether any part of the penalty should be paid to the victim of the breach, regard must be had to the degree of harm that the victim suffered as a result of the breach.*

[16] Silver Fern Farms breached the record of settlement entered with Mr Te Tuhi. It did not make reasonable efforts to contact Mr Te Tuhi or his representative to advise that it may not be able to meet its clause 3 obligations prior to the 7 day payment period expiring. Raising concerns about the record of settlement with the mediator did not discharge Silver Fern Farms obligations to Mr Te Tuhi.

[17] Mr Te Tuhi raised the issue with his employer following expiry of the seven day period. I accept this would have been stressful and caused embarrassment to him, amplified by Mr Te Tuhi's very recent return to work on a trial, the success of which was not guaranteed. The payment was not made until Mr Te Tuhi successfully completed the work trial despite repeated requests from his union for the payment to be made, threat of compliance application being sought, and ultimately, the filing of this application. A penalty to warranted.

[18] Factors in favour of a modest penalty award are that Silver Fern Farms did not breach every obligation under the record of settlement and I accept Mr Williams attempts to clarify the agreement were sincere.

[19] **Silver Fern Farms Limited is ordered to pay a penalty of $500 directly to Roger (Lucky) Te Tuhi pursuant to section 149(3) of the Employment Relations Act 2000.**

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[3] [2004] 2 ERNZ 448, at 464

Costs

[20] Costs are reserved. The parties are invited to attempt to resolve this issue themselves. If they are unable to then Ms White should file a costs memorandum within 14 days of the date of this determination. Mr Cleary should file any reply within a further 14 days.

Marija Urlich
Member of the Employment Relations Authority