

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE**

[2024] NZERA 39
3255339

BETWEEN

TECH 5 RECRUITMENT
LIMITED
Applicant

NATHAN WINDERS
Respondent

Member of Authority: Marija Urlich

Representatives: John Dustow, advocate for the Applicant
Mr Winders, in person

Investigation Meeting: 25 January 2024 (by audio-visual link)

Determination: 26 January 2024

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] By application lodged on 4 October 2023 Tech 5 Recruitment Limited seeks, by way of compliance order, to enforce a record of settlement entered with its former employee Nathan Winders and certified by a mediator. It also seeks a penalty and an order as to costs.

[2] By statement in reply lodged 7 December 2023 Mr Winders accepts he is in breach of the record of settlement but that he has been unable to pay due to his financial circumstances. He seeks a payment plan he can afford.

The Authority's investigation

[3] Directions dated 14 December 2023 (the directions), the notice of investigation meeting and audio-visual link were emailed to the email address with which Mr

Winders had corresponded with the Authority on this matter. In the directions the Authority identified the issues to be investigated and determined and an investigation meeting date. The directions also requested the parties file any relevant information by 22 January 2024 including that, if Mr Winders sought an order for payment by instalment, he should provide information regarding his financial position to support such an order.

[4] Within the timetable Tech 5 filed relevant information. Mr Winders did not. At the investigation meeting Mr Dustow and Mr Winders provided information to the Authority. As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all the information received.

Issues

[5] The issues for investigation and determination are whether:

- (i) a compliance order is made against Nathan Winders to comply with the record of settlement;
- (ii) a penalty is ordered a portion of which awarded to Tech 5 Recruitment Limited;
- (iii) whether orders for payment by instalment should be made; and
- (iv) either party entitled to an award of costs.

The record of settlement

[6] Clause 6 of the record of settlement provides Mr Winders agreed to pay Tech 5 \$18,000 to settle the employment relationship problem. This sum included \$14,000 which Mr Winders had agreed to pay Tech 5 in a record of settlement dated 30 March 2023, \$800 to reimburse unauthorised air credit use, \$505 in interest and \$2,695 in costs.

[7] Clause 7 recorded Mr Winders agreed to pay the settlement sum at the rate of \$1500 per month for 12 months. On 10 August the record of settlement was certified by a mediator pursuant to s 149 of the Act.

[8] Under the record of settlement Mr Winders was to make the first payment to on 30 August which he did. No other payments have been received despite Tech 5's unsuccessful attempts to contact Mr Winders prior to lodging this application. The balance of the settlement monies remains outstanding.

[9] The record of settlement provided the terms and conditions of the record of settlement were final, binding on and enforceable and were to remain confidential between the parties except in circumstances including Mr Winders not paying the settlement monies.

Compliance order – Nathan Winders

[10] Section 137(1)(iii) of the Act empowers the Authority to order a party to comply with any terms of settlement which s 151 of the Act provides may be enforced by a compliance order. Section 151 applies to any agreed terms of settlement enforceable by the parties under s 149(3) of the Act.

[11] Mr Winders has failed to comply with the record of settlement and it is appropriate to exercise my discretion under s 137(1)(b) of the Act to order compliance with the sums outstanding.

[12] Within 21 days of the date of this determination Nathan Winders is ordered to comply with the record of settlement and pay \$16,500 without deduction to Tech 5 Limited.

[13] Imposition of a compliance order is a serious matter. Should Mr Winders fail to comply with the compliance order as set out above Tech 5 is entitled to pursue the breach in the Employment Court or the District Court. The Employment Court has powers to impose a fine not exceeding \$40,000, order property to be sequestered, or impose a sentence of imprisonment not exceeding 3 months¹. Alternatively, a certificate of determination may be obtained from the Authority and enforcement obtained in the District Court.

¹ Section 139 and 140(6) Employment Relations Act 2000

Penalty

[14] Section 149(4) of the Act enables a party to seek the imposition of a penalty in respect of any established breach of a corresponding settlement agreement. The imposition of a penalty is discretionary and is generally imposed for the purpose of punishment as well as discouragement of others. A single breach of a settlement agreement by an individual may attract a penalty up to \$10,000 and for a company a penalty not exceeding \$20,000 may be awarded for a solitary breach.²

[15] Tech 5 says a penalty should be imposed and a portion paid to it given Mr Winder's breach of the record of settlement undermines the integrity and security of s 149 settlement agreements which are intended to give parties certainty and finality, that he is solely responsible for a knowing and ongoing breach of the record of settlement, the nature and the extent of the loss and damage suffered by it and the benefit to Mr Winders of retaining the settlement monies over an extended period.

[16] As a matter of public policy, in this case a penalty against Mr Winders is necessary to uphold the integrity of the full, final, binding and enforceable agreements allowed under s 149 of the Act.

[17] The level of penalty is determined by an assessment of the factors set out in s 133A of the Act alongside judgments of the Employment Court.³

[18] Mr Winders signed the record of settlement which records he understood the binding and enforceable nature of the record of settlement and must be taken to have been aware of its obligations under the record of settlement. He has paid \$1,500 of the total sum he agreed to pay under the record of settlement. There is no basis on which to reasonably conclude that the breach of the record of settlement was inadvertent, minor or technical though the Authority notes Mr Winders faced some personal challenges in the months after the record of settlement was entered.

[19] Tech 5 has been put to considerable inconvenience and cost to enforce the settlement it entered with Mr Winders.

² Section 135(2)(a) and (b) respectively.

³ For example *Borsboom (Labour Inspector) v Preet PVT Ltd* [2016] NZEmpC 143; *Nicholson v Ford* [2018] NZEmpC 132; *A Labour Inspector v Daleson Investment Limited* [2019] NZEmpC 12.

[20] A search of the relevant databases has not revealed previous proceedings for similar breaches involving Mr Winders.

[21] Taking all the factors into account Mr Winders is liable for a penalty of \$1,500, which is within the range of penalties currently imposed for failure to pay monies due under a record of settlement and is proportionate to the seriousness of the breach and harm caused.

[22] In the circumstances of this matter it is just for half the penalty sum (\$750) is to be paid to Tech 5 by Mr Winders, the remainder must be paid to the Authority for payment into a Crown bank account.

Payment by instalments

[23] In his statement in reply Mr Winders requested payment by instalment. He did not provide any information in support of instalment payments before the investigation meeting. At the investigation meeting he told the Authority he faced some personal difficulties in the months after the record of settlement was signed, that he has a job now and will likely have to look to borrow some funds to meet the settlement sum. Tech 5 opposes an instalment plan, it says the non-payment has gone on for long enough.

[24] The information before the Authority in support of Mr Winders financial position is insufficient to justify an order for instalment payments. The request is declined.

Summary of orders

[25] The Authority orders as follows:

Within 21 days of the date of this determination Nathan Winders is ordered to comply with the record of settlement and make the following payments without deduction to Tech 5 Limited:

- (i) \$16,500 without deduction;
- (ii) pay a \$1,500 penalty half of which is to be paid to Tech 5 Limited and half to the Crown.

Costs of representation and reimbursement of filing fee

[26] Tech 5 has incurred costs of in-house representation in this matter. This matter was able to be investigated by audio-visual link and took hearing time took less than 30 minutes. At the investigation meeting Mr Dustow advised Tech 5 withdrew its costs claim. It is fair and reasonable for it to recover the filing fee of \$71.56 incurred in lodging this application.

[27] Mr Winders is to reimburse Tech 5 Limited the filing fee of \$71.56 within 21 days of the date of determination.

Marija Urlich
Member of the Employment Relations Authority