

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2019] NZERA 117
3039031

BETWEEN JOY THOMPSON
 Applicant

AND PHOENIX PUBLISHING
 LIMITED
 Respondent

Member of Authority: TG Tetitaha

Representatives: J Thompson in person
 B Rawson, Respondent Director

Investigation Meeting: On the papers

Submissions Received: 21 January 2019 from the Applicant
 4 February 2019 from the Respondent

Date of Determination: 4 March 2019

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Joy Thompson obtained judgment against Phoenix Publishing Limited for an unjustified dismissal and unpaid wages resulting in damages of \$5,000 and wage arrears of \$4,383.52¹. She applied for and was granted compliance orders for the same. The penalty application was adjourned to allow Phoenix Publishing to obtain legal advice and make further submissions regarding penalties.² These have now been filed.

¹ *Joy Thompson v Phoenix Publishing Limited* [2018] NZERA Auckland 217.
² *Joy Thompson v Phoenix Publishing Limited* [2019] NZERA Auckland 25.

Penalty

[2] Phoenix Publishing submits the Authority does not have any jurisdiction to impose penalties for non-compliance with its earlier determination. The penalties arise for breaches of the Employment Relations Act 2000 and Holidays Act 2003 by the failure and continuing failure to pay the wages ordered by the earlier determination.

[3] Phoenix breached its employment agreement with Ms Thompson by under payment of her salary during her employment to the amount of \$4,383.52. This is a breach of s134(1) of the Employment Relations Act 2000 and renders Phoenix liable to payment of a penalty. Further Phoenix did not pay Ms Thompson her holiday pay upon termination. This is a breach of s27 Holidays Act 2003 giving rise liability to a penalty for non-compliance under s75 Holidays Act 2003.

[4] In respect of the non-compliance with the order to pay damages for hurt and humiliation, Ms Thompson may apply to the Court under s138(6) and seek imprisonment of the respondent director and/or a fine not exceeding \$40,000. I am not empowered to impose these remedies in respect of this non-compliance and do not intend doing so.

[5] However I am empowered to impose a penalty for non-payment of Ms Thompson's wages. The quantum of any penalty awarded for non-compliance must have regard to the matters set out in s133A of the Employment Relations Act 2000. The Courts have also considered a process for determining penalties for breaches of minimum standards.³ Part of the penalty relates to a breach of minimum standards for non-payment of wages.

[6] The relevant matters for the purposes of this application are:

- The starting point for breaches of minimum standards is \$20,000 per breach. There is one breach here of non-payment of wages.
- This breach is serious. This respondent has already faced penalties of \$10,000 for non-compliance and breaches.⁴ A starting point of \$20,000 is warranted for this breach.

³ *Jeanie May Borsboom (Labour Inspector) v Preet Pvt Limited and Warrington Discount Tobacco Limited* [2016] NZEmpC 143.

⁴ *Lennon v Phoenix Publishing Limited* [2018] NZERA Wellington 87; *Cooper v Phoenix Publishing Limited* [2018] NZERA Auckland 328.

- There are aggravating factors. Both breaches were intentional because the non-payment has been without any legal defence or reasonable excuse.
- The damages suffered by Ms Thompson have been acute given she has been out of pocket in terms of wages owed since her employment terminated in August 2017.
- The respondent has not paid any compensation for its breaches.
- This respondent has been before the Authority since 2016 on nine occasions including two appearances for compliance orders and three appearances for the imposition of penalties up to \$10,000.⁵
- There are no mitigating factors.
- There is no information about the means of the respondent to pay any penalty.
- In terms of proportionality and particularly the need for deterrence, a single penalty of \$15,000 is appropriate.

[7] Given Ms Thompson has largely been the victim of the non-compliance I intend awarding half of the penalty to her to address her damage due to non-compliance. The remainder must be awarded to the Crown given there has been ongoing non-compliance with the Authority's orders.

[8] I order Phoenix Publishing Limited to pay a penalty of \$15,000 within 7 days of this Determination into the bank account of the Employment Relations Authority. Half of the penalty is awarded is then to be paid to Ms Thompson.

TG Tetitaha
Member of the Employment Relations Authority

⁵ *Anderson v Phoenix Publishing Ltd* [2016] NZERA Auckland 373; *Bicknell v Phoenix Publishing Ltd* [2017] NZERA Auckland 42; *McCallum v Phoenix Publishing Ltd* [2017] NZERA Auckland 171; *Masjedi v Phoenix Publishing Ltd* [2018] NZERA Auckland 161; *Lennon v Phoenix Publishing Ltd* [2018] NZERA Wellington 48; *Cooper v Phoenix Publishing Limited* [2018] NZERA Auckland 301; *Lennon v Phoenix Publishing Limited* [2018] NZERA Wellington 87; *Cooper v Phoenix Publishing Limited* [2018] NZERA Auckland 328.