Attention is drawn to the order prohibiting publication of certain information in this determination

IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

[2015] NZERA Christchurch 25
5537317

	BETWEEN	GEOFF TYLEE-PORTER Applicant
	AND	THE MCLEAN INSTITUTE Respondent
Member of Authority:	Christine Hickey	
Representatives:	Jeff Goldstein, Counsel for Applicant Penny Shaw, Counsel for Respondent	
Investigation Meeting:	9 February 2015	
Determination:	2 March 2015	

DETERMINATION OF THE AUTHORITY

A. The McLean Institute must pay a penalty of $3,000 with $2,000 to be paid to Geoff Tylee-Porter and $1,000 to be paid to the Authority (for transfer to the Crown Account).

Employment relationship problem

[1] A Record of Settlement (the Agreement) was signed under s.149 of the Employment Relations Act 2000 (the Act) on 17 December 2014. The parties to the Agreement were the Geoff Tylee-Porter and The McLean Institute[1] (the Institute). The Agreement was signed by Mr Tylee-Porter and by Mr David Towns, Acting Chairperson and authorised signatory for the Institute.

[1] The Institute is a body corporate which originated as a charitable trust and was incorporated through The McLean Institute Act 1909. The Institute retains its charitable purposes.

[2] The Agreement dated dated 16 December 2014 was also signed by a mediator from the Mediation Services of the Ministry of Business, Innovation and Employment.

[3] The Agreement was certified under s.149 of the Act by the mediator. That certification confirmed that before making the Agreement, the parties were advised and accepted that they understood the agreed terms:

(i) were final, binding and enforceable; and
(ii) could not be cancelled; and
(iii) could not be brought before the Authority or the court for review or appeal, except for the purposes of enforcing those terms.

[4] Under clauses 2, 3 and 4 of the Agreement certain amounts of money were due to be paid to Mr Tylee-Porter by the Institute by 23 December 2014. This money was not paid by 23 December 2014.

[5] On 28 January 2015 Mr Tylee-Porter, lodged an application with the Authority seeking an urgent investigation meeting and seeking orders that the Institute:

a. Comply[2] with clauses 2 – 5 inclusive of the Agreement, specifically that the Institute:
    i. pay the sum of $7,500 plus GST ($8,625) as set out in clause 4; and
    ii. pay the $40,000 compensation set out in clause 2; and
    iii. pay the holiday pay as set out in clause 3; and
    iv. pay interest on the amounts still outstanding until they are paid; and
    v. provide the reference as set out in clause 5; and
    vi. pay interest on the sums that were not paid by 23 December 2014; and
b. Pay penalties of $6,666.66 for its failure to comply with clauses 2, 3 and 4 of the Record of Settlement. Penalties were requested to be directly paid to Mr Tylee-Porter; and

[2] Under s. 137(1)(a)(iii) of the Employment Relations Act 2000 (the Act)

c. Pay Mr Tylee-Porter's legal costs.

Mediation

[6] Because this mater involved the alleged breaches of the terms of an agreed settlement which had been agreed at mediation and signed under s.149 of the Act I considered mediation was not appropriate.

The respondent's evidence and submissions at the investigation meeting

[7] In its statement in reply, the evidence of Colin Hair, a director of the retirement village company which is a wholly owned subsidiary of the Institute, and Ms Shaw's submissions made at the investigation meeting the Institute:

- Said that it had provided the reference required under clause 5 of the Agreement on 26 January 2015.
- Agreed that it had not complied with clauses 2, 3 and 4 of the Agreement.
- Agreed that it should pay interest on the amounts not paid by 23 December 2014, although said that it could not pay that at the moment and was unable to give a timeframe within which the interest would be paid.
- Said that it could not pay the $8,625.00 legal costs due on 23 December 2014 under clause 4 although it agreed it must pay it. It could not give a timeframe within which it could pay.
- Asked that its precise financial position not be published so not as to make its financial position any worse and not to cause unnecessary distress to the residents of its retirement village.
- Said that because it could not pay it should not be subjected to penalties but if any penalty or penalties are imposed they should be at the lower end of the scale, such as $1,000.

[8] I prohibit from publication any other detail of the Agreement.

[9] Since the investigation meeting there have been a number of relevant developments which I refer to below.

Non-publication of financial details?

[10] Amongst its other business interests the Institute runs a retirement village. Mr Hair asks that The Institute's precise financial details of arrangements with its bank, SBS, particularly as they relate to the retirement village not be published in order not to worry residents of the retirement village unduly and so that the retirement village's financial position is not worsened by loss of confidence in the Institute's ability to manage its way out of its difficult financial position.

[11] Mr Goldstein submits that the public interest in this proceeding, and therefore the need for publication, outweighs the Institute's right to secrecy. Specifically he submits that the public ought to know that the Institute's business is having financial difficulties. However, he agrees that there is no need to mention the name or exact financial position of the retirement village.

[12] Clause 10 of Schedule 2 of the Act gives the Authority the power to:

> *order that all or any part of any evidence given or pleadings filed or the name of any party or witness or other person not be published, and any such order may be subject to such conditions as the Authority thinks fit.*

[13] The starting point for my consideration is the strong presumption for open justice. It is the paramount consideration. In this case I do not consider that it is outweighed by the Institute's understandable desire to keep details of its financial difficulties out of the public view. The existing residents of the retirement village have a right to know of these proceedings and what the Institute says led to its inability to pay Mr Tylee-Porter as it agreed to do in the Agreement. However, I accept that such residents are vulnerable through their age and in some cases also through their infirmity.

[14] Mr Hair's evidence disclosed that prospective purchasers of units at the retirement village have a legal right to be informed about the Institute's financial position. That has led to at least one prospective purchaser declining to continue with the purchase. It is entirely proper that prospective purchasers should know the exact financial position of the Institute.

[15] It is relevant that the retirement village is not a party to these proceedings.

[16] I see no reason for overturning the principle of open justice in this case. However, I consider that there is no need to publish the name of the retirement village operated by the Institute and I will not publish all the financial details supplied for the purpose of these proceedings except for those necessary to refer to in my determination of the issue of penalties.

[17] I am satisfied that existing residents of the retirement village and their representatives know full well that the Institute is intimately connected with the operation of the retirement village. Upon becoming aware of this determination they are entitled to enquire about the Institute's exact financial position if they wish. However, I do not consider it in the residents' best interests to have sensational newspaper headlines or other media announcements naming their retirement village as being in a precarious financial position without any guarantee that this determination or the correct financial position of the retirement village will be accurately conveyed.

[18] Therefore, pursuant to clause 10 of Schedule 2 of the Employment Relations Act 2000, the Authority orders that the name of the retirement village and the financial details of the Institute's bank accounts provided for these proceedings shall be confidential to the Authority, the parties and their counsel, except for those details published in this determination. The retirement village will be called 'the retirement village' throughout this determination and its name is not to be published.

Issues for determination

Holiday pay

[19] The mediator in signing the Settlement Agreement noted prior to doing so she:

> *…explained … the effect of sections 148A, 149(1)(& (3); and*
>
> *I confirm the parties have advised me that no minimum entitlements (monies payable under … the Holidays Act 2003 …) have been foregone in the reaching of this settlement; and*
>
> *I am satisfied that the parties understood the effect of sections 148A, 149(1)(& 93), and have affirmed their request that I should sign the agreed terms of the settlement.*

[20] On the evening of 3 February 2015 the Institute paid Mr Tylee-Porter $59,669.16 which it intended to be in payment of clauses 2 and 3 of the Settlement. At the investigation meeting it became clear that Mr Tylee-Porter was not satisfied that his full entitlement to holiday pay had been paid.

[21] On 9 February 2015 after the investigation meeting the parties were directed to agree on the amount of holiday pay by agreement if possible and if not to request the Authority to set the amount payable. Prior to the parties attempting to agree on pay owed the Institute was directed to supply Mr Tylee-Porter with his *full personnel file* [if it] *has not been forwarded to him it must be ASAP including a copy of the holiday record card Mr Tylee-Porter described at the investigation meeting.*

[22] I understand this matter has been resolved between the parties now and no compliance order is necessary.

Outstanding legal costs

[23] On 9 February 2015 after the investigation meeting the following direction was made:

> *Mr Hair should write to SBS immediately requesting it to agree to allow The McLean Institute to pay the outstanding legal costs agreed to be paid in clause 4 of the Record of Settlement dated 16 December 2014 and to allow The McLean Institute to pay the interest it has agreed to pay at a rate of 5% per annum on all amounts outstanding from 24 December 2014 until they are paid. The parties must notify the Authority as soon as the legal costs and interest on all outstanding payments are paid, if at all, before the Authority's determination issues.*

[24] On 23 February 2015 Ms Shaw advised that in Mr Goldstein's absence the previous week a cheque in payment of clause 4 of the Agreement had been sent to her instead. Also on 23 February 2015 Mr Goldstein advised the Authority that the cheque had been received and that he would advise *when it has been cleared*.

[25] On 26 February Mr Goldstein's office confirmed the cheque for the amount of $8,625 had cleared.

[26] No compliance order is now necessary in relation to clause 4 of the Settlement Agreement.

Agreed interest

[27] The Institute accepted that it should pay interest on the amounts that remained unpaid after 23 December 2014. The rate of interest that would have been ordered to be paid if the Authority had to make such an order in its discretion[3] is 5% per annum.

[28] I understand that this payment has now been made. If that is not correct Mr Tylee-Porter has the ability to come back to the Authority for the issue of interest to be resolved.

The reference

[29] On 29 January 2015 the Institute provided Mr Tylee-Porter with a reference. No compliance order is now necessary because the Institute has complied with clause 5 of the Settlement. The claim for a penalty for non-compliance with clause 5 was withdrawn at the investigation meeting. That was no doubt because clause 5 does not contain a time limit within which a reference should have been provided.

Penalties

[30] Under s.149(4) of the Act, a person who breaches an agreed term of settlement to which s.149(3) of the Act applies, could be liable to a penalty of up to $10,000 for an individual or up to $20,000 for a company or other corporation. The primary purpose of a penalty is to punish wrongdoing.[4] A further purpose is to deter future breaches by the penalised party and by others who bind themselves by entering settlement agreements signed under s.149 of the Act.

[31] Prior to 2011 the upper limits of penalties were $5,000 for an individual and $10,000 for a company or other corporation. The Institute is a corporation and so the maximum penalty that is possible for each breach of the Agreement is $20,000.

[32] The Authority's power to order a penalty is discretionary and it does not automatically follow that a where a breach of an agreed term of a record of settlement has been found, a penalty must be awarded, as Ms Show correctly submits.

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[3] Pursuant to clause 11 of the Second Schedule of the Act at the rate prescribed by s 87(3) of the Judicature Act 1908. The rate of 5% was set in 2011 by the Judicature (Prescribed Rate of Interest) Order 2011.

[4] *Xu v McIntosh* [2004] 2 ERNZ 448

[33] Mr Goldstein submits that submits a global penalty of $20,000 is appropriate for all the breaches.[5]

[34] The Institute agrees that it breached clauses 2, 3 and 4 of the Agreement. However, Ms Shaw submits that the Institute has not deliberately failed to comply with the Agreement but was prevented from doing so by its bank acting in an unexpected way on the evening of 17 December 2014 moving the proceeds of a large insurance settlement from one bank account to satisfy debt so making the funds available to the Institute insufficient to comply with the Agreement.

[35] Mr Hair's evidence discloses that the Institute's and the retirement village's finances are significantly intertwined. He says he resumed control of all the Institute's financial matters around the time of Mr Tylee-Porter's termination of employment. He says at the time of the redundancies of all the Institute's employees on 23 September 2014 the Institute understood that it had sufficient funds to cover any costs from the redundancies. However, on 29 September 2014 SBS issued Notices of Demand to both the Institute and the retirement village requiring repayment of all loans, including an overdraft that had been used to meet the retirement village's running costs.

[36] At that point the retirement village had at least one potential buyer but after having been advised of the retirement village's financial situation the pending sales did not occur.

[37] In late November 2014 the Institute advised Mr Tylee-Porter that it did not have sufficient funds to pay him his entitlements. Mr Tylee-Porter said he required his holiday pay to be paid but agreed to delay discussion about payment in lieu of notice until mediation on 16 December 2014.

[38] Mr Hair says that as at 16 December the Institute was confident it would be able to pay Mr Tylee-Porter within 7 days of the settlement being reached. That is because on 12 December 2014 a large sum in interim settlement of an earthquake insurance claim had been paid, at the direction of SBS, into the retirement village's

[5] Being $666,666.666 per clause breached.

overdraft account and there were sufficient funds left over to pay Mr Tylee-Porter the amounts agreed to in the Agreement.

[39] However, Mr Hair says that unexpectedly on 17 December 2014 SBS notified the Institute and the retirement village that the remainder of the insurance claim money would not be used to pay the retirement village's overdraft but would be redirected to repay other loans. The retirement village was also required to operate within its overdraft limits and that meant it was perilously short of funds.

[40] Mr Hair says that by 23 December 2014 the retirement village needed to seek intervention by a statutory supervisor and the Registrar of Retirement Villages which resulted in SBS agreeing to fund any excess drawings over the arranged overdraft limit to meet the retirement village's essential costs. Since then all payments proposed to be made by the Institute and the retirement village have needed the prior approval of SBS.

[41] On 20 January 2015 Mr Hair sent SBS a request that it release funds to pay Mr Tylee-Porter the amounts set out in clauses 2 and 3 of the Agreement. He did not request that the amount set out in clause 4 of the Agreement also be released. He says he did not do so because he thought SBS would not agree to pay that amount.

[42] By email on 26 January 2015 SBS refused to do so because it did not consider the Institute's responsibility under the Agreement to be an essential expense and it would not authorise *any new excess drawings*.

[43] Mr Tylee-Porter presented evidence that in one of the Institute's bank accounts from 23 December 2014 until 27 December 2014 there was a positive balance of a minimum of $65,672.84 which would have gone a long way to meeting the Institute's obligations to him under the Agreement. However, he was not paid any part of the money due to him.

[44] Mr Hair says that because of the critical situation with SBS having taken the insurance settlement proceeds in partial payment of the retirement village's debt he did not think that SBS would allow the Institute to pay Mr Tylee-Porter from that account. However, he agreed that he did not ask SBS to allow him to pay Mr Tylee-

Porter in December at all let alone try and pay Mr Tylee-Porter by 23 December as agreed.

[45] In *Xu v McIntosh* the Employment Court provided guidance to the Authority when considering imposing penalties. It made the following observations:

> *A penalty is imposed for the purpose of punishment of a wrongdoing which will consist of breaching the Act or another Act or an employment agreement. 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.*[6]

How much harm was caused by the breaches?

[46] I find that the harm in this case has been serious. Mr Tylee-Porter compromised his personal grievance claim and contractual entitlement claims for less than he believed they were worth on the basis he would be paid quickly and he would be able to put his employment problems behind him and move on. That has not occurred.

[47] Mr Tylee-Porter says that the termination of his long-term employment was itself was a shock and had its mental costs *but the failure of the Institute to pay the agreed settlement has caused incredible stress both financially and mentally.*

[48] Mr Tylee-Porter is not only out of pocket but he has also had to spend considerable time and energy trying to obtain payment, which he has found very stressful. The Institute's breach of the agreed terms of settlement has put Mr Tylee-Porter under serious financial pressure which has in turn has adversely affected his health and his relationship with his partner.

[6] Ibid, Paragraphs [47] and [48]

Was the breach technical and inadvertent or was it flagrant and deliberate?

[49] Mr Goldstein submits that the breach was deliberate and flagrant. He says that the Institute's difficult financial situation was what it relied on to make Mr Tylee-Porter redundant on 23 September 2014. However, as of 17 December 2014 the Institute either considered that it had the funds to pay Mr Tylee-Porter as it agreed to do or it signed the Record of Settlement not intending to be bound by it.

[50] The Institute maintains that it was confident it could pay but that SBS acted unexpectedly in requiring the whole amount of the insurance settlement funds to repay the retirement village's over-run of its overdraft facility. Ms Shaw submitted that confidence in the Institute's ability to pay was a reasonable belief based on Mr Hair's considerable commercial experience and his judgement based on that experience.

[51] The Institute says that Mr Hair's attempt to get SBS to release funds to pay Mr Tylee-Porter in settlement of clauses 2 and 3 on 20 January 2015 was a reasonable effort to comply with the Agreement.

[52] However, I consider it material that Mr Hair's approach did not include any consideration of clause 4 of the Agreement. He says that is because he did not think SBS would agree, but he did not even try to get it to agree.

[53] I consider the breaches not to have been technical or inadvertent ones. Even if Mr Hair's judgement that the Institute was in a position to pay Mr Tylee-Porter was reasonable the reality is that Mr Tylee-Porter was not paid as agreed. I consider that the Institute did not make reasonable efforts to pay Mr Tylee-Porter what it had agreed to pay him either on 23 December 2014 or after that until these proceedings were underway although some effort was made on 20 January 2015. In the case of the breach of clause 4 there was no effort to secure payment except once the Authority had held an investigation meeting and made specific directions.

[54] The breaches were ongoing. Whilst the breaches of clauses 2 and 3 may be less egregious than the breach of clause 4 all breaches will be considered below for a global penalty.

How important is it to bring home to the Institute that its behaviour was unacceptable and to deter other parties from failing to comply with records of settlement?

[55] The Act includes provisions encouraging parties to resolve their employment relationship issues between themselves. The Agreement represents such a resolution and therefore the failure by one party to honour the terms of any resulting agreement is a serious matter.

[56] Public confidence in s.149 settlements will be undermined if it is perceived that parties are permitted to breach these settlements without negative consequences. It is important that parties can have confidence in the enforceability of the terms of agreed settlements.

[57] It is consequently in the public interest to impose a penalty which not only punishes the Institute for its wilful breach of the Agreement, but which additionally will act a deterrent to others who may contemplate engaging in such behaviour.

[58] I have found the breach by the Institute to be significant, so the penalty should be set to reflect the Authority's disapproval of such behaviour. However, I also take into account the Institute's financial situation and determine that a global penalty of $3,000.00 is appropriate in the circumstances for the breaches of clauses 2, 3 and 4.

Should any part of the penalty be paid to Mr Tylee-Porter?

[59] Because of the degree of harm suffered by Mr Tylee-Porter I consider that $2,000 of the penalty should be paid to Mr Tylee-Porter and the remaining $1,000 should be paid to the Authority for the Crown Account.

Costs

[60] I have reserved the issue of costs for these proceedings to allow the parties to come to some agreement on costs if that is possible. Despite the relatively short duration of the investigation meeting Mr Goldstein seeks costs of more than the Authority's usual daily tariff of $3,500 pro rated for the time of the investigation meeting plus the filing fee of $71.56 on Mr Tylee-Porter's behalf. There is no question in my mind that the filing fee must be paid. If the parties do not reach an

agreement on legal costs within 28 days Ms Shaw should make submissions in response to Mr Tylee-Porter's claim for costs.

Christine Hickey
Member of the Employment Relations Authority