

- a) A payment of \$5,000 (without deductions) pursuant to s 123(1)(c) of the Employment Relations Act 2000.
- Clause 6 The Employer agrees to provide the Employee with accurate and up to date wage and annual leave information for the period of 1 April 2019 – 11 June 2020 within 5 working days from the signing of this document.
- Clause 7 The Employee agrees to pay \$80+GST to the employee's representative upon being invoiced to cover the Employee's costs.

[4] The Record of Settlement 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 they understood the agreed terms:

- a. were final, binding and enforceable; and
- b. could not be cancelled; and
- c. could not be brought before the Authority or the court for review or appeal, except for the purposes of enforcing those terms.

Note

[5] The parties agreed to the Authority determining this issue based on the Statement of Problem and the Statement in Reply.

Issue

[6] The issue which had been brought before the Authority by Mr Van Kemende is that Pallet King has failed to comply with the terms agreed in the Record of Settlement.

Background Facts

[7] The timeframes for compliance within the Record of Settlement were that within 5 business days of the Record of Settlement the monies agreed in clause 5 would be paid to Mr Van Kemende by Pallet King i.e. by 17 June 2020. However the Applicant states that after 7 business days, Mr Van Kemende had not received the monies agreed to be paid in the Record of Settlement.

[8] After discussions between Mr Van Kemende's representative and counsel for Pallet King, it was agreed that clause 5 would be satisfied on 29 June, and clauses 4 and 7 by 3 July 2020. Clause 6 was also to be satisfied within the timeframes agreed.

[9] Clause 5 was satisfied within the agreed timeframe, however a further extension was provided in respect of clauses 4 and 7 after the issue of failure to adhere to the agreed timeframe was raised with Pallet King, with fulfilment to be made by 10.00 a.m. on 6 July 2020.

[10] Clauses 4 and 7 were completed by the further extended date for fulfilment, however clause 6 which related to the provision of wage and annual leave information, was not.

[11] Mr Van Kemende states that an email with a blank PDF page was subsequently received which Pallet King claimed resolved all matters. When Pallet King was informed of the error, it responded that it was a system error. Mr Van Kemende subsequently received a document entitled: "Employee Payslip Information" which he states contained no dates, and variable units and amounts. Further, no leave information was present.

[12] Mr Van Kemende raised the issue with counsel for Pallet King who advised that she would check and inform Mr Van Kemende of the situation, however the information had not been received at the date of filing with the Authority.

[13] Pallet King claims that the monies due under clauses 4 were paid by 29 June 2020, and the monies due under clauses 5 and 7 were paid on 6 July 2020.

[14] In respect of the wage and annual leave information agreed to be provided under clause 6 of the record of Settlement, Pallet King states that information in the form of an Employee Payslip Summary was prepared and provided to Mr Van Kemende by Crystal Payroll Limited for the period 1 October 2019 to 5 July 2020.

[15] Mr Van Kemende stated that the information contained in the document is not compliant with the Record of Settlement because it showed no dates, variable units and amounts. There was no leave information present as agreed in the Record of Settlement.

Compliance Order

[16] The Record of Settlement refers in clauses 4,5,6 and 7 to the dates and/or actions triggering payment when the payment should be made and the accurate and up to date wage and annual leave information provided.

[17] I find that the payment was made as supported by the documentary evidence provided. However this was not by the dates set out in the Record of Settlement or as initially agreed and amended by the parties but in the cases of clauses 4 and 7 was made only by the further extended and agreed date.

[18] In regard to clause 6 of the record of Settlement, the payslip information provided by Pallet King does not provide the information required in wage and time records as set out in s130 of the Act which includes the numbers of hours worked in each pay period and the pay for those hours, and the wages paid to the employee in each pay period. There are no details of

when annual leave was taken (if any) or the amount of holiday pay (if any) paid. The payslip does not even provide the dates when wages were paid. It contains no dates or accurate wage and annual leave information.

[19] Pallet King has offered to supply this fully detailed information provided it is given more time to do so and submits that what has been provided correctly records the units and wage pay rate for Mr Van Kemende within the required period.

[20] From the evidence available to the Authority, I am satisfied that Pallet King failed to comply with the original dates agreed for payment in accordance with clauses 4,5, and 7 although I accept that it did so within the extended timeframes subsequently agreed to by the parties. Therefore compliance has happened.

[21] However I find that the payment schedule provided by Pallet King was not fully compliant in terms of what can be expected as: “accurate and up to date wage and annual leave information for the period of 1 April 2019 – 11 June 2020”.

[22] I note that Pallet King has now offered to provide this information.

[23] Accordingly, in order to effect compliance with the Record of Settlement, I therefore order Pallet King, no later than 14 days from the date of this determination, to provide accurate, fully detailed, and up to date wage and annual leave information for the period of 1 April 2019 – 11 June 2020 to Mr Van Kemende.

Penalty

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

[25] Public confidence in s 149 settlements will be undermined if it is perceived that parties are permitted to breach these settlements with impunity. It is important that the parties can have confidence in the enforceability of the terms of agreed settlements.

[26] By failing to comply with the terms of the Record of Settlement Pallet King have deprived Mr Van Kemende of the use of the monies it was agreed he would be paid within the agreed timeframe. Whilst this was not a significant delay, Mr Van Kemende had to engage representation to achieve compliance thereby incurring further, unnecessary, costs.

[27] Further it appears that Mr Van Kemende was not able to apply to the IRD for working for family arrears due to the non-compliance by Pallet King with clause 6 of the Record of Settlement, and this may have disadvantaged him financially. Moreover without this information, Mr Van Kemende is unable to confirm that he has received his correct annual leave entitlements.

[28] Having considered the principles which should govern the imposition of a penalty¹, I determine that a penalty of \$750.00 is appropriate in all the circumstances of this case given the nature of the breach of a term of a Record of Settlement freely entered into by the parties.

[29] I order that Pallet King is to pay a penalty of \$750.00 to the account of the Employment Relations Authority, 25 per cent of which is to be forwarded to the MBIE Trust Account and 75 per cent of which is to be forwarded to Mr Van Kemende. Payment is to be made within 14 days of the date of this Determination.

Costs

[30] Mr Van Kemende has applied for costs.

[31] Costs are at the discretion of the Authority. The principles applicable to awards of costs in the Authority are well established. It is a principle set out in *PBO Limited (formerly Rush Security Ltd) v Da Cruz*² that costs are modest. Costs are also reasonable as observed by the Court of Appeal in *Victoria University of Wellington v Alton-Lee*³ at para [48] “As to quantification, the principle is one of reasonable contribution to costs actually and reasonably incurred.”

[32] Costs in the Authority are made in accordance with a daily tariff amount which is currently set at \$4,500.00 for the first day of hearing. This matter was determined ‘on the papers’. Costs normally follow the event and Mr Van Kemende is entitled to a contribution towards his costs.

[33] I consider it appropriate to base the level of costs on the normal tariff in the Authority as at the date of filing and to take a quarter day of an investigation meeting as the starting point.

[34] Accordingly Pallet King is ordered to pay Mr Van Kemende the sum of \$1,125.00 towards his legal costs, pursuant to clause 15 of Schedule 2 of the Act.

¹ *Borsboom (Labour Inspector) v Preet PVT Ltd and Warrington Discount Tobacco Ltd* [2016] NZEmpC 143.

² [2005] 1 ERNZ 808.

³ [2001] ERNZ 305.

Filing Fee

[35] **Pallet King is also ordered to pay Mr Van Kemende the filing fee of \$71.56 within 14 days of the date of this Determination.**

**Eleanor Robinson
Member of the Employment Relations Authority**