

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

**[2019] NZERA 348
3057872**

BETWEEN

VINCENT WHITEWOOD
Applicant

AND

TREVOR STEVENSON
Respondent

Member of Authority: Eleanor Robinson

Representatives: Murray Trainer for the Applicant
Respondent in person

Investigation Meeting: On the papers

Determination: 13 June 2019

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] On 23 January 2019 a Record of Settlement was entered into under s. 149 of the Employment Relations Act 2000 (the Act). The parties to the Record of Settlement were the Applicant, Mr Vincent Whitewood (referred to in the Record of Settlement as Applicant 1) and the Respondent, Mr Trevor Stevenson.

[2] The Record of Settlement was signed by the Applicant and the Respondent and counter-signed by a Mediator employed by the Ministry of Business, Innovation and Employment on 22 February 2019.

[3] The issue which had been brought before the Authority by the Applicant is that the Respondent has not complied fully with clause 4 of the Record of Settlement, which states:

4. The Respondent will pay Applicant 1 \$10,000.00 (Ten Thousand dollars)
..... This amount will be paid to Applicant 1s nominated bank account
number ... in the following was:

\$2,500.00 no later than 25 February 2019; then

\$500 no later than 4 March 2019; then
\$500 no later than 11 March 2019, then
\$500 no later than 18 March 2019; then
\$500 no later than 25 March 2019; then
\$500 no later than 1 April 2019; then
\$500 no later than 8 April 2019; then
\$500 no later than 15 April 2019; then
\$500 no later than 22 April 2019; then
\$500 no later than 29 April 2019; then
\$500 no later than 13 May 2019; then

\$2,000.00 no later than 20 May 2019.

[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 on submissions from the parties.

Background

[6] Mr Whitewood claims that although he has been paid all the payments scheduled to be made by Mr Stevenson, seven of the payments were made outside of the scheduled dates as agreed in the Record of Settlement.

[7] This late payment resulted in him having to change time frames for debtors and apologise to the debtors in order to avoid late payment fees. This has been stressful for him and his family.

[8] Mr Stevenson provided confirmation that full payment had been made, but did not provide an explanation of the reason for any late payment.

Compliance Order

[9] The Record of Settlement refers in clause 4 to specific dates when payment should be made. In seven instances whilst payment was made the bank details reveal that this was one day after the due date in seven instances.

[10] In addition the final payment which was due to be paid on 13 May was paid on 20 May 2019, a week after the due date.

[11] From the evidence available to the Authority, I am satisfied that Mr Stevenson has failed to comply with clause 4 of the Record of Settlement.

[12] Given that full payment has now been received, I issue no order for compliance.

Penalty

[13] The Act includes provisions encouraging parties to resolve their employment relationship issues between themselves. Mr Whitewood sought mediation accordingly and the parties entered in to the Record of Settlement which was intended to resolve the matter without jurisdictional intervention.

[14] The Record of Settlement presented a resolution to the issues between the parties and therefore the failure by one party to honour the terms of any resulting agreement is a serious matter.

[15] 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. It is consequently in the public interest to impose a penalty at a level which will act a deterrent to others who may contemplate engaging in such behaviour.

[16] Having considered the principles which should govern the imposition of a penalty, I note that the factors the Court must have regard to in determining the appropriate penalty under s.133A of the Act.¹

[17] These factors include whether or not the breaches were committed knowingly or calculatedly, the duration of the breach, the number of people affected adversely and the extent of any departure from the statutory requirements. A history of previous breaches may also be relevant.²

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

² *Lumsden v SkyCity Management Ltd* [2017] NZEmpC 30

[18] The breach in this case arises primarily from the failure to adhere to the agreed payment schedule in accordance with clause 4 of the Record of Settlement.

[19] I take into consideration that fact that some of the payments due under clause 4 of the Record of Settlement payments were made on the due date and seven of the others, although after the due date, were paid within a day of it.

[20] However Mr Whitewood was entitled to expect the agreed payments would be made within the agreed timetable. His evidence is that he has suffered stress and inconvenience as a result of the default in payment.

[21] In all the circumstances I find that the penalty should be set at a level that reflects the appropriate factors and also the fact that Mr Stevenson has now made full compliance with the Record of Settlement.

[22] I order that Mr Stevenson is to pay a penalty of \$500.00, to Mr Whitewood. Payment is to be made within 14 days of the date of this Determination.

Costs

[23] The matter was determined 'on the papers'. Costs normally follow the event and the Applicant is entitled to a contribution towards its costs.

[24] I consider that Mr Whitewood should be reimbursed his full costs in this matter being \$1,021.56.

[25] Accordingly Mr Stevenson is ordered to pay Mr Whitewood the sum of \$1,021.56 as costs, pursuant to clause 15 of Schedule 2 of the Act within 14 days of the date of this Determination.

Eleanor Robinson
Member of the Employment Relations Authority