

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2022] NZERA 180
3148163

BETWEEN

BRAD WILLIAMS
Applicant

AND

TEAM ONE LIMITED
Respondent

Member of Authority: Rachel Larmer

Representatives: Carleton Mateer, advocate for the Applicant
No appearance by the Respondent

Investigation Meeting: 21 April 2022 by Zoom

Date of Determination: 4 May 2022

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Mr Williams was employed as an Operations Manager by Team One Limited (the respondent) from 14-30 July 2021.

[2] Mr Williams was paid his first pay late. Mr Williams was not paid for the two weeks he worked for the respondent. The respondent failed to give Mr Williams notice or pay him in lieu of notice when it dismissed him. It also failed to pay him any annual holiday pay when his employment ended.

[3] Mr Williams seeks wage arrears, penalties for breaches for the Wages Protection Act 1983 (the WPA), the Holidays Act 2003 (the HA03), and for breaches of his employment agreement. He also seeks costs.

[4] David (Dave) Etchells, is the sole director and shareholder of Team One Limited. Mr Williams reported to him. Mr Etchells sent Mr Williams an email that said he would not be paid unless he apologised for making a compliant to WorkSafe.

Mediation

[5] The respondent refused to comply with the Authority's referral to mediation and it breached the Authority's subsequent direction to mediation, by refusing to attend mediation.

The Authority's investigation

[6] The respondent has not engaged in the Authority's investigation in good faith because it failed to participate in any aspect of the Authority's investigation process.

No Statement in Reply

[7] The statement of problem was served on the respondent on 3 September 2021, so the statement in reply was due to be filed on 17 September 2021. The respondent did not file a statement in reply by that date.

[8] In an email dated 10 January 2022 the Authority informed the respondent that if it wanted to defend any of Mr Williams' claims then it needed to seek leave to file a statement in reply out of time. It was given until 17 January 2022 to do so.

[9] The respondent did not seek leave to file a statement in reply out of time, despite been given numerous opportunities by the Authority to do so. No statement in reply has been filed.

Communications from Mr Etchells

[10] All of the Authority's communications with the parties have been sent to Mr Etchells as the respondent's sole director. His responses have been unsatisfactory.

[11] In response to an email the Authority Officer had sent to the applicant's representative on 3 September 2021 that started "*Tēnā koe Carleton*", that was copied to Mr Etchells, he responded "*I don't answer to communications addressed in language other than English.*"

[12] The Authority Officer's email to the parties on 15 December 2021 that was addressed "*Tēnā koe parties*" was responded to by Mr Etchells sending back an email that said "*Don't speak to me in Māori*".

Communications to the respondent

[13] The respondent was advised that if it did not take steps to participate in the Authority's investigation then it would conduct a formal proof investigation of the applicant's claims. The respondent was advised that meant the claims would be determined based on the evidence that the applicant had filed.

[14] On 13 January 2022 the Authority Officer called Mr Etchells to ask him to respond to the Authority's email dated 10 January 2022 by 17 January 2022. That was followed up with an email on 17 January 2022, asking for a response by 12.00 pm that day to the Authority's email of 10 January 2022.

[15] The Authority Officer also called Mr Etchells on 17 January 2022 and left a voicemail asking for a response to the Authority's email of 10 January 2022.

[16] On 17 January 2022, the Authority emailed the parties informing them that due to the respondent's non-engagement, it would proceed to determine the applicant's claims on a "formal proof" basis. The applicant was required to file an affidavit in support of each of his claims, which was to attach as exhibits the relevant documentation he relied on.

[17] Mr Williams filed his affidavit on 2 February 2022 and a copy was provided to the respondent.

[18] After reviewing the affidavit the Authority had questions it needed to ask the applicant about his claims before the matter could be determined. A Zoom investigation meeting was therefore set down for 21 April 2022.

Notice of investigation meeting

[19] The respondent was advised of the date of the Zoom investigation meeting in an email that was sent to the parties by the Authority on 14 February 2022. A notice of investigation meeting details was sent to the parties on 24 February 2022. This was emailed to the respondent at the email address Mr Etchells had used to communicate with the Authority.

[20] The Authority also emailed the parties on 2 March 2022 advising that the Zoom investigation meeting would proceed as scheduled on 21 April 2022. The parties were again advised of the Zoom meeting details to enable them to attend.

Service of documentation

[21] The Authority arranged for a process server to serve the respondent at its registered address for service with:

- (a) A copy of the statement of problem and supporting documents that had been lodged by Mr Williams on 10 August 2021;
- (b) The Authority's Directions and Minutes;
- (c) Mr Williams' affidavit; and
- (d) The notice of investigation meeting for the Zoom investigation meeting.

[22] The process server personally delivered these documents to Mr Etchells, at the respondent's address for service, at 10.45 am on 11 April 2022. Mr Etchells identified himself to the process server before being served with the documents that were identified in the process server's affidavit dated 13 April 2022.

Respondent's non-attendance at IM

[23] On 21 February 2022 the Authority Officer called Mr Etchells and the respondent informed that he would not be attending the investigation meeting.

[24] The Authority emailed the parties on 24 February 2022 advising that the respondent's failure to engage in the investigation process would not stop the Authority from continuing with its investigation and that the applicant's claims would be determined based on the information and evidence the Authority had available to it on 21 April 2022.

[25] The Authority's email to the parties noted that Mr Etchells had informed the Authority that the respondent would not be attending the investigation meeting and he was asked to let the Authority know if that position changed.

Investigation Meeting

[26] The Authority conducted an investigation meeting by Zoom on 21 April 2022. Mr Williams and his advocate attended. The respondent did not attend.

[27] The Authority started its investigation meeting ten minutes later than the scheduled start time to give Mr Etchells extra time to attend, in case he had changed his mind about

participating in the Authority's investigation. He did not do so and the investigation proceeded in his absence.

Issues

[28] The following issues are to be determined:

- (a) Is Mr Williams owed wages arrears?
- (b) Did the respondent breach Mr Williams' employment agreement and/or the WPA and/or the HA03?
- (c) If so, should penalties be imposed on the respondent for any breaches that have occurred?
- (d) Should some or all of any penalties that may be imposed on the respondent be paid to the applicant personally instead of, or as well as, the Crown?
- (e) What costs and disbursements should the successful party be awarded?

Is Mr Williams owed wage arrears?

Hours worked but not paid

[29] Mr Williams was paid for the first four days that he worked (Tuesday 13 – Friday 16 July 2021) but he was not paid at all for the work he did from 19-23 and 26-30 July 2021.

[30] Mr Williams worked 45 hours (five days at nine hours a day, from 7.30 am – 5.00 pm with half an hour unpaid lunch break) the week commencing 19 July and 45 hours (five days at nine hours a day, from 7.30 am – 5.00 pm with a half an hour unpaid lunch break) the week commencing 26 July 2022.

[31] Mr Williams has worked 90 hours over two weeks that he has not yet been paid for. His gross salary was \$90,000 per annum, equals \$1,730.77 per week divided by 45 hours per week equals \$38.46 per hour. Mr Williams is therefore owed wage arrears of \$3,461.54, being \$38.46 per hour x 90 hours.

Notice pay

[32] Mr Williams was dismissed within his 90 day trial period. Clause 4.2 of his employment agreement required three days' notice of termination during his trial period. The respondent also had the option of paying in lieu of notice.

[33] Mr Williams was dismissed without notice after he informed Mr Etchells that he (Mr Williams) did not want to be verbally abused by Mr Etchells, as had occurred on a number of occasions.

[34] Mr Williams is therefore owed \$1,038.42 for three days' pay in lieu of notice, being 27 hours pay (consisting of three days x nine hours a day) x \$38.46 per hour.

Annual holiday pay

[35] The respondent also failed to pay Mr Williams his annual holiday pay entitlements. Because Mr Williams had worked for less than 12 months he was entitled to be paid eight percent of his total gross earnings as annual holiday pay upon termination of his employment. That did not occur.

[36] The respondent is ordered to pay Mr Williams annual holiday pay entitlements of \$469.17 which is eight percent of his total gross earnings of \$5,864.58, consisting of:

- (a) \$1,364.62 first pay;
- (b) \$3,461.54 wage arrears;
- (c) \$1,038.42.

[37] The respondent is ordered to pay Mr Williams total wage arrears of \$4,969.13 consisting of:

- (a) \$3,461.54 for the 90 hours he worked but was not paid;
- (b) \$1,038.42 for three days' unpaid notice pay;
- (c) \$469.17 annual holiday pay entitlements.

Did the respondent breach Mr Williams' employment agreement and/or the WPA and/or the HA03?

[38] The respondent breached Mr Williams's employment agreement by failing to pay him:

- (a) Three days' contractual notice of termination of his employment under the trial period provision;
- (b) His first pay on time;
- (c) For the 90 hours he worked in the last two weeks of July 2021;
- (d) Any annual holiday pay entitlements upon termination.

[39] Section 4 of the WPA requires an employer to pay an employee their entire wages without deduction when they become due. The failure by the respondent to pay Mr Williams his wages for his last two weeks of work, or to pay him his annual holiday pay or notice pay therefore breached s 4 of the WPA.

[40] Section 27(1)(a)(ii) of the HA03 requires an employee to be paid their outstanding annual holiday entitlements in their final pay. That did not occur and has still not occurred. The respondent's failure to pay Mr Williams his annual holiday pay in his final pay breached the HA03, as well as breaching his employment agreement and the WPA.

Should penalties be imposed on the respondent for its breaches?

[41] Penalties are imposed to punish and deter a wrongdoer and to signal disapproval of unacceptable conduct. It is therefore necessary and appropriate to recognise the respondent's breaches of Mr Williams' employment agreement, and of minimum entitlement provisions in the WPA and HA03, by imposing penalties on it.

Penalty factors

[42] Section 133A of the Employment Relations Act 2000 (the Act) sets out the factors that the Authority must consider when it is assessing penalties.

[43] *Objects of the Act* – the s 3 objects in the Act include (among other things) acknowledging and addressing the inherent imbalance of power between those in employment relationships as well as promoting the enforcement of employment standards.¹

[44] *The nature of the breaches* – The respondent breached Mr Williams' employment agreement, the WPA and the HA03. The breaches of the employment agreement were contractual breaches. The breaches of the WPA and HA03 involved statutory breaches of

¹ Section 3(a)(ii) and (ab) of the Act.

minimum entitlement provisions that had been put in place specifically to protect employees from exploitation by their employers.

[45] *The number of breaches* - There were four breaches of Mr Williams' employment agreement:

- (a) Failure to pay his first pay on time;
- (b) Failure to pay him for two weeks work;
- (c) Failure to give him contractual notice or to pay him in lieu of notice;
- (d) Failure to pay him his annual holiday pay in his final pay.

[46] The respondent's breaches of his employment agreement also breached the WPA, because under the WPA Mr Williams was entitled to be paid his wages when they became due and that did not occur. The WPA prohibits an employer from withholding an employee's wages in the way the respondent has done with Mr Williams' pay.

[47] The respondent has also breached s 27(1)(b) of the HA03 by failing to pay Mr Williams his annual holiday pay entitlements in his final pay.

[48] *Involvement in the breach* – Mr Etchells caused the respondent to withhold Mr Williams' pay in order to improperly pressure him to withdraw a legitimate WorkSafe health and safety complaint.

[49] *Penalty jurisdiction* - Under s 134 of the Act the Authority may impose a penalty of up to \$20,000 per breach of an employment agreement on a company, such as the respondent.²

[50] Under s 75(1)(b) of the HA03 the Authority may impose a penalty of up to \$20,000 per breach for specified breaches of the HA03. These breaches include (among other things) s 27 regarding payment of annual holiday entitlements.

[51] Under s 13(1)(b) of the WPA the Authority may impose a penalty on an employer or person who breaches the WPA. Section 13(2) of the WPA enables an employee to pursue a penalty against their employer, while a Labour Inspector may seek a penalty against an

² The maximum penalty per breach for an individual is \$10,000.

employer or a person who is involved in a breach of the WPA, as defined by s 142W of the Act.

[52] *Maximum potential penalties* - The maximum starting point for assessing penalties is therefore \$180,000 being:

- (a) Four breaches of the employment agreement x \$20,000 per breach; plus
- (b) Four breaches of the WPA x \$20,000 per breach; plus
- (c) One breach of the HA03 at a maximum of \$20,000 per breach.

[53] *Global penalties* – These potential maximum penalties should be globalised into two breaches, involving a maximum potential penalty of \$40,000, consisting of:

- (a) One breach of the employment agreement; and
- (b) One breach of the minimum entitlements employment legislation (being the WPA and HA03).

[54] *Were the breaches intentional, inadvertent or negligent?* – All of the breaches were deliberate and intentional. The respondent knew that Mr Williams was entitled to be paid for the work that he did in accordance with the payment arrangements in his employment agreement. That did not occur.

[55] Although the Authority considers the first breach (late payment of wages) could have possibly been inadvertent, the respondent did not produce any evidence to establish that.

[56] *Reason for the breaches* - The reason for all but one of the breaches (being the first breach involving the late payment of wages) is reprehensible.

[57] An email from Mr Etchells informed Mr Williams that he was not going to be paid unless he provided an apology that Mr Etchells could give to WorkSafe regarding the complaint Mr Williams had made involving the coverup of a work related accident. This was completely inappropriate.

[58] Mr Williams explained in detail the complaint that he had made to WorkSafe and the reasons for it. The Authority was satisfied that it was a proper complaint for Mr Williams to have made, and that he dealt with his legitimate concerns appropriately, by referring the incident to the appropriate investigatory statutory body (WorkSafe) to address.

[59] Even if there had been some issue over the genuineness of Mr Williams' WorkSafe complaint (and the Authority did not agree that was the case here) that did not permit the respondent to withhold Mr Williams' wages until he withdrew his complaint.

[60] *Severity of the breaches* – Although the amounts involved in the breaches were at the lower end of the financial scale, the respondent's improper motivation for all but the first of its breaches puts these breaches into a more serious category. All but the first breach (being the late payment of the first pay) are examples of an employer exercising its power to financial penalise an employee for raising legitimate (and serious) health and safety concerns.

[61] *Nature and extent of any loss suffered as a result of the breaches* – Mr Williams has been deprived of money he was entitled to be paid back in July 2021. He has therefore lost the use of that money for more than nine months, which is clearly a serious breach of the respondent's employment obligations.

[62] *Steps to avoid/mitigate the effects of the breaches* – The respondent has done nothing to avoid or mitigate the effect of its breaches. Mr Williams has not been paid the money he is owed. The respondent refused to attend mediation and declined to participate in the Authority's investigation into Mr Williams' claims. There has been no remorse or contrition.

[63] *Circumstances in which the breach took place* – Mr Williams was not a vulnerable employee. He was however placed into a financially compromised position when the respondent failed to pay him what he was owed. Although Mr Williams is not the sole income earner in his family, the respondent's breaches caused him to suffer financial stress and embarrassment.

[64] Mr Williams was a new employee and the respondent's breaches occurred at the beginning of the employment relationship. The evidence presented to the Authority was that the breaches occurred because Mr Williams was concerned about the respondent's deliberate covering up of a workplace accident, so he had raised that with WorkSafe. The respondent used its superior financial power to hurt Mr Williams financially for making the WorkSafe complaint.

[65] *Previous conduct* – The respondent has not previously appeared before the Authority or had penalties imposed on it.

[66] *Deterrence* – The respondent would have known its breaches were contrary to its contractual and statutory obligations and were therefore unacceptable. The penalties need to be set at a level that will deter this respondent and Mr Etchells from acting in this way in future. The penalties must also be at a level that sends a clear message to this and other employers that withholding wages as retribution against an employee is never appropriate.

[67] *Culpability* – The respondent’s breaches of the HA03 were part of the continuing course of improper conduct by the respondent towards Mr Williams, in an attempt to force him to withdraw the WorkSafe complaint he had made. The respondent is therefore highly culpable for its breaches.

[68] *Consistency* – The Authority is not aware of any directly comparable cases. However, the Authority considers that it has set penalties at a level that is broadly consistent with other penalty cases that have involved breaches of the HA03, WPA and/or employment agreements.

[69] *Ability to pay* – This was not raised as a factor. The respondent’s business is still operating so be any issues relating to an ability to pay penalties.

[70] *Proportionality of outcome* – Proportionality must be applied to reflect the amount in issue as a result of the breaches that occurred but also the reprehensible conduct associated with withholding wages to force a health and safety complaint to be withdrawn.

[71] *Outcome* – bearing in mind all of these factors, the Authority has imposed total penalties on the respondent of \$6,000 for its breaches of Mr Williams’ employment agreement, of the HA03 and of the WPA.

[72] These are apportioned as \$3,000 (of the maximum \$20,000) penalty for the one globalised breach of the employment agreement and \$3,000 (out of the maximum \$20,000) penalty for the one globalised breach of the WPA and HA03.

Should some or all of penalties be paid to Mr Williams instead of or as well as the Crown?

[73] Mr Williams has had the stress and expense of bringing these penalty claims to the Authority. He has suffered financially as a result of these breaches, which have all personally

affected him. Mr Williams has still not been put back into the position he would have been in had (all but one of) these breaches not occurred.³

[74] It is appropriate to award Mr Williams \$4,000 of the total \$6,000 penalties imposed on the respondent, to reflect the harm that he has suffered. The remaining \$2,000 penalty is to be paid directly to the Crown bank account. These penalties are to be paid by the respondent within 28 days of the date of this determination.

What if any costs should be awarded?

[75] Mr Williams as the successful party is entitled to a contribution towards his actual legal costs. He gave evidence to the Authority of the actual costs incurred.

[76] The Authority has adopted its usual notional daily tariff based approach to costs. The current notional daily tariff is \$4,500 for the first day of an investigation meeting. This investigation meeting took one and a half hours, so the pro-rated notional starting point for assessing costs in this matter is \$1,125.

[77] That amount then needs to be adjusted to reflect the particular circumstances of this case. There are no factors that warrant reducing the starting tariff. However the Authority considers that the notional starting tariff should be increased by \$375 (representing half an hour of the notional daily tariff) to reflect that the manner in which the respondent conducted itself increased Mr Williams' actual legal costs.

[78] Mr Williams is also entitled to be reimbursed \$71.56 for his filing fee.

[79] The respondent is therefore ordered to pay Mr Williams \$1,571.56 towards his actual legal costs and filing fee.

Orders

[80] Within 28 days of the date of this determination the respondent is ordered to pay:

- (a) Mr Williams \$10,540.69 consisting of;
 - (i) \$4,969.13 wage arrears;
 - (ii) \$4,000 of the penalties imposed;

³ With the exception of the first breach which was the late payment of Mr Williams' first pay.

- (iii) \$1,500 towards his actual legal costs; and
- (iv) \$71.56 to reimburse his filing fee; and
- (b) The remaining penalties balance of \$2,000 to the Crown bank.

Rachel Larmer
Member of the Employment Relations Authority