

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**[2012] NZERA Auckland 105
5371129**

BETWEEN TIM HARRINGTON
Applicant

AND NZ IMPORTS & EXPORTS
LIMITED
First Respondent

AND JOHNNY BE GOOD
Second Respondent

Member of Authority: Eleanor Robinson

Representatives: Danny Gelb, Advocate for Applicant
No appearance by or for Respondents

Investigation Meeting: 22 March 2012 at Auckland

Determination: 23 March 2012

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] On 31 January 2012 a Record of Settlement (“the Settlement”) was signed under s149 of the Employment Relations Act 2000 (“the Act”). The parties to the Settlement were the Applicant, Mr Tim Harrington, and the Respondent, NZ Imports and Exports Limited (“Imports & Exports”). The Settlement was signed by Mr Johnny Be Good, sole Director of Imports & Exports. The Record was also signed by a Mediator employed by the Department of Labour.

[2] The issue now brought before the Authority by Mr Harrington is that Imports & Exports has not complied with any of the terms of the Settlement. The relevant terms are as set out in clauses 2 to 5 of the Settlement:

2. *Imports & Exports Limited agrees to pay Tim Harrington the sum of \$1738.00 net in terms of holiday pay, wages and commissions owing. This agreed amount will be paid by way of direct credit within 14 days of the date hereof.*

3. *Imports & Exports Limited agrees to provide Tim Harrington with a Certificate of Service detailing the roles and functions undertaken and the duration of employment with an acknowledgement that the employment relationship ended by way of Tim Harrington's resignation.*
4. *NZ Imports & Exports Limited shall pay Tim Harrington within 14 days of the date hereof, the compensatory sum of \$500.00 in terms of section 123(1)(c)(i) of the Employment Relations Act 2000. This amount will be paid to the Applicant by way of direct credit.*
5. *Imports & Exports Limited agrees to pay the sum of \$2500+GST by way of a contribution towards the applicants costs. This amount will be paid to Land & Building Solutions Ltd upon receipt of a GST invoice.*

[3] The 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:

- (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] The Authority set a hearing date of 22 March 2012, which was communicated to the parties by a Notice of Investigation Meeting, duly served on Imports & Exports on 20 February 2012 at 11.22 a.m. As no confirmation of attendance was received from Imports & Exports, a further Notice of Investigation Meeting was served, effected by way of personal service on 19 March 2012 by Mr Harrington at the Registered Office and Address for Service of Imports & Exports.

[5] There was no appearance for Imports & Exports at the Investigation Meeting and an Authority Support Officer was unable to contact Mr Be Good on the day of the Investigation Meeting.

Determination

[6] From the evidence available to the Authority, I am satisfied that Imports & Exports has failed to comply with the Settlement. I am further satisfied that unless a compliance order is made, Imports & Exports is unlikely to comply with the agreed Settlement.

[7] A compliance order pursuant to s 137(1)(a)(iii) of the Employment Relations Act (“the Act”) is therefore necessary and appropriate.

[8] In order to effect compliance with the terms of the Settlement, I therefore order Imports & Exports to comply with the Parties’ agreed terms of settlement which were entered into under s.149 of the Act by 5 April 2012.

Interest

[9] Mr Harrington has applied for interest on the outstanding sums as set out in the Settlement.

[10] The Authority has the power to award interest pursuant to clause 11 of the Second Schedule of the Act at the rate prescribed by the Judicature Act 1908, which is currently 5% per annum¹.

[11] I consider that it is appropriate that Imports & Exports are ordered to pay interest on the outstanding sums owed to Mr Harrington. I note that these sums include Mr Harrington’s entitlement to statutory payments in respect of holiday pay, in addition to wages. Mr Harrington has been deprived of the use of these monies and had had to borrow money as a result.

[12] Imports & Exports is to pay interest of 5% from 14 February 2012 until the amounts specified in the Settlement have been paid in full.

Penalties

[13] Mr Harrington has applied for penalties against both Imports & Exports, and Mr Be Good.

¹ Judicature (Prescribed Rate of Interest) Order 2011 (SR2011/177)

[14] Pursuant to s 149(4) of the Act, a person who breaches an agreed term of settlement to which the Act applies, is liable to a penalty of up to \$10,000.00 for an individual or up to \$20,000.00 for a company.

[15] As the then Chief Judge observed in *Xu v McIntosh*², a penalty: “*is imposed for the purpose of punishment of a wrongdoing which will consist of breaching the Act ...*”

Imports & Exports

[16] Imports & Exports is a company who has breached the terms of an agreed settlement certified under s 149 of the Act by the Mediator. As such Imports and Exports is liable to a penalty not exceeding \$20,000.00.

[17] The Employment Court in *Xu v McIntosh*³ said that the first question to be asked in contemplating the award of a penalty is “*how much harm has the breach occasioned?*”

[18] I find that the harm in this case has been significant. Mr Harrington had agreed to settle his personal grievance claim on the basis that events prior to his dismissal had been extremely stressful, and the Settlement gave him the opportunity to effect closure on this period of his career. However this has not occurred due to the failure of Imports & Exports to comply with the terms of the Settlement.

[19] Further Mr Harrington, already financially disadvantaged, has been put to additional time, expense and stress trying to obtain payment. In all these circumstances, Mr Harrington has been placed under financial pressure, which has resulted in his having to borrow monies from his flat-mate and parents.

[20] The Employment Court said in *Xu v McIntosh*⁴ that the next question to be examined is the culpability of the perpetrator. Was the “*the breach technical and inadvertent or was it flagrant and deliberate?*”

[21] I find that the breach by Imports & Exports was flagrant and deliberate. Imports & Exports was aware of its obligations since Mr Be Good, the sole Director, had signed the Settlement. Imports & Exports has failed to comply with the terms of Settlement and has provided no explanation for this.

² [2004] 2 ERNZ 448

³ Ibid at para [47]

⁴ Ibid at para [48]

Public Interest

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

[23] 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 parties can have confidence in the enforceability of the terms of agreed settlements.

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

[25] I have found the breach by Imports & Exports to be significant, and the penalty should be set to reflect the Authority's disapproval of such behaviour. I determine that a penalty of \$7,000.00 is appropriate in the circumstances.

[26] **I order Imports & Exports to pay \$7,000 as a penalty pursuant to s 149(4) of the Act .**

Mr Be Good

[27] Mr Be Good, although not himself the employer of Mr Harrington, was I find a party to Imports & Exports breach of the Settlement. Mr Be Good is the sole Director of Imports & Exports, Mr Be Good signed the Settlement and was therefore fully aware both of the terms of the Settlement and the effective date by which compliance with those terms was due.

[28] The Court of Appeal in *Peacock v NZ Performance etc Union*⁵ held that “a person who was the “mind” of the company may be guilty of aiding and abetting the company ...” I consider that Mr Be Good was the “mind” of Imports & Exports, and as such he aided, abetted or incited the breach of the Settlement by Import & Export.

[29] In considering the appropriate level of a penalty in respect of Mr Be Good, I am mindful of the fact that Mr Be Good was not personally Mr Harrington's employer. Imports & Exports remains liable as Mr Harrington's employer, and the incorporation of Imports & Exports as a limited company entitled Mr Be Good to limit his liability.

⁵ [1990] 2 NZILR 257

[30] **I order Mr Be Good to pay \$2,000.00 as a penalty pursuant to ss 134(2) and !35 of the Act.**

Payment of the penalties to Mr Harrington

[31] In accordance with the observation of the Employment Court in *Xu v McIntosh*⁶ whether a penalty is paid to the victim of the breach, this should be decided with respect to the degree of harm suffered as a result of the breach.

[32] I consider that Mr Harrington has been harmed to a significant degree in that his health has suffered as a result of events surrounding the termination of his employment. These events included his having been accused of theft and threatened with the prospect of police involvement. Mr Harrington said he had felt that his integrity had been threatened, and as a result of these actions, he had suffered from stress and had sought medical assistance. Mr Harrington explained that he was still on medication for anxiety.

[33] Mr Harrington continues to suffer financially and his reliance on his flat-mate to pay the rent of the flat they share, and on his parents for financial loans to pay the necessities of life, has caused him embarrassment and has adversely affected his relationship with his flat-mate.

[34] Mr Harrington stated the unresolved nature of his situation continues to affect his ability to return to full health, and to full-time employment.

[35] In the circumstances I consider it appropriate that a proportion of the penalties is paid to Mr Harrington.

[36] **Imports & Exports is ordered to pay Mr Harrington \$3,000.00 of the \$7,000.00 penalty, the remaining \$4,000.00 to be paid to the Crown.**

[37] **Mr Be Good is ordered to pay Mr Harrington \$1,000.00 of the \$2,000.00 penalty, the remaining \$1,000.00 to be paid to the Crown.**

[38] For the information of Imports & Exports, failure to comply with an order such as this one made by the Authority under s 137 of the Act may provide a basis for an application to be made by Mr Harrington to the Employment Court for enforcement of the order. Under s140 of

⁶ [2004] 2 ERNZ 448

the Act, where the Court is satisfied that any person has failed to comply with a compliance order made under s137, the Court may order remedies, including a fine not exceeding \$40,000 and/or the seizure of property and for the proceeds of sale to be distributed to the person enforcing the Authority's order.

Summary of Orders

[39] **Imports & Exports is ordered:**

- a. to comply with the Parties' agreed terms of settlement which were entered into under s.149 of the Act by 5 April 2012**
- b. to pay interest of 5% from 14 February 2012 until the amounts specified in the Settlement have been paid in full**
- c. to pay \$7,000.00 as a penalty, \$3,000.00 to Mr Harrington, and \$4,000.00 to the Crown**

[40] **Mr Be Good is ordered:**

to pay \$2,000.00 as a penalty, \$1,000.00 to Mr Harrington and \$1,000.00 to the Crown.

Costs

[41] Mr Harrington has claimed costs in relation to this proceeding on an indemnity costs basis, but has provided no details on the level of these costs. The matter took less than half a day of meeting time. In these circumstances I am not minded to depart from the Authority's usual practice of a notional daily tariff basis, this being now accepted to be at a rate of \$3,500.00 per day.

[42] Accordingly, Imports & Exports is ordered to pay Mr Harrington \$875.00 as a contribution towards his costs pursuant to clause 15 of Schedule 2 of the Employment Relations Act 2000.

[43] I am satisfied that Mr Harrington has been put to some additional expense in bringing this claim, and order Imports & Exports to reimburse Mr Harrington the \$71.56 filing fee..

Eleanor Robinson
Member of the Employment Relations Authority