

Attention is drawn to the non-publication order at paragraph [14] of this determination.

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2017] NZERA Christchurch 31
5632476

BETWEEN MS A
Applicant

AND RAELENE and DEAN
REES PARTNERSHIP, trading as
REES ACCOUNTING
Respondent

Member of Authority: Christine Hickey

Representatives: Adam Gallagher and Grace Hall, counsel for Ms A
Jeff Goldstein, counsel for the Respondents

Investigation meeting: 9 December 2016

Submissions: At the investigation meeting

Determination: 8 March 2017

**DETERMINATION OF
THE EMPLOYMENT RELATIONS AUTHORITY**

Orders

- A. In paying less than Ms A was entitled to by way of annual holiday pay the Rees Accounting Partnership has breached the settlement agreement.**
- B. Within 28 days of the date of this determination the Rees Accounting Partnership must pay Ms A:**
- i. 17 days of annual holiday pay in line with section 24(2) of the Holidays Act 2003; and**
 - ii. 8% holiday pay on amounts earned from hours worked during closedown periods, if outstanding. In addition, if not already paid, the annual holiday entitlement from September 2015 to January**

2016 must be paid. The parties should work together to calculate any outstanding amount. If they are unable to agree Ms A may return to the Authority to have the amount set; and

- iii. **Interest of 5% per annum on the 17 days annual holiday pay entitlements and any other outstanding holiday pay from 9 February 2016 until the amount is paid in full; and**
- iv. **A penalty of \$3,000.00. \$1,500.00 is to be paid to the Authority for the Crown bank account. \$1,500.00 is to be paid to Ms A.**

C. I have reserved costs and set a timetable for submissions.

Employment relationship problem

[1] Ms A claims that her former employers, Raelene and Dean Rees Partnership, trading as Rees Accounting (the respondent), have breached a settlement agreement entered into on 29 January 2016. The specific term said to have been breached is the undertaking that respondent would pay all outstanding salary, annual leave and other statutory entitlements due as at the termination date.

[2] Ms A claims that the respondent has not paid her the correct amount of annual leave owing to her. Ms A claims an outstanding leave entitlement of at least \$14,792¹, along with interest on her unpaid annual leave entitlement.

[3] In addition, Ms A claims that the respondent should pay a penalty for its breach of the terms of the settlement agreement. She says that all or part of that penalty should be paid to her.

[4] She also claims that she should be entitled to indemnity costs.

[5] The respondent denies it has breached any of the terms of the record of settlement, and seeks costs from Ms A. It says Ms A did not have the amount of annual holiday entitlement she claims at the end of her employment. That is because she was paid her four-week annual holiday entitlement in advance of the annual closedown period. The respondent denies breaching the Holidays Act 2003.

Non-publication?

[6] Mr Gallagher submits that some of the respondent's evidence was wholly irrelevant, and some of it was of a "scurrilous nature". Therefore, the Authority

¹ At the investigation meeting Ms A sought a greater amount of approximately \$17,000.

should issue a non-publication order, to the effect that part of the evidence and the names of the parties are not to be published.

[7] Ms A was particularly concerned about the allegations against her credibility because of a conviction. She accepted that she was the first party to mention her conviction. She did so in her application to the Authority. She says her decision to do that was based on her desire to be transparent and honest with the Authority. However, Mr Gallagher submits that the evidence produced by the respondent goes beyond, and is irrelevant to, the issue of whether the respondent breached its obligations under the record of settlement.

[8] Ms A says that if the details of her conviction are published she will be significantly prejudiced in her ability to continue relationships with existing clients who place a considerable amount of trust and confidence in her.

[9] Under clause 10 of Schedule 2 of the Employment Relations Act 2000 (the Act), the Authority has the power to order that all or any part of any evidence given, or the name of any party, not be published.

[10] This power is exercised sparingly, balancing the important principle of open justice against the interests of the party requesting non-publication. However, there are particular cases in which the public interest in open justice is not such a compelling principle.

[11] In this case, the parties made a confidential agreement to settle their differences. None of the details of that agreement can be brought before the Authority, except for enforcement purposes.

[12] The evidence that the respondent wishes to be taken into account, and argues should be published, is not the subject matter of these proceedings. It was not the subject matter of the employment relationship problem that the parties settled. In addition, that information about Ms A's past was clearly known to the respondent, or at least some part of it, before employing Ms A in 2007 and certainly before the parties agreed on the terms of their confidential settlement.

[13] I do not consider that there is any public interest in publishing details of the aspect of Ms A's past that the respondent has raised. The respondent raised those details to call into question Ms A's credibility. However, that does not mean that the

public needs to be aware of the information. Rather, it was something for me to bear in mind when assessing the weight that I could put on Ms A's evidence. I have done that and those details do not need to form part of my determination.

[14] Using the power granted to the Authority by clause 10, Schedule 2 of the Act, I order that Ms A's name and any details about Ms A's past or any details that might lead to her being identified must not be published. I consider the non-publication order is in the overall interests of justice in these circumstances.

[15] There is no reason that the name of the respondent should not be made public.

Issues

[16] The core issue is whether Ms A has received her statutory minimum entitlement to her annual holiday pay. She claims that the respondent failed to calculate her annual holiday entitlements properly. Every December the respondent paid its entire staff for their four weeks of annual holiday entitlement prior to the annual closedown. Staff were paid for four weeks holiday, even though the closedown was for less than 20 working days, or four weeks.

[17] In order to determine whether the respondent breached the settlement agreement by not paying the Ms A the correct amount of final pay, including accumulated holiday pay, I need to decide:

- (i) Did the respondent incorrectly pay out a portion of Ms A's annual holidays from 2010 to 2015?
- (ii) If so, should the respondent have reinstated the portion of annual holidays that were paid out, but not taken as annual leave, prior to Ms A's employment ending?
- (iii) If so, how much annual leave entitlement was paid out incorrectly, and how many days should have been credited back during Ms A's employment?
- (iv) What effect did Ms A's paid work during some of the January closedown have on her annual holiday entitlement? In particular, should she have been re-credited with those days as annual holiday entitlements?

- (v) Did the respondent breach the terms of the settlement agreement?
- (vi) If so, how much does the respondent still owe Ms A by way of her statutory entitlement to annual holiday pay?
- (vii) Should the respondent pay a penalty for breaching the settlement agreement?
- (viii) If so, how much should the penalty be, and should it be paid to Ms A?
- (ix) What should happen about legal costs?

[18] Credibility was raised as an issue for me to consider. I have considered the credibility of the evidence presented to me by both parties and have reached conclusions. In reliance on s 174E(b)(iii) of the Act, I do not need to indicate why I reached credibility findings. However, I have stated and explained my findings on the facts, stated and explained my findings on the relevant issues of law and expressed my conclusions necessary to dispose of the matter. I have not set out a record of all the evidence, or recorded all submissions made by the parties.

Background facts

[19] Ms A began work for the respondent on 17 September 2007 as a senior accountant. Mrs Rees, who is a chartered accountant, signed all of her work off.

[20] Clause 6 of Ms A's individual employment agreement (IEA) allowed the employer to close down for approximately four weeks over the Christmas and New Year period.

[21] In accordance with the Holidays Act 2003 (the HA) and her IEA, Ms A was entitled to four weeks' paid annual leave upon the completion of 12 months employment. The IEA also stated:

Your holidays must be taken at a time suitable to the demands of your position. While we will try to accommodate your preferred timing of holidays, the Employer closes down for approximately 4 weeks over the Christmas/New year period. You must take annual leave during the closedown period, unless otherwise agreed with the Employer.

If this agreement is terminated we will pay you your outstanding annual leave.

[22] Ms A was first entitled to four weeks of annual leave on 16 September 2008. From at least December 2011, Ms A and all other staff were required to take all of their annual leave during the closedown period.

[23] It was the respondent's practice that employees were not able to take leave during the year because all of their annual leave had been paid out over the previous Christmas/New Year period. If employees wanted to take paid holiday leave, outside of the closedown period, they needed to work hours over and above their usual week's hourly requirement and take time off as time in lieu.

[24] After the New Year statutory holidays, but before the office officially opened again, Ms A would go into work on a number of days. She generally did not work full days. She claimed and was paid for the hours she worked, despite already having been paid for those days as annual leave. This practice occurred every January during the relevant period.

[25] From time to time, and especially if they did not have enough accumulated annual leave to cover the whole closedown period, some other employees would also come back to work before the office closedown officially ended.

Payout of annual holidays – Holidays Act 2003

[26] Sections 28A to 28F of the HA deal with how a portion of annual holidays may be paid out instead of taken as leave. An employee may request, in writing, that their employer pay out a maximum of one week of the employee's annual holidays in "each entitlement year".

[27] If an employer has incorrectly paid out a portion of the employee's annual holidays where the employee did not make a request for payment, s 28B operates to ensure the employee's entitlement to take the portion of annual leave concerned remains in force as if the payment had not been made.

[28] Sections 28C and 28D operate to mean that an employee cannot be required to request a payout and an employer cannot be compelled to make a payout.

Ms A's submissions

[29] I consider the claim for further holiday pay for annual leave in three parts.

[30] First, were some days incorrectly paid out when annual leave was paid before the close down? Therefore, should some annual holidays have been available to Ms A to take as annual leave during the rest of the working year?

[31] Mr Gallagher submits that Ms A never requested, under s 28A of the HA, that she be paid out for any of her annual leave. Therefore, in paying her out the respondent breached the HA. It incorrectly paid out a portion of her annual holidays. The appropriate remedy during Ms A's employment was under s 28B(2) of the HA. That required the respondent to ensure that Ms A's entitlement to "take the portion of annual holidays concerned remains in force as if the payment had not been made."

[32] Secondly, since that did not happen, Mr Gallagher submits Ms A has not received her statutory entitlements and that she should have been paid out for those days as part of the settlement agreement when her employment ended.

[33] Mr Gallagher submits that Ms A was disadvantaged during her employment by having no annual leave available to take during the year as, effectively, her leave balance was re-set to zero every December.

[34] Thirdly, I understand Mr Gallagher to submit that coming in to work on a number of days in each January during the annual closedown, for which Ms A had been paid annual leave, meant that she also became entitled to have those days remain in force as annual holidays as if the payment for them had not been made.

Were there incorrectly paid out days during the closedowns?

[35] I deal first with the issue of how many days may have been incorrectly paid out during the closedown periods.

[36] The parties agree the dates that the office was closed over Christmas/ New Year were:

Closed 12.30 pm Wednesday 23/12/09 – reopened Wednesday 21/1/10
Closed 12.30 pm Thursday 23/12/10 – reopened Monday 24/1/11

Closed 12.30 pm Thursday 22/12/11² – reopened Monday 23/1/12
 Closed at close of business Friday 21/12/12 – reopened Monday 21/1/13
 Closed at close of business Friday 20/12/13 – reopened Monday 20/1/14
 Closed at close of business Monday 22/12/14 – reopened Tuesday 20/1/15
 [I note I have no dates for December 2015 to January 2016]

[37] The office was never closed down for 20 working days once the four days of statutory holidays (Christmas Day, Boxing Day, New Year's Day and the day after New Year's Day) were taken into account. Therefore, Ms A was paid out all of her annual leave, despite not being able to take all of her annual leave over that period. That meant that she had no accumulated annual leave to take during the year.

[38] I calculate that, without taking into account the hours Ms A worked during the closedown periods, she was paid out for a total of 17 days she was unable to take as annual holidays because the office opened again before the 20 paid days were up:

Dates of close down	How many working days able to be taken?	How many annual holidays due December to December?	Surplus days that could not be taken as annual holidays
12.30 pm, 23 December 2010, reopen 24 January 2011	17.5	20	2.5 days
12.30 pm, 22 December 2011, reopen 23 January 2012	17.5	20	2.5 days ³
End of day 21 December 2012, reopen 21 January 2013	16	20	4 days

² This is the first year that the legislation allowed a request to be paid out for up to a week of annual holiday leave.

³ The amount Ms A was paid in December 2011 included the 2.5 days annual holidays she had not taken, or been paid for, from the previous year.

End of day 20 December 2013, reopen 20 January 2014	16	20	4 days
End of day 22 December 2014, reopen 20 January 2015	16	20	4 days

[39] The statutory ability to request up to one week of annual holiday entitlement to be paid out came into effect on 1 April 2011.

[40] The respondent says Ms A requested and was happy to be paid out her annual holiday pay each Christmas. A request under s 28A of the HA must be in writing. There is no written record of such requests.

[41] I conclude that Ms A did not request to be paid out any of her annual holiday entitlement.

[42] She was incorrectly paid out 2.5 days for the 2010-2011 year in December 2012 along with 2.5 days from the year ending December 2012 being incorrectly paid out.

[43] In the subsequent years, because Ms A did not request that any days of her annual holiday entitlement be paid out, she was incorrectly paid out 4 days in each year.

[44] Because the respondent incorrectly paid out 17 days⁴ of annual leave, Ms A should have been entitled to take those 17 days of annual holiday during her employment because they should have remained in force as if the payment for them had not been made.

⁴ In assessing the number of days I have assumed that the correct payment for annual holidays was made for the period December 2015 to January 2016. If that is not correct then the respondent must pay Ms A correctly for that period.

Should Ms A have been paid out for those days as accumulated leave not taken at the end of her employment?

[45] The answer to this question will determine whether the respondent has breached the settlement agreement because it is agreed that no paid out days were re-credited to Ms A's leave balance during her employment.

[46] Ms A alleges the respondent has breached clause 2 of the settlement agreement. When interpreting clause 2, I consider clauses 4 and 11 must be read together with it:

2. The Employer will pay the Employee all outstanding salary, annual leave and any other statutory entitlements due and owing to the Employee as at the termination date.

...

4. The sums referred to at paragraphs 2 and 3 above will be paid directly into the Employee's nominated bank account within 7 days of the Mediator signing this agreement.

...

11. In reaching this agreement, the parties confirm that neither has agreed to forego minimum entitlements (moneys payable under the Minimum Wage Act 1983, or the Holidays Act 2003, as defined by the Employment Relations Act 2000).

[47] The mediator certified that:

... 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;

[48] On Thursday, 28 January 2016, Mr Gallagher emailed Mr Goldstein at 3.48 pm:

... we request your client provide her time and wage records ... and her holiday and leave records ... for the period of her employment. The holiday and leave records should include information relating to our client's leave balances (both annual and sick leave) and records your client holds about when leave was taken so that it complies with s 81 Holidays Act.

In addition, our client has instructed we request information relating to your client's practice of paying out employees their full annual leave entitlement at the end of the year (whether or not that time was taken as annual leave). Our client does not recall ever requesting she receive a cash payment in lieu of her annual leave entitlement. If it is your client's practice to cash up employees' annual leave entitlement, then please have your client provide a copy of the written authority our client provided authorising this. Please have your client's payroll officer identify how much of our client's annual leave has been "cashed up" year on year ... As you will be aware, the Holidays Act

provides very limited circumstances in which an employer can pay out an employee's annual leave in cash.

[49] Ms A and Mrs Rees signed the settlement agreement on Friday, 29 January 2016. However, the respondent did not provide the requested records until Monday, 1 February 2016.

[50] Mr Goldstein submits that even if Ms A's annual leave should have been reinstated that applied only during her employment. He points out the purpose of annual leave, as set out in s 3 of the HA, is

to provide employees with ... the opportunity for rest and recreation.

[51] He submits, therefore, that Ms A cannot now use any annual holidays for rest and recreation and that the legislation does not contemplate cash payments instead.

[52] The respondent had a policy of not allowing employees to take paid annual holidays at any time outside the closedown period. That was not Ms A's choice. In effect, that policy was in breach of the HA because the closedown period was never long enough for Ms A to take all of her annual holidays. The respondent's policy did not comply with the object of the HA to provide adequate opportunities for rest and recreation.

[53] The legislation contemplates the employee gaining back their entitlement to take leave wrongly paid out during their employment. Had the respondent re-credited Ms A with her annual holiday entitlements during her employment, as s 28B(2) required, it may have asked her to re-pay the holiday pay it incorrectly paid out. However, the respondent was not aware that it had breached the HA so did not do so. At the end of their employment, employees must be paid the monetary value of their annual leave entitlement. Ms A should have been reinstated with annual holiday entitlements and therefore, could have taken that leave during each year outside the closedown period.

[54] Section 24 of the HA applies when employment ends and the employee is entitled to annual holidays and has only taken some of them. If, as should have happened, Ms A was entitled to a further 18.5 days annual leave, she should have been paid out for that at the greater of her ordinary weekly pay at the end of her employment, or her average weekly earnings in the 12 months prior to the end of her employment.

[55] In addition, Mr Gallagher's email of 28 January 2016 put the respondent on notice that it may not have properly paid or calculated Ms A's leave during her employment. Mrs Rees signed the settlement agreement the day after Mr Gallagher's email was sent. Therefore, the respondent must be taken to have known Ms A expected to be re-credited with some of her annual leave entitlement.

[56] It cannot be right that an employer can incorrectly pay out an employee for annual holiday pay and not put that right during the employment but escape any consequences because the employment has ended. That is particularly so when the respondent was on notice before signing the settlement agreement and in that agreement agreed that Ms A had not foregone any of her entitlements under the HA.

[57] Mr Goldstein submitted that I should make my determination in line with the Authority determination of *Begum v Saiyad Enterprise Limited*⁵ in which Member Arthur decided not to pay annual holiday pay. Ms A's case is different from that in *Begum*, in that I have found Ms A did not ask for her annual leave to be paid out, unlike Member Arthur's conclusions about Ms Begum.

[58] The respondent has breached the settlement agreement by not paying Ms A all of her minimum entitlements under the HA.

[59] Section 137 of the Act gives the Authority the power to order compliance with a settlement agreement. Therefore, I order that the respondent pay Ms A the 17 days incorrectly paid out as annual holiday pay.

How does Ms A's time worked and paid during the closedowns affect her annual holiday pay entitlement?

[60] Ms A says that every year before the closedown she and Mrs Rees discussed the date she would come back before the closedown finished.

[61] Mrs Rees denies that and says that she used to come in at least a couple of times a week and there was no need for Ms A to do so as well. Instead, the respondent says that Ms A freely chose to return to work during the closedown periods. It says it did not require her to do so and did not instruct her to do so. It says Ms A chose when and for how long she would work over that period.

⁵ [2014] NZERA Auckland 505, 8 December 2014.

[62] The respondent paid Ms A wages for the hours she worked during the closedown. As a result, she was paid twice for the same period, having been paid her holiday pay and then paid wages for the hours worked. Therefore, the respondent submits it does not owe Ms A any further pay for those days she did not take as annual holidays.

[63] The respondent goes further and submits it would be “morally repugnant” if the Authority compels it to pay Ms A for a third time by re-crediting as annual holidays the days she chose to work. Essentially, this is an argument against double, or triple, dipping.

[64] Mr Gallagher submits that moral arguments are irrelevant when the issue is one of technical compliance. His submission is that analogously to the annual holidays incorrectly paid out, the respondent should have re-credited Ms A with annual holiday entitlements for those days worked during the closedowns.

[65] As part of its objection to paying Ms A any further money the respondent has suggested that it had discovered that Ms A over-claimed the number of hours she worked and so has been over-paid. The respondent has made no counter-claim against Ms A. Such a claim is perhaps precluded by the settlement agreement, which was in full and final settlement of all matters between the parties arising out of the employment relationship.

[66] Ms A was not required to keep timesheets but Mr Rees, who was in charge of the payroll, was aware that Ms A kept a daily record of her work hours in her diary. The respondent supplied Ms A with a new diary every year. Mr Rees accepted Ms A’s self-reporting of her hours worked and did not ask to see her diary to check the hours worked or cross check them in any way. I note that apart from MYOB records created for payroll purposes the respondent did not keep a wages and time record for Ms A, so was arguably in breach of s 130 of the Employment Relations Act (the ER Act).

[67] If I consider Ms A’s ability to make an accurate claim for wages arrears (which includes holiday pay) was prejudiced by the lack of employer records, s 132 of the ER Act allows me to accept her evidence, unless the employer proves that her claims are incorrect. Ms A and the respondent may have had different understandings of how the respondent’s unusual paid/unpaid lunch break arrangements resulting in

some employees being eligible to leave early on a Friday afternoon should apply to her if she did not take lunch breaks. However, it was a relatively small work place and the principals in the partnership were frequently present and therefore aware of how many hours Ms A put in at work. I am not undertaking a wholesale reassessment of wages paid, and Ms A's diary records are the only contemporaneous and therefore the best record of her hours.

[68] I accept that Ms A worked the hours she claimed on the days she claimed during the closedown periods. She explained to my satisfaction that some of her hours did not exactly line up with the office alarm times because she claimed for time taken to clear the post office box and do any other tasks outside of the office.

[69] I find that this unusual situation is not one that s 28B(2) of the HA applies to because it is not strictly analogous to an incorrect paying out of annual leave.

[70] I find that the respondent did not impose any requirement on Ms A to come to work during the closedown, and it did not direct her to do so. Ms A decided to do so but with the respondent's knowledge and tacit approval. The respondent clearly considered Ms A was doing work of value to it because it chose to pay her. It did so knowing that it had already paid her annual holiday pay for those same days. Ms A also worked those hours in the knowledge that she was getting paid twice for the same time.

[71] The respondent could have insisted Ms A did not work, since she was supposed to be on paid annual leave. Mrs Rees said that it was simpler to allow Ms A to do what she wanted to do. However, it is not sufficient for an employer to say that an employee was insistent on doing what she wanted so it merely complied with her wishes.

[72] I consider the situation more analogous to someone having worked and been paid for a full day of work then working some further overtime hours and being paid for those.

[73] I apply my equity and good conscience jurisdiction to decide it is not appropriate that Ms A should have been re-credited with those days she worked as annual leave days. That is because she was fully aware that she was being paid twice for those hours worked. She was not disadvantaged in working and being paid for those hours. She could simply have decided to remain on annual leave on those days.

[74] However, I am uncertain whether in calculating Ms A's final annual holiday pay under the settlement agreement⁶ the respondent paid her 8% of her entire gross earnings, specifically including the hours she worked during the closedowns. The respondent should know whether it has paid her out on that basis or not. If it has, it must inform Mr Gallagher and the Authority of that within 7 days of this determination. If not, it must calculate how much that 8% additional pay is, by agreement with Ms A, and pay her that amount.

[75] In addition, I assume that the respondent has paid Ms A under s 24 of the HA for the annual holiday entitlement she acquired for the period from her anniversary date on 17 September 2015 until her last day on 29 January 2016. If not, it must calculate how much that additional pay is, by agreement with Ms A, and pay her that amount.

[76] If there is any outstanding amount and the parties cannot agree on what that is Ms A may come back to the Authority for me to calculate it.

Interest

[77] Ms A seeks interest on the amounts not paid to her by 8 February 2016. The Authority has the power to award interest pursuant to clause 11 of the Second Schedule of the Act at the rate prescribed by s 87(3) of the Judicature Act 1908, which is currently 5% per annum.⁷

[78] Given that the respondent should not have paid out the 17 days of annual holiday pay that it did, and has not yet made that right with Ms A, I consider it reasonable that the respondent should pay 5% interest on that amount from 9 February 2016. That is the day after the date by which the respondent agreed to pay Ms A her full HA entitlements.

[79] If the respondent owes any further amount 5% interest must also be paid on that amount from 9 February 2016.

[80] The interest will continue to accrue until the date the whole amount outstanding is paid in full.

⁶ When her employment had come to an end – s 27(1)(b) of the HA.

⁷ Judicature (Prescribed Rate of Interest) Order 2011.

Should the respondent pay a penalty?

[81] Section 149(4) of the Act provides that a person who breaches and agreed term of settlement is liable to a penalty imposed by the Authority.

[82] Section 133 of the Act gives the Authority jurisdiction to impose penalties. Section 133A provides mandatory considerations for the Authority in determining an appropriate penalty. In addition, in the Employment Court case of *Boorsboom v Preet PVT Limited and Warrington Discount Tobacco Limited*⁸ a Full Court set out a four-step analysis for reaching decisions on whether to penalise and how to fix penalties.

[83] Mr Gallagher submits that the category the respondent fits is a “corporation”, for which the maximum penalty is \$20,000.⁹ However, that is not correct. The respondent is a partnership in which the individual partners are jointly and severally liable.

[84] For individual employers the maximum penalty the Authority can impose is \$10,000 for each breach.¹⁰ The maximum penalty was doubled in 2011 and was “enacted to mark stronger parliamentary disapproval”¹¹ of activities that breach statutory minimum standards.

[85] The purpose of the imposition of a penalty is to punish and to deter. Both reasons apply in this case. I consider it correct to impose a penalty to punish the respondent for its breach of the settlement agreement and deter other employers from any other breaches of settlement agreements.

Section 133A considerations

[86] Section 3(a)(v) of the Act provides that an object of the Act is to “promote mediation as the primary problem-solving mechanism.” A settlement agreement certified and signed by a mediator is an enforceable agreement. It is not in the interests of justice or within the objects of the Act that such an agreement should be able to be breached without consequence.

⁸ [2016] NZEmpC 143

⁹ Section 135(2)(b) of the Employment Relations Act 2000.

¹⁰ Section 135(2)(a) of the Employment Relations Act 2000.

¹¹ *Boorsboom v Preet*, *ibid*, at paragraph [60].

[87] I consider the breach to have been intentional because the respondent was on notice from 28 January 2016 that Ms A considered it may have paid her out in contravention of the HA provisions. It did not seek to clarify with Ms A what she considered her entitlement was before paying out her holiday pay. Therefore, it was an ongoing breach.

[88] The breach had a negative effect on Ms A, in that her final pay was less than expected but she was not a particularly vulnerable employee.

[89] I do not consider the respondent has attempted to mitigate any adverse effects of the breach. Instead, it has continued to argue it should not pay Ms A another cent.

[90] I am not aware that the respondent has previously been found to have breached a term of a settlement agreement.

Boorsboom v Preet considerations

Step One: Identification of nature and number of breaches

[91] I am satisfied that I need to consider the imposition of a penalty for the breach of the settlement agreement. There was one breach. The maximum penalty the Authority can impose is \$10,000, and that is the starting point for my consideration of a penalty for this breach.

[92] Because there was one breach, I do not need to consider whether there should be a global penalty.

Step Two: Assessment of the severity of each breach – aggravating and mitigating factors

Aggravating factors

[93] This is not the most serious breach conceivable, the starting point for deductions or credits should be less than the maximum penalty. The respondent appeared to believe it was entitled to pay only the amount of annual holiday pay that it did.

[94] The nature of the loss or damage to Ms A is difficult to quantify. However, I accept that she received less than she understood she had ‘bargained for’ and has had to remain engaged in legal proceedings when the settlement agreement should have

achieved the full and final settlement she believed had been reached. I consider the starting point should be 30% of the maximum penalty, or \$3,000.

Mitigating factors

[95] I have not identified any mitigating factors. For example, there has been no remorse expressed.

Step Three – the respondent’s financial circumstances

[96] I have not received any financial evidence from the respondent. I have no reason to suspect the respondent would have difficulty paying any penalty that I impose.

Step Four - Proportionality

[97] This requires me to consider whether the provisional penalty reached after the first three steps is proportionate to the seriousness of the breach, and the harm occasioned by it. This step is to ensure that the imposition of a penalty, and the amount of it, is just in all the circumstances. In addition, I need to examine any other similar cases to impose a penalty in line with them.

[98] According to a table of cases¹² where penalties have been imposed post-*Preet*, there has been only one other penalty for breach of a settlement agreement – *Wanaka Sun (2003) Limited v Brooke Woodrow*.¹³ In that case, the authority imposed a penalty of \$250 for a breach of a non-disparagement clause that was significantly different from this case and caused only minimal harm, if any. I do not consider that case useful as a benchmark for this case.

[99] I consider a \$3,000 penalty is proportionate in relation to the type of breach and its impact, as well as sending an appropriate message to parties about the importance of complying with a settlement agreement.

Should some of the penalty be paid to Ms A?

[100] Section 136(2) of the Act allows me the discretion to decide whether part of the penalty must be paid to any person. Ms A has applied for the penalty to be paid to

¹² Prepared and kept up to date by legal research assistance provided to the Authority.

¹³ [2017] ERA Christchurch 3.

her. Mr Gallagher submits that is appropriate because she has been denied the use of money that was rightfully hers and has had to come to the Authority to recover it. I agree that Ms A has suffered unnecessary hardship by being put to unnecessary trouble and expense. However, I consider that only 50% of the penalty should be paid to Ms A.

Costs

[101] Generally, the unsuccessful party is required to make a reasonable contribution to the successful party's legal costs. The parties are encouraged to come to an agreement on costs. I remind Mr Gallagher that there are limited circumstances in which indemnity costs are awarded.

[102] The investigation meeting last one day. The proceedings were lodged on 1 July 2016, when the daily tariff was \$3,500 per day.

[103] If agreement on costs is not possible, the party seeking costs should make submissions on costs within 28 days of this determination. The other party should respond within a further 14 days. The parties should include submissions on whether there are factors they consider should lead to an uplift or reduction in the daily tariff amount.

Christine Hickey
Member of the Employment Relations Authority

APPENDIX

One employee affected

<i>Step 1: Nature & number of breaches – potential maximum penalties</i>		
Section 149, Employment Relations Act 2000 One breach		\$10,000
	Subtotal	\$10,000
<i>Step 2: Aggravating factors as a proportion of maxima in Step 1</i>		
It is an aggravating feature that the respondent knew before paying out the final pay that it had not complied with the HA provisions re paying out annual holidays		\$3,000
	Subtotal	\$3,000
<i>Step 2: Ameliorating/mitigating factors (reducing aggravating factors subtotal)</i>		
I have not identified any mitigating factors.		\$3,000
	Subtotal	\$3,000
<i>Step 3: Defendant's financial circumstances</i>		
I have no evidence on these – not relevant	Subtotal	\$3,000
<i>Step 4: Proportionality</i>		
No need for reduction or increase as the amount is appropriately proportional to the breach	TOTAL	\$3,000