

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2018] NZERA Auckland 132  
3016391

BETWEEN	MATTHEW HAWEA Applicant
A N D	SPF SPECIALIST PLASTERBOARD FIXING LIMITED First Respondent
A N D	ROYDON GUILFORD Second Respondent

Member of Authority: T G Tetitaha

Representatives: D Gelb, for the Applicant  
A Sharp, Counsel for Respondents

Investigation Meeting: On the papers

Submissions Received: 24 April 2018 from Applicant  
9 and 24 April 2018 from Respondents

Date of Determination: 30 April 2018

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**DETERMINATION OF THE  
EMPLOYMENT RELATIONS AUTHORITY**

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- A. The compliance order proceeding against SPF is dismissed.**
- B. Given the lack of any evidential basis for proceeding against the second respondent, the proceeding for a penalty for aiding and abetting is dismissed.**
- C. The application for penalty against SPF for breaches of the settlement agreement is dismissed.**
- D. Costs are reserved. If either party seeks an order for costs a memorandum shall be filed and served 14 days from the date of this**

**determination. The other party shall have 14 days to file and serve a reply.**

### **Employment relationship problem**

[1] Matthew Hawea alleges there were breaches of a settlement agreement by both respondents. He seeks compliance orders and penalties.

[2] The Respondents submit there is no jurisdiction to make compliance orders because the money owed under the settlement agreement was paid in full albeit after the due dates for compliance.

[3] Mr Hawea accepts payment has been received but still seeks penalties for the late payment payable to him including alleging aiding and abetting of breaches of the settlement agreement by Mr Guilford.

### **Relevant facts**

[4] A record of settlement dated 4 July 2017 (settlement agreement) was signed between Matthew Hawea and SPF Specialist Plasterboard Fixing Limited (SPF) and Roydon Guilford. Amongst other things the settlement provided for SPF to pay Mr Hawea within 7 days of the date of the agreement the sum of \$2,250 under s.123(1)(c)(i) of the Employment Relations Act 2000 (the Act). The payment was to be made to Mr Hawea's nominated bank account.

[5] The settlement agreement also provided for payment by SPF of a contribution towards Mr Hawea's advocates fees of \$2,250 plus GST 21 days after receipt of an invoice. The payment was by direct credit into Employment Law Advocacy's bank account. Mr Gelb emailed his invoice to Mr Guilford on 4 July 2017 stating this was given to Mr Guilford following mediation. The invoice had the bank account number for Employment Law Advocacy.

[6] On 13 July 2017 Mr Gelb emailed Mr Guilford alleging non-payment and breach of the settlement agreement. Mr Guilford replied asking for his nominated bank account. This was forwarded later the same day. Payment of \$2,250 was made on 17 July 2017. This was 6 days after the due date.

[7] On 27 July 2017 Mr Gelb emailed Mr Guilford stating his invoice was due to be paid on 25 July 2017. He sent a further email on 29 July 2017 stating:

Hi Roydon

Not addressing this will not make it go away.

Unless my invoice is paid by Monday I will have to pass your invoice to Mathew for payment and this will result in Mathew making a claim in the Authority for breach of settlement for failing to pay as per the settlement agreement in both the late payment of the money to Mathew and for failing to contribute to his costs.

This will result in penalties and costs awarded against you. I don't like doing this but you are not leaving us with any alternative.

[8] On 2 August 2017 a statement of problem seeking compliance orders and penalties was filed. It alleged breaches of the settlement agreement by late receipt of the compensation payment due to Mr Hawea and non-payment of the contribution towards his advocate fees. It sought the following remedies:

- a) For the Authority to issue a compliance order to the respondent for the terms breached of the settlement agreement;
- b) To impose a penalty on the respondent of \$20,000 for this breach as per s135 of the Employment Relations Act 2000, payable to the applicant;
- c) To impose a penalty on the second respondent of \$10,000 for inciting, aiding and or abetting the breaches by the respondent;
- d) An indemnity on costs in relations to this proceeding as per schedule 2 clause 15(1) of the Employment Relations Act 2000;
- e) To pay the applicant interest on all amounts due from the due date until paid in full as per schedule 2 clause 11(1) of the Employment Relations Act 2000.

[9] On that same day, Mr Gelb issued an invoice to Mr Hawea for \$3,852.50. This comprised \$2,250 plus GST for his legal fees up to the settlement agreement and an additional \$1,100 plus GST for filing the statement of problem. The invoice was due for payment 7 days thereafter on 9 August 2017.

[10] The final payment of \$2,250 plus GST was made on 16 August 2017. This was 22 days after the due date.

## **Hearing**

[11] Both parties have sought a determination being made on the papers based upon the information set out in their pleadings and the attachments and submissions. Neither party filed briefs or wished to examine each other's evidence at hearing. Given the amount of remedies and largely agreement about the relevant facts, I am prepared to determine this matter on the papers.

## **Service of proceedings**

[12] There have been problems with service of these proceedings. The statement of problem was sent by courier post to a rural delivery address in Wellsford. Courier Post had been unable to confirm that delivery occurred. Neither respondent filed a statement in reply at that time.

[13] The applicant was then directed to personally serve the proceeding on Roydon Guilford. This occurred on 22 March 2018. The respondents filed a draft statement in reply on 9 April 2018 together with a Memorandum seeking leave to file out of time. By consent leave to file the statement in reply is granted.

## **Compliance orders (SPF only)**

[14] Given full payment under the settlement agreement has been received, there is no basis for compliance orders to be made against SPF. The compliance order proceeding against SPF is dismissed.

## **Penalty for aiding and abetting s134 (Roydon Guilford only)**

[15] On 13 November 2017 the applicant was advised by the Authority in a Minute that his statement of problem did not adequately detail any basis for proceeding against the second respondent, Roydon Guilford. He was asked to disclose the basis for joinder or risk that part of the proceeding being struck out.

[16] No further amended statement of problem or other information was filed. There is no information or evidence Mr Guilford aided or abetted any breach of the settlement agreement by SPF.

[17] Full payment by SPF has now been received albeit late. This was paid prior to service of the proceeding upon Mr Guilford. Given the lack of any evidential basis

for proceeding against the second respondent, the proceeding for a penalty for aiding and abetting is dismissed.

**Penalty for breach of settlement agreement s135 (SPF only)**

[18] SPF have twice paid the sums owed after the dates provided in the settlement agreement. Breaches of settlement agreements are treated as serious matters, often warranting a penalty.

[19] Section 133A sets out the matters the Authority must have regard to when determining the amount of any penalty.

[20] SPF alleges in its statement in reply that the first non-payment to Mr Hawea was due to the failure to supply a nominated bank account number. Mr Gelb provided Mr Hawea's nominated bank account number on 13 July 2017. Payment occurred 4 days later on 17 July 2017. Given the late provision of the nominated bank account after the due date for payment, this breach has occurred due to Mr Hawea's omission to supply his bank details. In my view no penalty is therefore warranted.

[21] The second late payment was due to SPF's erroneous belief there was no timeframe provided for payment of Mr Gelb's invoice. The settlement agreement provides for payment within 21 days of the invoice. Mr Gelb raised this with SPF on 29 July 2017. The statement of problem was filed on 2 August. Payment was made on 22 August 2017. This breach appears inadvertent as opposed to intentional or negligent.

[22] There is no evidence Mr Hawea was detrimentally affected in any way by the late payments. There is reference to Mr Hawea being embarrassed by the non-payment in July, but this late payment was in part caused by the lack of a nominated bank account.

[23] There is no evidence he was detrimentally affected by the late payment of Mr Gelb's invoice in August. There is no evidence Mr Hawea paid the invoice in advance of receiving his full settlement agreement entitlement. There is no evidence interest has been charged to Mr Hawea for non-payment of fees.

[24] The Court has declined to award any penalty where there was no evidence that this failure was wilful or that it had any adverse consequences.<sup>1</sup> This appears to be the case here – other than the costs of filing these proceedings, Mr Hawea has faced no other detriment.

[25] The filing of proceedings was premature and unnecessary. Two emails were insufficient to warrant incurring costs of \$1,100 plus GST to enforce a debt of \$2,250 plus GST. There is other low cost recovery action Mr Hawea could have taken to enforce the debt including making a statutory demand upon SPF.

[26] In the circumstances I decline to award a penalty. The application for penalty against SPF for breaches of the settlement agreement is dismissed.

[27] Costs are reserved. If either party seeks an order for costs a memorandum shall be filed and served 14 days from the date of this determination. The other party shall have 14 days to file and serve a reply.

**TG Tetitaha**  
**Member of the Employment Relations Authority**

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<sup>1</sup> *Dalley v Norrell Building Limited* [2013] NZEmpC 4 at [50].