

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI  
TE WHANGANUI-Ā-TARA ROHE**

[2019] NZERA 735  
3075752

BETWEEN VANESSA McCOSH  
Applicant

AND STRAIGHT UP FORESTRY  
LIMITED  
First Respondent

AND DUANE PETHERICK  
Second Respondent

Member of Authority: Michele Ryan

Representatives: Kelly Coley, advocate for the applicant  
Duane Petherick on behalf of the first respondent and in  
person as the second respondent

Investigation Meeting: On the papers

Date of Determination: 23 December 2019

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] Vanessa McCosh says the first respondent, Straight Up Forestry Limited (SUF), and the sole director of the first respondent, Duane Petherick as the second respondent, are in breach of obligations contained in a record of settlement agreed between them pursuant to s 149 of the Employment Relations Act.

[2] Ms McCosh seeks an order for compliance as well as penalties for breach of a settlement agreement. She asks also that she be reimbursed costs and disbursements associated with this claim.

### **The investigation**

[3] In a case management conference held between Ms McCosh's representative and Mr Petherick on 22 November 2019 the parties' agreed Ms McCosh's claims could be decided on the papers. A timetable for the exchange of information was put in place. Confirmation of those arrangements were set out in Minute and sent to the parties on 25 November 2019.

[4] There has been no contact from the respondents following the case management call. No good cause has been furnished for the failure to engage with the Authority's investigation and pursuant to cl. 12, Schedule 2 of the Act I have proceeded to determine Ms McCosh's claims.

### **The settlement agreement**

[5] Despite an agreement to keep the terms of the record of settlement confidential, it is necessary to record the relevant provisions of the parties' agreement as follows.

[6] Clause 3 of the record of settlement provided that SUF would pay the applicant \$5,000 in compensation. Payment was to occur over 6 months by way of monthly instalments. Specified dates on which payments were due were agreed.

[7] Clause 5 stated:

If the total amounts specified in clauses 3 ... above are not paid in full by the required timeframes then Respondent 2, Duane Petherick will pay the Applicant any outstanding unpaid amounts within 7 days of the first default payment.

[8] At clause 6 the first respondent agreed to provide a certificate of service and the nature of the information it was required to contain was detailed.

[9] The first of the scheduled payments was made.<sup>1</sup> However no further payments have been met. That failure triggered Mr Petherick's liability for the matters recorded at cl. 3. He too has not complied with his obligations at cl .5.

[10] In an email responding to the statement of problem, Mr Petherick, simply says he can't "*afford the payments*".

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<sup>1</sup> As was payment of costs to the applicant's representative, pursuant to cl. 4 of the record of settlement.

### **Compliance Order**

[11] Section 137(1)(iii) of the Employment Relations Act (the Act) empowers the Authority to order a party to comply with any terms of settlement which s 151 of the Act provides may be enforced by a compliance order. Section 151 applies to any agreed terms of settlement enforceable by the parties under s 149(3) of the Act.

[12] Section 138(4A) of the Act provides that the Authority may order compliance, in respect to payment of a sum of money to an employee, by ordering payment by instalments “*but only if the financial position of the employer requires it*”. Section 138(4A) sets a high threshold for the exercise of the Authority's discretion to order payment by instalments.

[13] The respondents' failure to provide relevant financial information, as was agreed in the case management conference of 22 November 2019, means I am unable to assess whether Mr Petherick's financial position requires an order for instalment payments to ensure compliance. I am unwilling to make an order of instalment payments in these circumstances.

[14] Ms McCosh's application for a compliance order is granted.

### **Penalties**

[15] The imposition of a penalty is discretionary. I have no information from the respondents concerning this aspect of Mrs McCosh's claim. But it is clear Mr Petherick is in breach of clause 5 of the record of settlement. SUF has breached clause 6.

[16] There is no basis on which I could reasonably conclude the breaches were inadvertent, or minor and technical which may provide good reason to decline Ms McCosh's claim for penalties. In the absence of that material it is appropriate to order penalties.

[17] Section 149(4) of the Act enables a party to seek the imposition of a penalty in respect of any established breach of a corresponding settlement agreement. A single breach of a settlement agreement by an individual may attract a penalty up to \$10,000; for a company a penalty not exceeding \$20,000 may be awarded for a solitary breach.<sup>2</sup>

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<sup>2</sup> Employment Relations Act 2000, s 135(2)(a) and (b) respectively.

[18] The quantum of a penalty is determined by an assessment of the factors set out at s 133A of the Act. Having regard to the statutory criteria alongside the guidance provided in judgements of the Employment Court,<sup>3</sup> I make the following comments

[19] Mr Petherick signed the record of settlement. He must be taken to have been aware of both his and SUF's obligations under the record of settlement. I have little doubt the breaches were intentional. Agreements made under s 149 of the Act are a critical means by which parties to an employment relationship may resolve a problem. A breach of a mediated settlement impacts not only on the parties directly involved, but may do so on any individual contemplating resolution of dispute by the same method. Parties should be entitled to feel confident that s 149 agreements may be relied upon and complied with. As a consequence any breach of a mediated settlement is serious.

[20] Amongst other things, the imposition of a penalty under s 149(4) is to punish a party who reneges on such agreements and to deter other from similar conduct. It remains unclear why the respondents agreed to make specific payments if they were unwilling or unable to do so. The respondents' cavalier approach to legal process and the obligations under the record of settlement warrants sanction.

[21] I have no direct evidence of the effect of the breaches for Ms McCosh, but it is apparent from the record of settlement that she compromised legal entitlements in exchange for an early resolution of her claims, modest compensation, and a certificate of service. Any benefits flowing from her agreement to the record of settlement have been eroded by the respondents' failures.

[22] No financial or other hardship has been established as a factor I should take into account in an assessment.

[23] I am unaware of any previous involvement by the respondents in proceedings for similar breaches.

[24] In *Preet* the Court found that the quantum of any penalty imposed should be proportionate to the level to the seriousness of the breach(es) and harm occasioned by them.<sup>4</sup>

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<sup>3</sup> For example; *Borsboom (Labour Inspector) v Preet PVT Ltd* [2016] NZEmpC 143; *Nicholson v Ford* [2018] NZEmpC 132; *A Labour Inspector v Daleson Investment Limited* [2019] NZEmpC 12

[25] Taking all the above factors into account, including that a portion of the agreed sum under the record of settlement has been paid, I find Mr Petherick is liable for a penalty of \$1,500, which is within the range of penalties currently imposed for failure to pay monies due under a record of settlement and is proportional to the seriousness of the breaches and harm occasioned in this instance. A further penalty of \$500 is warranted for breach of the obligation by SUF to provide a certificate of service.

[26] In the circumstances of this matter I consider it would be just for half of the each penalty sum awarded (\$750 plus \$250 respectively) is paid to Ms McCosh, the remainder must be paid to the Authority for payment into a Crown bank account.

### **Costs**

[27] Ms McCosh is entitled to costs associated with obtaining a compliance order where she was assisted by her representative. Mr Petherick and Straight Up Forestry Limited are both jointly and severally liable to pay Ms McCosh \$750 as contribution towards costs associated with this application, and \$71.56 for the filing fee.

### **Summary of Orders**

[28] Pursuant to the Employment Relations Act:

- (a) Duane Petherick is ordered to comply with clause 5 of the record of settlement and pay \$3,500 to Ms McCosh. The payments must be paid within 30 days of this determination.
- (b) Straight Up Forestry Limited is ordered to comply with clause 6 of the record of settlement and provide Ms McCosh, within 30 days of this determination, a certificate of service in accordance with the terms set out in the record of settlement.
- (c) Duane Petherick must pay the penalty sum of \$1,500 for breaching clause 5 of the record of settlement. Half of this sum (\$750) must be paid to Ms McCosh and the other half (\$750) to the Authority for payment to the Crown.

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<sup>4</sup>

Above at [147]

- (d) Straight Up Forestry Limited must pay the penalty sum of \$500 for breach of clause 6 of the record of settlement. Half of this sum (\$250) must be paid to Ms McCosh and the other half (\$250) to the Authority for payment to the Crown.
- (e) Mr Petherick and Straight Up Forestry Limited are jointly and severally liable to contribute the sum of \$821.51 towards Ms McComb's costs.

### **Comment**

[29] Mr Petherick needs to be aware that the imposition of a compliance order is a serious matter. Should he and/or SUF fail to comply with the compliance orders set out at [23] at (a) and (b), Ms McCosh is entitled to pursue the breach in the Employment Court or the District Court. The Employment Court has powers to impose a fine not exceeding \$40,000, order property to be sequestered, or sentence imprisonment not exceeding 3 months.<sup>5</sup> Alternatively, a certificate of determination may be obtained from the Authority and enforcement obtained through the mechanisms and remedies available under the *District Courts Act 1946* and *District Courts Rules 2014*.

Michele Ryan  
Member of the Employment Relations Authority

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<sup>5</sup> Section 139 and 140(6)