

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2020] NZERA 214

3098953

BETWEEN

ALISON FLUKER
Applicant

AND

COLORWORX NURSERY
LIMITED
Respondent

Member of Authority: Rachel Larmer

Representatives: Jeremy Sparrow, counsel for the Applicant
Peter Arnesen, for the Respondent

Investigation Meeting: 28 May 2020 by telephone conference

Submissions and Further Information Received: 7, 22 and 28 May 2020 from Respondent
28 May 2020 from Applicant

Date of Determination: 29 May 2020

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Ms Fluker began employment with Colorworx Nursery Limited (Colorworx) in November 2017. Various issues arose that resulted in the the parties negotiating an agreed exit of Ms Fluker from her employment. The settlement terms were recorded in a settlement agreement.

[2] The settlement was signed off by a mediator from the Ministry of Innovation Business and Employment (MBIE) Mediation Services (the Record of Settlement) under s 149 of the Employment Relations Act 2000 (the Act).

[3] The parties signed the Record of Settlement on 11 March 2020 and the mediator from Mediation Services signed it on 16 March 2020, after speaking to the parties. Mr Bernard Green signed the Record of Settlement on behalf of Colorworx. Mr Green is employed by Colorworx as the Nursery Manager and he is responsible for managing staff.

Claims

[4] Colorworx breached the Record of Settlement by failing to pay the amounts specified in clauses 3 and 4.

[5] Ms Fluker has applied for a compliance order requiring Colorworx to pay the money it owes under the Record of Settlement. She also asked for a penalty to be imposed on Colorworx for its breaches of the Record of Settlement and that some or all of any penalty imposed be paid to her personally.

[6] Ms Fluker also seeks solicitor/client costs for this application under clause 7 of the Record of Settlement that stated collection costs incurred by Ms Fluker due to Colorworx's default on its payment obligations were payable by Colorworx.

[7] After Ms Fluker lodged her Statement of Problem with the Authority, Colorworx claimed for the first time in its Statement in Reply that Mr Green was not authorised to enter into the Record of Settlement on behalf of Colorworx and that he had done so under duress.

[8] Colorworx's position was that Ms Fluker should not be able to enforce the Record of Settlement and that it should not have to pay a penalty because its breaches were due to its serious financial problems.

Investigation meeting

[9] The Authority's investigation meeting was conducted by telephone conference on 28 May 2020. Ms Fluker, Mr Peter Arnesen (Colorworx's director) and Mr Green all gave evidence to the Authority under affirmation. The parties were also given time after the investigation meeting to provide the Authority with further relevant documentation, and each party did so.

Issues

[10] The following issues are to be determined:

- (a) Is the Record of Settlement enforceable?
- (b) If so, what is Ms Fluker owed?
- (c) Should a compliance order be issued?
- (d) If so, what conditions should the compliance order be made subject to?
- (e) Should a penalty be imposed on Colorworx?
- (f) Should some or all of any penalty imposed be paid to Ms Fluker?
- (g) What if any costs should be awarded?
- (h) What interest should Ms Fluker be awarded?

Is the Record of Settlement enforceable?

[11] Colorworx claimed that the Record of Settlement should not be enforceable because:

- (a) Mr Green was not authorised to settle with Ms Fluker;
- (b) Mr Green only signed the Record of Settlement under duress;
- (c) Colorworx could not afford to pay Ms Fluker the money it had agreed to pay her in the Record of Settlement.

Was it reasonable for Ms Fluker to rely on Mr Green's authority to sign the Record of Settlement on behalf of Colorworx?

[12] Ms Fluker bears the onus of proving on the balance of probabilities that it was reasonable for her to rely on Mr Green's authority to settle her claims. She has easily discharged that onus.

[13] On 4 March 2020 Ms Fluker's lawyer (Mr Sparrow) contacted Mr Arnesen to discuss resolving her issues. Mr Arnesen referred Mr Sparrow to Mr Green as the person he needed to communicate with.

[14] Mr Sparrow told Mr Arnesen that he (Mr Sparrow) preferred to deal with Mr Arnesen as Colorworx's director or with Colorworx's lawyer. Mr Arnesen told Mr Sparrow that Colorworx could not afford a lawyer and he reiterated that Mr Sparrow had to speak to Mr Green.

[15] Mr Sparrow then communiated with Mr Green over the period 4 – 11 March 2020. At no time during their settlement discussions did Mr Green suggest he did not have authority to settle Ms Fluker's claims.

[16] Mr Arensen and Mr Green both confirmed to the Authority that they believed it was best for everyone for Ms Fluker's employment to end and that they did not want the time, cost or distraction of having to investigate her concerns, which would have necessitated taking statements from other staff.

[17] Mr Arnesen also told the Authority that he had previously told Ms Fluker she should leave her employment to avoid formal processes being commenced against her. That 'advice' resulted in Ms Fluker engaging Mr Sparrow.

[18] Ms Fluker told the Authoirty she only agreed to leave her employment because Colorworx agreed to pay her specified amounts on 20 and 27 March 2020. She said that if she knew she would not be paid then she would have remained employed and receiving wages.

[19] An email from Mr Sparrow to Mr Green on 11 March 2020 asked if he could "*confirm he is able to sign and return this [the Record of Settlement]*". Mr Green's response was to sign and return it. The notation under Mr Green's signature stated that he had "*Signed on behalf of the Employer.*"

[20] Clause 10 of the Record of Settlement states "*The signatory for the Employer to this agreement duly confirms and warrants that they are authorised to enter into this settlement on behalf of the Employer.*"

[21] The mediator from Mediation Serrvices contacted Mr Green, and explained the effect of s 149(3) of the Act, before the mediator certified the Record of Settlement under s 149(4) of the Act. Mr Green did not raise any concerns about his authority with the mediator.

[22] Mr Green said he had done what he thought was best for Colorworx because he did not want to involve Mr Arnesen who was already stressed about the financial problems the business was facing. When Mr Green told Mr Arnesen about the settlement shortly before the first payment became due on 20 March, Mr Arnesen told Mr Green to contact Mr Sparrow to advise that the first payment would not be made because the company was financially embarassed.

[23] Mr Arnesen also spoke to Ms Fluker's lawyer around the time the first instalment was due to be paid to her. Mr Arnesen did not raise any concern at that time about Mr Green's authority to settle. Instead Mr Arnesen told Ms Fluker's lawyer that Colorworx could not afford to pay the money it had agreed to pay Ms Fluker.

[24] Ms Fluker was reasonably entitled to rely on Mr Green as her manager, as the person that Colorworx's director had told her lawyer she had to engage with regarding her issues, as the person who engaged in settlement discussions with her lawyer and as the person who had signed a settlement agreement that specifically recorded that he had the necessary authority to settle.

[25] Colorworx expressly agreed that Mr Green had authority to settle. It cannot now change its mind about that once Ms Fluker has sought to enforce the Record of Settlement.

Did Colorworx sign the Record of Settlement under duress?

[26] The claim by Colorworx that it entered into the Record of Settlement under duress was not credible. Colorworx secured favourable terms of settlement for itself.

[27] Mr Green did not tell the mediator that he had only signed the Record of Settlement under duress. Mr Arnesen did not raise duress as a concern when he spoke to Ms Fluker's lawyer around 20 March 2020.

[28] There was no credible evidence of duress. Colorworx was under financial pressure. It wanted Ms Fluker's employment to end. Mr Arnesen had told her he thought she should resign. It did not want to investigate her concerns. It did not want to incur legal costs. It was clearly in Colorworx's best interests at the time to enter into an agreed exit with Ms Fluker.

[29] Ms Fluker's lawyer quite rightly pointed out to Colorworx that if Ms Fluker's claims were not resolved by mutual agreement then she would be filing Authority proceedings, which would increase her legal costs and the amounts she would be claiming as remedies. That advice was not improper and was factually correct.

[30] There was no illegitimate pressure exerted on Mr Green or Colorworx and there was no evidence that it was the imposition of illegitimate pressure that compelled Colorworx to enter into the Record of Settlement. There were no threats or coercion. It was in Colorworx's best interests to settle with Ms Fluker.

[31] There was no evidence that Mr Green had his freewill overborne. He had more than 24 hours to consider Ms Fluker's settlement proposals. He never asked for more time to respond. Mr Green and Colorworx were free to have rejected Ms Fluker's settlement proposals.

[32] The documents show that the settlement communications were conducted in a normal, polite and professional manner. Mr Green responded to Ms Fluker's settlement proposals with counter suggestions, that were accepted by Ms Fluker. Colorworx's counter offers were reflected in the reduced settlement payment and in the instalment payments that were reflected in the Record of Settlement.

[33] There was nothing unprofessional, unwarranted, or improper in the communications that Ms Fluker's lawyer had with Colorworx regarding this settlement. Colorworz entered into a settlement that was beneficial to it and which met its interests at the time.

[34] Colorworx's claim of duress does not succeed.

Finding

[35] The Record of Settlement is final, binding and enforceable. Mr Green was told that by the mediator and that was also expressly recorded in clause 11.

What is Ms Fluker owed?

[36] Colorworx and Ms Fluker had a different view of what she was owed under the Record of Settlement. These conflicts in the evidence have been resolved in Ms Fluker's favor, on the basis the Authority considered her version was more likely than not correct. The Authority did not consider that the evidence supported Colorworx's claim that Ms Fluker only worked two days a week.

[37] Ms Fluker sought notice pay based on the three days work per week she actually worked, instead of the 40 hours per week that was specified in her employment agreement.

[38] The Authority finds that Colorworx is required to pay:

- (a) Ms Fluker \$145.14 holiday pay under clause 3.1 of the Record of Settlement;
- (b) Ms Fluker \$708 outstanding pay in lieu of notice under clause 3.3 of the Record of Settlement;

- (c) Holland Beckett Law \$575 legal costs as per its invoice dated 16 March 2020 under clause 3.4 of the Record of Settlement;
- (d) Ms Fluker \$1,500 under clause 3.5 of the Record of Settlement;
- (e) Ms Fluker \$1,500 under clause 4 of the Record of Settlement.

[39] Colorworx therefore currently owes Ms Fluker \$3,853.14 and her lawyer \$575 under the Record of Settlement.

Should a compliance order be issued?

[40] Colorworx has breached its Record of Settlement payment obligations. More than two months have elapsed since the first breach, which has still not been remedied. There was no evidence produced to the Authority that suggested Colorworx would meet its obligations under the Record of Settlement unless the Authority issued a compliance order.

[41] It is therefore appropriate and necessary to exercise the Authority's discretion under s 137 of the Act to order Colorworx to comply with its obligations under the Record of Settlement dated 16 March 2020.

Should the compliance order be made subject to conditions?

[42] Colorworx said that since entering into the Record of Settlement its already poor financial position has deteriorated further due to the Covid-19 lockdown. Colorworx told the Authority that it has no funds, because it did not receive income during lockdown. It is currently awaiting its bank's investigative accounting report before the bank decides what action to take regarding its current overdraft facility.

[43] Mr Arnesen filed an affidavit and gave evidence to the Authority that Colorworx has been unable to repay its temporary overdraft facility which was due to have been repaid on 20 April 2020. It also owes creditors an amount outstanding of \$65,000 that it is unable to pay.

[44] Colorworx's bank has instructed BDO chartered accountants to carry out an investigative report. Mr Arnesen said he had been told BDO would be recommending to the bank that Colorworx be permitted to continue trading (with reduced staff) while steps were taken to sell the business.

[45] Mr Arensen also said that its big clients pay it at the end of the month, so he believed there would be funds available to pay Ms Fluker by way of instalments at the end of June and July.

[46] Colorworx's financial situation warrants an order allowing it to pay the money it owes by instalments. However the Authority also recognises that Ms Fluker is not working, so has not received any income since her employment ended under the Record of Settlement on 13 March 2020. She is therefore in a very difficult financial situation herself.

[47] The Authority has agreed to give Colorworx extra time to meet its payment obligations to Ms Fluker, so it needs to ensure that it honours its commitments to her and does not reprioritise funds it receives for other purposes.

[48] Notwithstanding its own financial problems, Colorworx must prioritise its payment obligations to Ms Fluker. Colorworx must not use money it receives by way of loan(s), an extended overdraft facility or from a sale of plant/equipment or its business for anything else until Ms Fluker has been paid in full all of the amounts, including interest, that she and her lawyer is owed.

[49] Accordingly, the compliance order is subject to the following condition:

Colorworx is ordered to pay Ms Fluker all of what she is owed, including interest, within 48 hours of it receiving a loan, an extension to its overdraft or proceeds from the sale of plant/equipment or of some or all of its business.

[50] However it is uncertain if any of those scenarios will come to pass. Therefore a time limited obligation is also imposed on Colorworx to ensure it complies with the Record of Settlement obligations by specified dates. The payments are to occur in two stages. Ms Fluker is to be paid by 30 June 2020 and Holland Beckett Law is to be paid by the 31 July 2020.

[51] The specific compliance orders are set out at the end of this determination.

Should a penalty be imposed on Colorworx?

[52] Colorworx signed the Record of Settlement on 11 March 2020. The first instalment was due on 20 March 2020. Mr Arnesen was unable to point to anything that had changed between 11 and 20 March 2020. Colorworx therefore entered into the settlement and within days deliberately breached it.

[53] While the second instalment of \$1,500 due on 27 March 2020 was likely affected by the lockdown that occurred on Wednesday 25 March, because Colorworx closed its business the day before on Tuesday 24 March 2020, the fact remains that Ms Fluker only agreed to end her employment on 13 March because she was expecting to have received her full payout by 27 March 2020.

[54] Colorworx's breaches have had a particularly bad effect on Ms Fluker. She has lost her job and therefore income and the ability to pursue her substantive claims. She has not been entitled to the wage subsidy, which she could have got if still employed during lockdown, and she is facing grim prospects in terms of obtaining new employment in this uncertain economic climate.

[55] Colorworx has benefited at Ms Fluker's expense by avoiding potential liability and exposure to increased legal costs by settling Ms Fluker's concerns/potential claims, it has avoided the need to continue paying her wages by getting her to resign, it settled for a minimal amount and then within days of that failed to pay her the money that had induced her to leave her employment by agreement.

[56] Colorworx is clearly facing financial difficulties. However so is Ms Fluker. She was a low paid part time employee who since 13 March 2020 has had no income as a result of Colorworx's actions. She does not have the same access to borrowing facilities or the ability to generate income in the way Colorworx does. In that way she can be said to be worse off than Colorworx financially.

[57] Instead of constructively engaging with Ms Fluker to get her the money she is owed as a high priority, Colorworx instead raised spurious legal arguments in an attempt to avoid its legal obligations to her. That has forced Ms Fluker to incur additional legal costs that exceeded the amount she had settled for.

[58] Colorworx derived significant benefits from the settlement while simultaneously effectively depriving Ms Fluker of the small financial benefit she expected to receive. That

behaviour by Colorworx undermines the s 3 objects of the Act, which aims to encourage good faith behaviour and promotes mediation as the primary problem solving mechanism.

[59] A penalty is necessary to punish Colorworx for its breaches and to deter it from failing to comply with Record of Settlement obligations. A penalty is also required to maintain public confidence in mediation as an effective problem resolution mechanism and to deter others who may be inclined to breach their settlement obligations.

[60] Section 133A of the Act sets out the factors the Authority must consider when assessing penalties. These include the object of the Act as stated in s 3 which includes (among other things) recognising the need for employment relationships to be built on good faith behaviour, the desire to promote mediation as a primary problem solving mechanism and reducing the need for judicial intervention.

[61] The nature of the Colorworx's breaches were deliberate. The extent of the breaches are ongoing. These were deliberate and intentional breaches which were made only nine days after entering into the settlement and only four days after the mediator signed off the Record of Settlement. Colorworx's act of entering into a settlement without the means to pay the money it had committed to paying Ms Fluker is contrary to the good faith obligations that the Act is built on.

[62] Colorworx failed to appropriately address its breaches, for example by volunteering an alternative payment plan. Instead it forced Ms Fluker to take legal action, thereby incurring costs, to enforce her right to be paid. These actions are wrong and need to be denounced and punished. Colorworx has not previously had a penalty imposed on it by the Authority.

[63] Colorworx is ordered to pay a penalty of \$2,000 under s 149(4) of the Act for its multiple breaches of the Record of Settlement. This level of penalty has taken Colorworx's genuine financial problems into account and acknowledges that it has limited means to pay a penalty.

Should some or all of the penalty imposed be paid to Ms Fluker?

[64] Ms Fluker is a low paid part time employee who compromised her rights for a minimal financial settlement in the expectation that all of the money would be paid to her within 16 days of the parties' agreement to settle their issues. Ms Fluker still likely to have to wait another month before the money she is owed will be paid, meaning she will have waited for more than three months to get paid.

[65] Ms Fluker resigned from her employment in reliance on the payments that were going to be made to her. If she knew that Colorworx could not or would not pay her then she would not have allowed her employment to end. It is appropriate to award her most of the penalty that was imposed on Colorworx personally to recognise the harm she has suffered, that she cannot be compensated for.

[66] In accordance with s 136(2) of the Act Colorworx is ordered to pay \$1,500 of the total penalty imposed to Ms Fluker by no later than 30 June 2020. The remaining \$500 of the total penalty imposed is to be paid to the Crown Bank account by 30 August 2020.

What if any costs should be awarded?

[67] Ms Fluker as the successful party is entitled to a contribution towards her costs. The parties agreed in the Record of Settlement that Colorworx would pay Ms Fluker solicitor/client if it breached its settlement obligations.

[68] Clause 7 states:

The Employer shall be liable for any collection costs (including solicitor/client costs) incurred by the Employee should the Employer default in its payment obligations under this Agreement.

[69] Ms Fluker's actual legal costs were \$3,871 plus GST. However Mr Sparrow discounted that to \$3,200 (plus GST plus the \$71.56 filing fee) to align with the amount advised to the Authority during the investigation meeting. Ms Fluker's actually incurred legal costs for these proceedings are therefore \$3,751.56, as per the invoice Holland Beckett Law issued on 28 May 2020.

[70] The indemnity clause is upheld. The actual costs Ms Fluker has incurred are objectively reasonable and there are no public policy reasons that the indemnity clause the parties agreed to should not be enforceable.

[71] By way of a cross check, the Authority's notional daily tariff is \$4,500 for a one day investigation meeting, so the amount claimed by Ms Fluker is less than that. Mr Sparrow's involvement was reasonable and the time incurred reflected an appropriate level of support to Ms Fluker.

[72] Mr Sparrow's involvement as counsel was also helpful to the Authority in terms of the information he presented and the persuasive submissions he made on behalf of Ms Fluker, which reduced the investigation meeting time this matter might otherwise have required and also assisted the Authority to determine the various issues involved in an efficient manner.

[73] It would also erode the benefit of the settlement if Ms Fluker was required to bear her own legal costs when she is out of work, has no income, not been paid her settlement money and has no immediate employment prospects.

[74] It is only fair for Colorworx to bear the legal costs of its decision to put Ms Fluker to the expense of enforcing her Record of Settlement, instead of presenting her with a viable alternative.

[75] Colorworx is ordered to reimburse Ms Fluker \$3,751.56 inclusive of GST for her actual legal costs and for reimbursement of her filing fee (which is included as a disbursement in this invoice). This amount is to be paid directly to Holland Beckett Law by no later than 31 July 2020.

What interest should Ms Fluker be awarded?

[76] Colorworx has deprived Ms Fluker of the use of money that she should have received in March 2020. This has caused her considerable hardship. Colorworx needs to pay interest on the money it has defaulted on paying her.

[77] An award of interest also needs to be made on the other amounts awarded to Ms Fluker by the Authority (in addition to the Record of Settlement amounts) in case Colorworx defaults on paying her what she is owed under this determination or in case it only partially pays her the amounts it has been ordered to pay.

[78] Although clause 7 of the Record of Settlement provided for penalty default interest of 15% per annum to be paid by Colorworx if it breached any of its payment obligations, Ms

Fluker is not seeking compliance with that. Ms Fluker is simply seeking to be awarded interest in accordance with the the Interest on Money Claims Act 2016.

[79] Interest on the Record of Settlement money owed by Colorworx is to be paid to:

- (a) Ms Fluker on \$3,853.14 from 20 March 2020 until it is paid in full;

[80] Interest is also awarded to Ms Fluker on the part of the penalty she has been awarded (\$1,500) and on any part of the legal costs reimbursement (\$3,751.56) that has not been paid in full to Holland Beckett Law by 31 July 2020.

Summary of Orders

[81] If Colorworx receives a loan or an extension of its bank overdraft or if it sells plant/equipment or some or all of its business (*“the event”*), then it must within:

- (a) 48 hours of the event pay Ms Fluker all of the amounts, including interest, she has been awarded in this determination;
- (b) Seven days of the event to pay Holland Beckett Law in full the amounts, including interest, it has been awarded in this determination;
- (c) 28 days of the event pay the Crown bank account the \$500 part of the total penalty that has been imposed on it for breaching the Record of Settlement.

[82] If Colorworx does not obtain a loan or extend its overdraft or sell plant/equipment or some or all of its business before 30 June 2020, then Colorworx is ordered to:

- (a) Comply with clauses 3.1, 3.3, 3.5 and 4 of the Record of Settlement by paying Ms Fluker \$3,853.14 in full by no later than 30 June 2020;
- (b) Comply with clause 3.4 of the Record of Settlement by paying Holland Beckett Law \$575 by no later than 31 July 2020;
- (c) Pay Ms Fluker interest on the \$3,853.14 she is still owed under the Record of Settlement from 20 March 2020 until that full amount has been paid;
- (d) Pay Ms Fluker \$1,500 of the penalty imposed on it by no later than 30 June 2020;

- (e) Pay interest on any part of the penalty that is to be paid to Ms Fluker personally that is still outstanding from 1 July 2020 until the part of the penalty she is owed has been paid to her in full;
- (f) Pay the Crown bank account \$500 of the penalty imposed on it by 30 August 2020;
- (g) Pay Holland Beckett Law interest on \$575 from 20 March 2020 until it is paid in full;
- (h) Pay Holland Beckett Law \$3,752.56 GST inclusive to reimburse Ms Fluker's legal costs in this matter by no later than 31 July 2020;
- (i) Pay Holland Beckett Law interest on any legal fees that remain outstanding from 1 August 2020 onwards until the full amount of legal fees payable has been paid;

[83] All of the interest awarded in this determination is to be calculated using the Civil Debt Interest calculator on the Ministry of Justice website.

[84] Colorworx must therefore pay:

- (a) Ms Fluker \$5,353.14 plus the interest she was awarded in paragraph [82](c) by 30 June 2020;
- (b) Holland Beckett Law \$4,327.56 plus the interest awarded in paragraph [82](g) by 31 July 2020;
- (c) The Crown bank account \$500 of the penalty imposed by 30 August 2020.

Effect of further non-compliance

[85] If Colorworx fails to comply with this compliance order, Ms Fluker may apply to the Employment Court to address the breach. In which case the Court may in accordance with s 140(6) of the Act order (among other things) imprisonment of up to three months, a penalty of up to \$40,000 and/or sequestration of property.

[86] Failure to pay Ms Fluker the \$1,500 part of the penalty she has been awarded by 30 June 2020 and/or Holland Beckett Law the \$3,751.56 it is owed by 31 July 2020 may result in

Ms Fluker applying for a further compliance order for those amounts. In which case Colorworx would be exposed to further potential costs liability.

Rachel Larmer
Member of the Employment Relations Authority