

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

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

[2020] NZERA 351  
3081432

BETWEEN	STEPHEN LONGSHAW Applicant
AND	WATER MART WAIRARAPA (2017) LIMITED First Respondent
	Richard Hayden McNaughton Second Respondent

Member of Authority: Trish MacKinnon

Representatives: Bede Laracy, advocate for the Applicant  
Richard McNaughton, for the Respondents

Investigation Meeting: On the papers

Date of Determination: 31 August 2020

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**COMPLIANCE DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] Stephen Longshaw seeks orders for compliance and costs in relation to payments due under the terms of a settlement agreed with his former employer, Water Mart Wairarapa (2017) Limited (Water Mart). Agreement was reached over those terms in the course of an Authority investigation meeting on 15 August 2019 and incorporated into a Consent Determination.<sup>1</sup>

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<sup>1</sup> [2019] NZERA 480.

[2] The terms of settlement have not been fully complied with and Mr Longshaw seeks payment of outstanding amounts, and interest. He also asks the Authority to impose a penalty on Water Mart for the breaches.

[3] The terms of settlement were subject to an order I made under clause 10, Schedule 2 of the Employment Relations Act 2000 (the Act) prohibiting publication of any details of the agreement the parties had reached. To the extent necessary for determining Mr Longshaw's compliance application, I now lift that order.

[4] It was agreed, in the course of a case management conference between the Authority and the parties on 18 March 2020, the matter would be determined on the papers by way of affidavits and submissions. The requirement for affidavits was dropped following agreement by the parties over the amount of monies outstanding.

[5] At Mr Longshaw's request, and without opposition from Water Mart's sole director, Richard McNaughton, I directed that Mr McNaughton be joined as second respondent to these proceedings under s 221(a) of the Act. It was a term of the settlement agreement that Mr McNaughton would personally guarantee payments in the event that Water Mart did not or could not make any of them.

[6] Mr McNaughton, who represented Water Mart and himself, acknowledged the full terms of settlement had not been met. In the statement in reply he filed on behalf of both respondents Mr McNaughton referred to unsuccessful efforts they had made to resolve the situation. He attributed his and Water Mart's failure to comply with the terms of settlement to the financial state of Water Mart and he asked the Authority to consider varying the current consent order to a lesser amount per week to enable compliance.

[7] The statement in reply also raised an allegation of misrepresentation by Mr Longshaw as to his employment situation. Mr McNaughton asked the Authority to make orders as it saw fit in relation to that allegation.

[8] This determination has been issued outside the timeframe set at s 174D (2) of the Act in circumstances the Chief of the Authority has decided, as he is permitted to do by s 174D(3), are exceptional.

### **The Authority's jurisdiction regarding compliance**

[9] The Authority has the power to order compliance under s 137 of the Act in specified situations. The provision relevant to the current situation is s 137(1)(b). It provides that the Authority may order compliance where any person has not observed or complied with any order, determination, direction, or requirement made or given under the Act by the Authority or a member or officer of the Authority. The consent determination I issued on 15 August 2019 sits within this category.

### **Submissions and discussion**

[10] Under the terms of settlement, an agreed sum was to be paid to Mr Longshaw by way of weekly instalments, comprising 10 in total. Payments began on 28 August 2019 and ten payments were made. However, four of the payments were for less than the agreed instalment amount and, after the first 6 weeks, payment became sporadic. The last payment was made on 17 February 2020 at which time \$2,500 remained outstanding.

[11] Mr Laracy submitted, on behalf of the applicant, that a compliance order was warranted because of the deliberate and serious breaches of the agreed terms of settlement, which had been made into orders by the Authority. With regard to the respondents' claim that the breaches were due to a lack of funds, he submitted there was no material change in Water Mart's position when the breaches occurred compared to when the terms were agreed.

[12] Water Mart must have known when it agreed to the terms of settlement that it would not be able to pay, in Mr Laracy's submission. He said the alternative scenario was that Water Mart agreed to the terms with no intention of being bound by them. Either way in his view, there was significant intentional malfeasance.

[13] Mr Laracy submitted a penalty of \$3,500 was warranted, of which at least 50 percent should be paid to Mr Longshaw. The purpose of the investigation meeting of 15 August 2019 had been for the Authority to investigate Mr Longshaw's claim to have been unjustifiably dismissed by Water Mart and, in his submission, Mr Longshaw would not have entered into an agreement if he had known his former employer would fail to comply in full with its terms.

[14] Mr McNaughton acknowledged both he and Water Mart had a liability to Mr Longshaw. He said their precarious financial position had precluded them from complying with the terms of settlement.

[15] Mr McNaughton submitted he has had major problems since purchasing Water Mart in August 2017 and these have resulted in losses to the company. He provided a letter from Water Mart's accountants to support his claim. The letter related to the company's performance for the year ending 31 March 2018 and an anticipated result for the year ended 31 March 2019.

[16] While acknowledging the debt to Mr Longshaw, Mr McNaughton submitted the respondents entered into the agreement with him on the basis of untrue information he had given them regarding the length of time he had been out of work. This, in Mr McNaughton's submission, was fraudulent and misleading.

[17] In Mr McNaughton's submission the onus was on Mr Longshaw to prove what his weekly income had been for the three months following his purported termination. He claimed Mr Longshaw's failure to prove, by way of providing his tax summaries for that period, was presumptive evidence that Mr Longshaw had misled Water Mart.

[18] Mr McNaughton cited *Hayward v Zurich Insurance Company PLC* which, he submitted, applied and was persuasive authority in New Zealand<sup>2</sup>. In that judgment the United Kingdom Supreme Court allowed an insurance company to set aside a settlement agreement because of fraudulent misrepresentation by the appellant, despite the insurer having misgivings about the appellant's claim prior to settling.

[19] In reply submissions Mr Laracy observed, with regard to the respondents' allegation of misrepresentation, the case law cited by Mr McNaughton had not, to his knowledge, been applied in the New Zealand jurisdiction. Even if it had, the respondents would need to prove fraudulent conduct on Mr Longshaw's part, which they had not done.

[20] Having considered the submissions of the parties, I find a compliance order to be appropriate. Mr McNaughton has acknowledged the debt the respondents had to Mr Longshaw. He has provided no compelling reason for non-payment and I note that, if the alternative instalment payment regime he proposed in the respondents' statement in reply had

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<sup>2</sup> [2016] UKSC 48.

been put in place, the debt to Mr Longshaw would have been satisfied by now. As that money was not paid, it should be available for payment in a lump sum now. Accordingly there will be no instalment plan put in place.

[21] I am not persuaded by Mr McNaughton's claim to have entered the settlement agreement on the basis of untrue representations by Mr Longshaw. He has provided no evidence to support his assertions that Mr Longshaw gave false information. I accept Mr Laracy's submission that he has simply made wide generalised statements that lack evidence and credibility.

[22] Mr Longshaw seeks interest on the outstanding amount. I have calculated that, if the full amount agreed between the parties had been paid in accordance with the terms of settlement, Mr Longshaw would have been paid in full by late October 2019. Mr Longshaw has lost the benefit of that money for ten months and I find it reasonable to award him interest on the outstanding sum of \$2,500 from 1 November 2019. In reaching that decision I have taken into account that Water Mart has provided no compelling reason for its failure to pay Mr Longshaw the full amount it agreed in August 2019, in a full, final and binding agreement.

[23] Mr Laracy submits it is appropriate for the Authority to award a penalty for a breach of agreed terms of settlement that have been formalised by the Authority by way of a Consent Determination. In his view the requirements of s 149(3) have been fulfilled.

[24] That section of the Act relates to agreed terms of settlement that have been signed off by a person who is employed or engaged by the chief executive of the Ministry of Business, Innovation and Employment (MBIE) and who has followed the process set out at s149(2) of the Act. Authority members are neither employed nor engaged by MBIE and s 149(4), which provides that a person who breaches an agreed term of settlement to which s 149(3) applies is liable to a penalty imposed by the Authority, is not applicable to consent determinations. The application for a penalty is accordingly declined.

### **Summary of Findings**

[25] Water Mart Wairarapa (2017) Limited and Richard McNaughton are jointly and severally ordered to comply with the terms of settlement agreed to, and made the subject of orders, in the Authority's Consent Determination of 15 August 2019.

[26] They are to pay Mr Longshaw the outstanding amount of \$2,500.00 in full by 14 September 2020.

[27] They are also to pay interest of \$59.45 on the outstanding amount pursuant to Schedule 2, clause 11 of the Act and calculated in accordance with the Interest on Money Claims Act 2016.<sup>3</sup>

### **Costs**

[28] Mr Longshaw seeks costs and reimbursement of the Authority filing fee. His representative submits \$2,500.00 to be an appropriate amount. Mr Laracy has cited *Carruthers v Brommel Roofing Limited*, a recent judgment of the Employment Court.<sup>4</sup> In that case Judge Perkins ordered \$2,500 to be paid in respect of costs relating to enforcement proceedings in the Authority that were determined on the papers.

[29] I accept that submission and order Mr McNaughton and Watermart, jointly and severally, to reimburse Mr Longshaw the filing fee of \$71.56 and contribute to his costs in the sum of \$2,500.

Trish MacKinnon  
Member of the Employment Relations Authority.

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<sup>3</sup> Calculated from 1 November 2019 to 14 September 2020.

<sup>4</sup> [2020] NZEmpC 22.