

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2021] NZERA 285
3130914

BETWEEN

MICHAEL SIMMONS
Applicant

AND

NEW ZEALAND FUTURE
FOREST PRODUCTS LIMITED
Respondent

Member of Authority: Nicola Craig

Representatives: Stephen Corlett, counsel for the applicant
David Henry, agent for the respondent

Investigation Meeting: On the papers

Submissions [and further Information] Received: 7 May, 3, 16 and 18 June 2021 from the applicant
20 April, 13 May, 17 and 18 June 2021 from the respondent

Date of Determination: 8 July 2021

DETERMINATION OF THE AUTHORITY

A. New Zealand Future Forest Products Limited breached a settlement agreement with Michael Simmons and is ordered within 28 days of the date of this determination:

- a) To comply with the settlement agreement by paying Mr Simmons \$50,186.56 gross;**
- b) To pay a penalty of \$2,000, with \$1,000 to be forwarded to Mr Simmons and \$1,000 to be paid into the account of the Employment Relations Authority to be forwarded to the Crown account; and**

- c) **To pay Mr Simmons \$750 as a contribution to his costs and \$71.56 for the Authority's filing fee.**

What is the Employment Relationship Problem?

[1] Michael Simmons and New Zealand Future Forest Products Limited (NZFFPL or the company) entered into a settlement agreement (the agreement). The agreement was signed by a mediator from the Ministry of Business, Innovation and Employment on 18 December 2020.

[2] The agreement provided for the payment by NZFFPL of all Mr Simmons' entitlements due and owing as at the termination of employment date along with an additional six weeks' pay in lieu of notice. No figures are specified.

[3] No payment has been made and Mr Simmons now seeks a compliance order requiring payment along with a penalty. The company acknowledges that payment has not been made and provides several explanations.

How did the Authority investigate?

[4] A case management conference was held with Mr Simmons, who was at that point self-represented, and David Henry, director of NZFFPL. The Authority proposed that this matter be investigated on the papers and no objection was received.

[5] Mr Henry indicated that some payments into the company were expected and Mr Simmons agreed to wait for a period. In the meantime the parties were to provide additional information, including calculations of the amount owing under the settlement agreement.

[6] The money was not forthcoming. Mr Simmons wished to proceed and appointed a representative. The Authority asked the parties to attempt to reach agreement on the sum owing under the agreement and they were able to do so.

[7] NZFFPL sought to have payment to be ordered by way of instalments. By consent a non-publication order was made regarding the company's draft accounts and those accounts were supplied. To the extent necessary for the issuing of this determination that order is varied.

[8] The parties were given a final opportunity to make further comment.

[9] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has not recorded everything received from the parties but has stated findings and conclusions and specified orders made as a result.

What explanations were given by NZFFPL?

[10] The company says the time when payment initially became due was in the Christmas holidays and its office was closed which, due to an administrative error, resulted in payment not being made. NZFFPL claims that the cost was fully budgeted and accounted for at that time although it was feeling the financial effects of a failed merger in 2020. Senior management are reported to have foregone remuneration as a result.

[11] The statement in reply lodged in early February 2021 indicated that the administrative error was being rectified. Why, if the payments were fully budgeted and accounted for, they were not available to be paid once an error was discovered is not entirely clear.

[12] NZFFPL does say that it was advised, seemingly by a lawyer, that rather than make payment it had to await the outcome of the Authority process. No written advice was filed.

[13] At the time of the case management conference in April 2021 two upcoming sources of funding for the payment to Mr Simmons were identified by Mr Henry. However, payment was not made with some broad explanation provided of difficulties with those sources.

[14] Submissions as recently as 18 June 2021 indicate that at least one of the income streams is still in place.

Was there a breach of the settlement agreement?

[15] The agreement required payment within ten working days of the agreement being signed by all parties. That time is well past. NZFFPL breached the settlement agreement.

Should NZFFPL have to comply and how much is owing?

[16] NZFFPL committed to payment under the agreement. Its explanations about the reasons for delay in payment do not justify its failure to meet its obligations under that agreement. The parties agree that the total sum outstanding under the agreement is \$50,186.56 gross (or \$34,290.39 net).

[17] NZFFPL identifies that it does not have funds for immediate upfront payment of the entire amount owing. Draft accounts are provided. A monthly instalment plan is sought although no figures are suggested.

[18] Although the company's apparent financial position cannot currently be described as rosy, there are payments which Mr Henry indicates it expects, albeit they have not been forthcoming at times anticipated previously.

[19] Mr Simmons objects to any payment by instalments. This includes on the basis that the sums have been outstanding for around six months and that the accounts do not support the existence of a dire financial position.

[20] The accounts provided are draft management accounts. No revenue figures are provided although the company asserts elsewhere that no or limited revenue was earned. The accounts disclose not insubstantial current assets in terms of receivables and a positive net asset position of a larger amount than is owed to Mr Simmons.

[21] Under s 138(4A) of the Act instalments may be ordered but only if "the financial position of the employer requires it". This is not an easy test to meet and I do not accept that payments by instalment should be allowed in the circumstances of this case.

[22] NZFFPL is ordered to comply with the agreement within 28 days of the date of this determination by paying Mr Simmons the sum of \$50,186.56 gross.

[23] Interest has been claimed. The Employment Court decided under predecessor legislation that interest could not be awarded on amounts owing under settlement agreements.¹ The wording of the relevant provision has changed, however I consider that the delay in payment is best dealt with by way of penalty.

[24] It appears that NZFFPL may not have paid previous PAYE deductions and Kiwisaver contributions to the Inland Revenue Department. The company refers to teething problems with a new outsourced HR system. Amounts outstanding should be paid to the IRD forthwith.

¹ *Wolfenden v The New Zealand Film and Television School Ltd* [1999] 2 ERNZ 21.

Should a penalty be imposed on NZFFPL?

[25] A penalty may be imposed for a breach of a settlement agreement although it is not mandatory.² I have considered whether this is an appropriate case in which to award a penalty.

[26] Under the settlement agreement NZFFPL committed to make payments to the company's former employee. Mr Henry has commented on the company's financial position. However, it seems that those matters must have been at least somewhat evident at the time of signing the agreement.

[27] No partial payments have been made although Mr Henry suggests this may have been on advice once the matter was with the Authority.

[28] I consider that a penalty is appropriate, although I will consider NZFFPL's circumstances when assessing the amount.

What level of penalty is appropriate?

[29] I have examined the factors in s 133A of the Act along with the Employment Court's approach in *Nicholson v Ford* and *A Labour Inspector v Daleson Investment Ltd*.³ I have only limited evidence on which to base my assessment.

[30] The maximum penalty against a company is \$20,000. There is one breach of the settlement agreement with the starting point therefore being \$20,000.

[31] The resolving of employment relationship problems through mediation is a critical part of New Zealand's employment framework. When parties reach agreements which are signed by a mediator they must be able to be confident that the terms of those agreements are complied with.

[32] The fact that part of the payment is for accrued wages and holiday pay makes the breach more serious. There is a need for deterrence of both NZFFPL and others who may regard money owing under settlement agreements as simply another bill which is a little late in payment.

² The Act, s 149(4).

³ *Nicholson v Ford* [2018] NZEmpC 132 and *A Labour Inspector v Daleson Investment Ltd* [2019] NZEmpC 12.

[33] Although there was reference to an administrative error initially, NZFFPL has clearly been on notice for some time that the sum remains unpaid. The continued failure to pay is intentional.

[34] Mr Simmons was lenient in allowing the company a grace period for payment after the case management conference. However, he indicates that he now has income tax owing which he is unable to pay without the funds from NZFFPL. He is finding the delays in payment stressful and frustrating.

[35] I have made some allowance for NZFFPL's apparent financial position and the fact that the company has participated in this proceeding. I have also considered other cases involving breaches of settlement agreements.

[36] I conclude that NZFFPL should pay a penalty of \$2,000. I do not accept that the whole of the sum should be paid to Mr Simmons as the Crown also has a strong interest in ensuring that settlement agreements signed by a mediator are complied with. Within 28 days of the date of this determination the company is to pay a \$2,000 penalty, with \$1,000 to be forwarded to Mr Simmons and \$1,000 to be paid into the account of the Employment Relations Authority to be forwarded to the Crown account.

Costs

[37] Mr Simmons obtained representation during the course of this proceeding and he is entitled to a contribution towards those costs. Costs of \$750 are sought and I accept this as a reasonable contribution to Mr Simmons' costs.

[38] NZFFPL is ordered to pay Mr Simmons the following within 28 days of the date of this determination:

- (i) \$750 as a contribution towards costs; and
- (ii) \$71.56 for the Authority's filing fee.

Nicola Craig
Member of the Employment Relations Authority