

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2021] NZERA 482
3145505

BETWEEN

KANWARPREET SINGH
Applicant

AND

CHARMAC HOLDINGS LIMITED
First Respondent

DION SYME
Second respondent

JODIE SYME
Third Respondent

Member of Authority: Peter van Keulen

Representatives: Kevin Murray, advocate for the Applicant
No appearance for the Respondents

Investigation Meeting: 27 October 2021

Submissions Received: 27 October 2021 for the Applicant

Date of Determination: 1 November 2021

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Kanwarpreet Singh and Charmac Holdings Ltd signed a record of settlement on 28 May 2021 (the Record of Settlement). A mediator from the Mediation Services of the Ministry of Business Innovation and Employment signed the Record of Settlement, pursuant to s 149 of the Employment Relations Act 2000 (the Act).

[2] Mr Singh says Charmac Holdings has failed to comply with clause 2, clause 3 and clause 4 of the Record of Settlement relating to payments to be made to him.

[3] On the basis of these failures Mr Singh lodged a statement of problem in the Authority seeking a declaration of breach by Charmac, a penalty against Charmac Holdings, interest on the amount representing unpaid wages which is payable under the Record of Settlement and costs.

[4] Mr Singh also says two directors of Charmac Holdings, Dion Syme and Jodie Syme, are persons involved in a breach of employment standards pursuant to s 142W of the Act. On this basis his statement of problem also seeks declarations of breach by the directors as persons involved in the breach, and penalties against both directors.

[5] Charmac Holdings in its statement in reply acknowledges that the payments required under the Record of Settlement have not been made. It says the payments were to be made from the return of a bond payable to it upon the sale of its Columbus Cafe business but the release of money to it has been delayed.

[6] Mr Syme and Ms Syme both say they are not parties to the Record of Settlement and they cannot be personally liable under the Record of Settlement. They also say non-compliance with the Record of Settlement rests solely with Charmac Holdings.

The Authority's investigation

[7] My investigation into this matter was initially put on hold when, in the first case management conference on 3 September 2021, the advocate then acting for all three respondents advised that payments due under the Record of Settlement would be made by Charmac Holdings by 10 September, this being the date Charmac Holdings expected to receive the bond money as the sale of its business had completed on 1 September.

[8] A further case management conference was required on 16 September 2021 as the payments were not made by Charmac Holdings on 10 September 2021. The advocate who had previously acted for Charmac Holdings no longer acted for it and did not participate in the conference.

[9] The three respondents were all advised of the date and time for the case management conference and the Authority called Mr Syme on the contact details provided. Mr Syme was

not available when called for the case management conference so I proceeded with the conference without any of the respondents participating.

[10] In the case management conference I set this matter down for an investigation meeting to be conducted by zoom. After receiving notification of the investigation meeting Mr Syme advised he would be available to participate and requested an invitation to the zoom meeting. This was forwarded to him.

[11] In addition to this the three respondents were served with a notice of investigation meeting which set out the date and time for the investigation meeting.

[12] So, the three respondents were aware of the date and time of the investigation meeting and Mr Syme had advised he would attend on behalf of all three respondents.

[13] However on the morning of 27 October 2021, the day of the investigation meeting, Mr Syme sent an email to the Authority stating he was no longer able to attend the investigation meeting.

[14] Faced with the choice between adjourning the investigation meeting or proceeding without Mr Syme participating for the respondents I decided to proceed because:

- (a) The factual enquiry was limited and could be provided by Mr Singh.
- (b) The payments due to Mr Singh are almost four months overdue and the application for compliance had been delayed because of assurances of payment by Charmac Holdings that had not been met – further delay to Mr Singh was unfair and could be prejudicial to his ability to obtain payment from Charmac Holdings.
- (c) The respondents could be given the opportunity to respond to the evidence and/or make any submission in writing after the investigation meeting.

[15] So, I therefore proceeded with the investigation meeting pursuant to clause 12 of Schedule 2 of the Act.

[16] In my investigation meeting Mr Singh gave evidence under affirmation and his advocate gave oral submissions supported by written submissions lodged before the meeting.

[17] After the conclusion of the investigation meeting the Authority sent an email to Mr Syme advising that the evidence showed the payments due under the Record of Settlement had not been made and therefore a compliance order and a penalty were likely to be made against Charmac Holdings. Mr Syme was invited to provide any comments or submission on that including providing any explanation for non-payment and/or any indication of when payment might be made, by midday on 28 October 2021.

[18] No response has been received from Mr Syme.

Facts giving rise to this claim

[19] Mr Singh and Charmac Holdings had an employment relationship problem which they resolved through mediation on 28 May 2021. The parties reached an agreement in full and final settlement, which was recorded in the Record of Settlement.

[20] The operative clauses of the Record of Settlement provide for payments to be made by Charmac Holdings to Mr Singh by 1 July 2021. The payments were:

(a) \$10,000.00 pursuant to s 123(1)(c)(i) of the Act;

(b) \$4,500.00 plus GST for costs; and

(c) \$6,675.91 (net) for salary and accrued holiday pay owing at the end of Mr Singh's employment.

[21] Charmac Holdings failed to make these payments by 1 July 2021.

[22] Charmac Holdings has advised Mr Singh that it was unable to make the payments as it had not received bond money that was to be paid to it on the sale of its Columbus Café business. The first indication was that this money would be released to it such that payments due under the Record of Settlement would be made to Mr Singh in August 2021. This then changed to by 10 September 2021, but the payments were not made. Charmac Holdings then advised that the bond was being held for 90 days and payment from the bond money was the only option the company had given its financial situation. Nothing further was provided in terms of a commitment to payment from that bond money and when that would be.

[23] Since this last communication no payments have been made to Mr Singh.

Has Charmac Holdings breached the record of settlement?

[24] Charmac Holdings has breached the Record of Settlement by not making the required payments; therefore I will make the declaration of breach as sought.

Is it appropriate to make a compliance order?

[25] As Charmac Holdings has breached the Record of Settlement a compliance order is necessary. I will make an order for compliance pursuant to s 137(2) of the Act.

Should I impose a penalty against Charmac Holdings?

[26] Given Charmac Holdings' breach of the Record of Settlement I consider it appropriate to impose a penalty against it. In assessing the quantum of this penalty I have considered the relevant factors set out at s 133A of the Act and looked at the range of penalties awarded in similar cases. Based on this I conclude that the appropriate penalty is \$3,000.00.

[27] I also conclude that this penalty should be paid to Mr Singh in order to compensate him for some of the inconvenience, distress and cost he has suffered or incurred through Charmac Holdings not meeting its obligations.

Should I award Mr Singh interest on the amount of unpaid wages?

[28] I do not believe I can award interest on sums payable under a Record of Settlement. And given that the Record of Settlement settles any claim for unpaid wages including interest, I can award interest on any amount of unpaid wages independently of the Record of Settlement.

[29] In any event, awarding interest is discretionary and I am not satisfied that the discretion should be exercised – this is because any loss arising to Mr Singh for not being paid any of the amounts due under the Record of Settlement, on time, is compensated by the penalty I have imposed.

Should I make orders against Mr Syme and Ms Syme?

[30] It is my view that s 142W of the Act does not apply to breaches of a record of settlement – this not being an employment standard which s 142W applies to. So I will not make orders against Mr Syme and Ms Syme as sought by Mr Singh in his statement of problem.

[31] When discussing this with Mr Singh's advocate he advised that what was sought then was a compliance order compelling Mr Syme and/or Ms Syme as directors of Charmac Holdings to take steps to ensure that Charmac Holdings makes the payments due under the Record of Settlement.

[32] These are orders I can make pursuant to s 137(2) of the Act.¹

[33] However I am concerned that the application for these orders to be made against Mr Syme and Ms Syme were not set out in the statement of problem and therefore Mr Syme and Ms Syme have not had the opportunity to consider their position in response and have not been given an opportunity to appear on this application.

[34] Therefore I will not make the orders sought against Mr and Ms Syme now but will defer any consideration until such time as they have had an opportunity to consider the application and respond. In this regard an urgent case management conference will be convened to set directions for this.

Costs

[35] Mr Singh's advocate seeks costs for the application. I am satisfied that an award of costs is appropriate and given the circumstances I set that at one half day of the daily tariff being \$2,250.00.

[36] Charmac Holdings must also pay \$71.56 for the filing fee on the statement of problem.

Orders

[37] Charmac Holdings Ltd has breached the Record of Settlement as it failed to make the required payments.

[38] Charmac Holdings Ltd must comply with clauses 2, 3 and 4 of the Record of Settlement by paying Mr Singh \$10,000.00 pursuant to s 123(1)(c)(i) of the Act, \$4,500.00 plus GST for costs, and \$6,675.91 (net) for salary and accrued holiday pay owing at the end of Mr Singh's employment, by 5 November 2021.

[39] Charmac Holdings must pay \$3,000.00 to Mr Singh for the penalty imposed upon it for its breach of the Record of Settlement, by 5 November 2021.

¹ *Chambers v Pelabon* [2019] NZEmpC 45.

[40] Charmac Holdings Ltd must pay Mr Singh \$2,250.00 as a contribution to his legal costs and \$71.56 for the filing fee in this matter.

Peter van Keulen
Member of the Employment Relations Authority