

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

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

[2021] NZERA 115  
3117432

BETWEEN	FAAFETAI TUTAGALEVAO Applicant
AND	STEPHEN WILDERMOTH trading as STEPHEN WILDERMOTH TRANSPORT Respondent

Member of Authority:	Trish MacKinnon
Representatives:	Greg Lloyd, counsel for the Applicant No appearance for the Respondent
Investigation Meeting:	26 February 2021 at Wellington
Submissions [and further Information] Received:	On the day from the Applicant None from the Respondent
Date of Determination:	24 March 2021

---

**DETERMINATION OF THE AUTHORITY**

---

**Employment Relationship Problem**

[1] Faafetai Tutagalevao claims his former employer, Stephen Wildermoth, trading as Stephen Wildermoth Transport, breached the terms agreed in a record of settlement that was signed by a mediator employed by the Ministry of Business, Innovation and Employment (MBIE). He seeks an enforcement order in relation to Mr Wildermoth's failure to comply with the record of settlement and also seeks the imposition of a penalty and costs.

[2] Mr Tutagalevao initially sought the payment of interest on all monies unpaid under the terms of the record of settlement. He withdrew that claim in the course of the investigation meeting.

[3] Mr Wildermoth did not file a statement in reply and has had limited engagement with the Authority over the matter. He did not attend a scheduled case management telephone conference on 27 January 2021, informing the Authority that he was driving a truck and could not pull over. He did attend a case management conference call on 9 February 2021, having been informed the call would proceed with or without his attendance.

[4] On that conference call, Mr Wildermoth did not dispute that he owed money to Mr Tutagalevao under the record of settlement. He offered no explanation for not paying it and said he would pay the amount outstanding to Mr Tutagalevao on 22 February 2021. Mr Tutagalevao was prepared, at that time, to waive his claims regarding a penalty and costs if all the outstanding monies were paid without the need for further intervention by the Authority. He was not prepared to waive those claims if an Authority hearing proved necessary for enforcement of the outstanding monies.

[5] I informed Mr Wildermoth that an investigation meeting would take place on Friday 26 February 2021 if the Authority had not received prior confirmation from Mr Tutagalevao that he had received full payment of the outstanding sums under the record of settlement. I also informed Mr Wildermoth, that, if an investigation meeting did take place, the issue of penalties and costs would be considered.

[6] Mr Tutagalevao confirmed on 25 February 2021 that he had not received the outstanding monies from Mr Wildermoth.

### **The Authority's investigation**

[7] Mr Wildermoth failed to appear on 26 February 2021 at 9.30 am, which was the time scheduled for the investigation meeting. I postponed the start of the meeting by 10 minutes and asked an Authority Officer to contact him by telephone in case he had been delayed by traffic or some other reason beyond his control. Mr Wildermoth told the Authority Officer he did not know the investigation meeting was taking place and asserted he had until the end of February 2021 to pay the money owed to Mr Tutagalevao.

[8] I do not accept Mr Wildermoth's explanation for not attending the investigation meeting. I am satisfied he was aware from the conference management call of 9 February 2021 that an investigation meeting would be held on 26 February 2021 if Mr Tutagalevao had not received all outstanding monies before that date. Mr Wildermoth had confirmed his

availability to attend an investigation meeting on 26 February during the conference call of 9 February.

[9] Mr Wildermoth did not have to rely on his memory, however, as the Authority sent him a Notice of Direction confirming the matters discussed in the 9 February 2021 case management conference. That document, and a Notice of Investigation Meeting confirming the date, time and location of the 26 February 2021 hearing, was sent to Mr Wildermoth on 10 February 2021.

[10] As I was satisfied there was no good cause for Mr Wildermoth's failure to attend, I commenced the investigation meeting in his absence as the Authority has the discretion to do under cl 12 of Schedule 2 of the Employment Relations Act 2000 (the Act).

### **Background**

[11] On 7 May 2019 the Authority determined Mr Tutagalevao was unjustifiably dismissed and ordered Stephen Wildermoth trading as Stephen Wildermoth Transport to pay arrears of wages, lost wages and compensation to him.<sup>1</sup> The Authority also noted that Mr Tutagalevao had established a claim to unpaid holiday pay which it was unable to determine at the time. The parties were to calculate and agree on the amount of holiday pay due, with leave being reserved for Mr Tutagalevao to return to the Authority if no agreement was reached. The issue of costs was also reserved.

[12] The parties resolved those outstanding matters as part of agreed terms that were recorded in a record of settlement signed by an MBIE mediator on 27 September 2019.

[13] Before signing the record of settlement both parties confirmed they fully understood that once the mediator signed the agreed terms of settlement:

1. The settlement is final and binding on and enforceable by us; and
2. Except for enforcement purposes, neither of us may seek to bring those terms before the Employment Relations Authority or Court whether by action, appeal, and application for review, or otherwise; and
3. The terms of settlement cannot be cancelled under Section 36 to 40 of the Contract and Commercial Law Act 2017; and
4. That section 149(4) provides that a person who breaches an agreed term of settlement to which subsection (3) applies is liable to a penalty imposed by the Employment Relations Authority.

---

<sup>1</sup> [2019] NZERA 274.

[14] The terms of settlement were expressed to be confidential to the parties, so far as the law allows. It is necessary, however, to set out some of those terms as a result of the breach by Mr Wildermoth. The salient terms are as follows:

- 2.4 The parties have agreed on the following terms to give effect to the Authority's determination and all matters between the parties.
- a. The employer will pay the employee \$XX under s. 123(1)(c)(i) of the Act on or before 31 July 2019.
  - b. The employer will pay to the employee \$XX net on or before 31 October 2019.
  - c. The employer will pay a contribution to the employee's legal costs of \$7,000 plus GST on or before 31 October 2019. The payment will be made directly to the employee's lawyer, Greg Lloyd, upon receipt of an invoice.
  - d. The employer will pay the employee \$15,000 net to the employee on or before 31 January 2020.
  - e. The parties agree that the payments made by the employer to the employee under clauses (b) and (d) are net and that the employer is responsible for the payment of all appropriate taxes including PAYE.

- ...  
4. This is full and final settlement of all matters between the parties arising out of the employment relationship.<sup>2</sup>

[15] Of those terms, Mr Wildermoth paid (a) on time and (b) several weeks late. He paid (c) without the GST component, again several weeks late. He paid \$2,500 only of term (d) some weeks later than the due date.

[16] As a result of proceedings Mr Tutagalevao instigated in the District Court, recovery of a further \$5,542.78 was achieved. He says he was advised the District Court could enforce payment of the sums recorded in the Authority's determination only, and not those in the record of settlement, hence his current application to the Authority.

[17] By Mr Tutagalevao's calculation, with which I agree, \$8,007.22 remains outstanding from the record of settlement being:

- (i) \$6,957.22 net; and

---

<sup>2</sup> For preservation of confidentiality, I have not included the dollar value of those terms paid in full by the respondent.

- (ii) \$1,050 being the unpaid GST component of the contribution to his lawyer's costs.

### **Subsequent events**

[18] Mr Tutagalevao advised the Authority on 3 March 2021 that Mr Wildermoth had now paid him the outstanding monies. He further advised that he wished to continue with his claim for penalties and costs.

[19] I agree it is reasonable for those issues, which formed part of my investigation, to be considered. Mr Wildermoth had explicitly been informed that a consequence of not paying the outstanding monies owing to Mr Tutagalevao before 26 February 2021 would be the inclusion of penalties and costs in the Authority's investigation.

### **Penalty considerations**

[20] Stephen Wildermoth is liable to a penalty for breaching the 27 September 2019 mediated settlement agreement.<sup>3</sup> Arguably he is liable to more than one penalty as he breached three of the four terms concerning the payment of monies to Mr Tutagalevao. However, as he sought one penalty only in the statement of problem and his submissions were consistent with that I take the point no further.

[21] Not all breaches will result in the imposition of a penalty and it is relevant to ascertain how much harm the breach has occasioned and how important it is to bring home to the party in default that such behaviour is unacceptable or to deter others from such a behaviour.<sup>4</sup>

[22] Section 133A of the Act sets out factors the Authority and court are to take into account when considering penalties. In summarised form they are:

- (i) The object of the Act; and
- (ii) The nature and extent of the breach; and
- (iii) Whether it was intentional, inadvertent, or negligent; and
- (iv) The nature and extent of loss or damage suffered by any person, or gains made or losses avoided by the person in breach, due to the breach; and

---

<sup>3</sup> Section 149(4) of the Employment Relations Act 2000.

<sup>4</sup> *Xu v McIntosh* [2004] 2 ERNZ 488 at [464].

- (v) Whether the person in breach has paid any compensation, reparation or restitution or taken other steps to mitigate any adverse effects, actual or potential; and
- (vi) The circumstances in which the breach occurred, including the vulnerability of the employee; and
- (vii) Whether the person in breach has been found by the Authority or the court, in proceedings under this or any other Act, to have previously engaged in similar conduct.

[23] A Full Court of the Employment Court provided guidance over the application and weighting of those factors in *Borsboom (Labour Inspector) v Preet PVT Limited*<sup>5</sup> and further refinements have since been made by the Court, including in *Nicholson v Ford*.<sup>6</sup>

### **Is a penalty warranted?**

[24] I consider a penalty should be imposed on Mr Wildermoth for the following reasons. Firstly, having agreed to terms of settlement, it was not open to Mr Wildermoth to elect to comply with certain terms and ignore others. All terms were agreed by the parties to the record of settlement to be "...final and binding on, and enforceable on us...". The imposition of a penalty will impress on Mr Wildermoth that it is unacceptable for a party to breach the terms of a mediated settlement agreement.

[25] Secondly, imposing a penalty on Mr Wildermoth may act as a general deterrent to others who may believe they can choose not to abide by all terms of a mediated settlement agreement.

[26] The final reason is the harm caused to Mr Tutagalevao by Mr Wildermoth's actions. Mr Tutagalevao gave persuasive evidence of the negative consequences he has endured as a result of Mr Wildermoth's failure to abide by the agreed terms of settlement. He has not been able to put the matter behind him and move on with his life as he would have been able to do if the terms of settlement had been complied with in the timeframe specified. It is a constant and ongoing cause of stress for him and his family.

[27] He has also been deprived of the use of the money owed to him which he says has had a significant and detrimental effect on him and his family members. Out of respect for Mr

---

<sup>5</sup> *Borsboom (Labour Inspector) v Preet PVT Limited* [2016] NZEmpC Christchurch 143.

<sup>6</sup> *Nicholson v Ford* [2019] NZEmpC 187.

Tutagalevao and his family's privacy, I will not elaborate but I have accepted the evidence he gave on that matter.

[28] I consider the breach of the mediated settlement agreement to be serious and significant. It is now more than a year since all payments under the terms of the settlement agreement should have been made. Mr Wildermoth had ample opportunity to discharge his debt to Mr Tutagalevao in that time but did not do so until after the Authority's investigation meeting. I accept Mr Tutagalevao's view that Mr Wildermoth deliberately chose not to abide by the terms of the settlement agreement.

[29] The starting point for a penalty is \$10,000, which is the maximum amount that can be imposed on an individual under s 135(2)(a) of the Act. Mr Lloyd submits the maximum, or close to the maximum, penalty should be imposed, with part or the whole of the penalty being awarded to Mr Tutagalevao.

[30] In his submission, the only mitigating factor for Mr Wildermoth is that he paid a large part of the money owing under the s 149 record of settlement. That is offset in his view, however, by what he described as Mr Wildermoth's "deliberate and flagrant" refusal to pay the outstanding money owed.

[31] There is no evidence to suggest Mr Wildermoth is unable to pay a penalty. He was clearly able to pay the outstanding sums under the record of settlement, as he demonstrated in the week following the investigation meeting. In the meantime, however, Mr Tutagalevao had the added stress and inconvenience of the investigation meeting to bear.

[32] In deciding on the quantum of a penalty I have taken into account a number of factors, including the statutory factors listed in paragraph 22 above, and the case law I have referred to, in particular, *Preet* and *Nicholson*. Relevant factual considerations include the payment in full Mr Wildermoth has now made of the amounts agreed in the settlement agreement entered into by the parties in September 2019; the lengths Mr Tutagalevao had to go to in order to achieve that full payment; the delay of more than a year in completing payments; and the effect on Mr Tutagalevao of the delay.

[33] After weighing all factors I find a discount of 60 percent should apply, resulting in a penalty of \$4,000.00. Of that amount, 75 percent is to be paid to Mr Tutagalevao and 25 percent to the Crown.

**Orders**

[34] I order Stephen Wildermoth, who trades as Stephen Wildermoth Transport, to pay a penalty of \$4,000.00 in total, of which \$3,000.00 is to be paid to Mr Tutagalevao, and \$1,000.00 is to be paid to the Employment Relations Authority for payment into the Crown account. Payments are to be made within 28 days of the date of this determination.

**Costs**

[35] Mr Tutagalevao seeks costs based on the Authority's notional daily tariff of \$4,500.00 for a one-day investigation meeting. He was assisted by counsel throughout his attempts to enforce payment of the sums owing to him by Mr Wildermoth and I agree that payment of costs based on the daily tariff is appropriate. The investigation meeting was relatively brief and I find an award for a quarter of a day to be adequate.

[36] Stephen Wildermoth is further ordered to contribute to the legal costs incurred by Mr Tutagalevao in the sum of \$1,125.00. Payment is to be made within 28 days of the date of this determination.

**Trish MacKinnon**  
**Member of the Employment Relations Authority**