

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2022] NZERA 364
3166163

BETWEEN TREVOR THOMSON
Applicant

AND HISPEC HOMES NZ LIMITED
First Respondent

AND BEAU MURPHY
Second Respondent

Member of Authority: Helen Doyle

Representatives: Paul Mathews, advocate for the Applicant
No appearance by the Respondents

Investigation Meeting: 21 July 2022 at Christchurch

Submissions Received: On the day

Date of Determination: 5 August 2022

SECOND DETERMINATION OF THE AUTHORITY

Application to reopen investigation

[1] Trevor Thomson applies to reopen the investigation to which the Authority determination of 30 March 2021 relates.¹

[2] The earlier investigation concerned compliance with a record of settlement (record of settlement) between Mr Thomson and Hispec Homes NZ Limited (Hispec Homes) under s 149 of the Employment Relations Act 2000 (the Act). There were additional claims for a penalty,

¹ *Thomson v Hispec Homes NZ Limited and Beau Murphy* [2021] NZERA 124.

interest, and costs. Beau Murphy was joined to the proceedings and an order was sought under s 137(2) of the Act that he takes necessary steps for Hispec Homes to comply with the orders.

[3] The matter was complicated by the fact that Hispec Homes was in Covid-19 business debt hibernation at the time of the Authority investigation and had a one-month protection against enforcement that ended on 31 March 2021. That was subsequently extended for six months.

[4] When it undertook its investigation, the Authority needed to determine whether Hispec Homes was protected from enforcement of the amounts agreed in the settlement agreement. Proceedings under the debt hibernation scheme cannot be begun or continued except with permission of the business entity or the High Court. That protection however does not apply if the debt is an excluded debt.²

[5] The Authority considered the meaning of an excluded debt as defined in schedule 13 of the Companies Act 1993 and in light of its purpose.³

[6] The Authority concluded in its determination that the agreed amounts to be paid to Mr Thomson under the record of settlement for compensation and legal costs were not excluded debts but holiday pay in the settlement agreement was an excluded debt. No orders were made for a penalty and interest. The Authority was not prepared to make an order for compliance in respect of the holiday pay in the circumstances, including that there was at that time an adjourned application in the High Court for liquidation. No order for costs was made.

[7] Mr Mathews has applied to have the investigation to which the determination relates reopened. The main ground on which the application is made is that the debt hibernation period for Hispec Homes ended on 1 October 2021. Despite demands made to Hispec Homes and promises that payment would eventuate the amounts in the record of settlement remained outstanding at the time the application to reopen was made.

² Clause 40 of schedule 13 of the Companies Act 1993.

³ Clause 4 of schedule of the Companies Act 1993.

Investigation process

[8] No statement in reply was lodged by Hispec Homes or Mr Murphy to the reopening application.

[9] The Authority set the matter down for a case management conference on 23 May 2022. Mr Mathews attended that conference together with Mr Murphy and John Fernando. Mr Murphy is the sole director of Hispec Homes and Mr Fernando a shareholder of Hispec Homes.

[10] During the case management conference, the Authority set the matter down for an investigation meeting on 21 July 2022. It timetabled for a statement in reply to be lodged by 27 May 2022 and for any statements of evidence and relevant documents be lodged by both parties by 14 July 2022. Mr Fernando advised that the holiday pay would be paid immediately and that, following a property settlement due to take place on 1 July 2022, the remainder of the money would be paid.

[11] The respondents attended to payment of the sum of \$698.78 being holiday pay on 9 June 2022. There was no compliance with the direction to lodge a statement in reply and no statements of evidence were lodged on behalf of the respondents.

[12] There were no other documents lodged by the respondents except for an email sent by Mr Murphy on 9 June 2022 that he should not be personally mentioned in the proceedings. He set out that the company was going through financial difficulties but was “striving to have the debt paid before the date of the meeting.”

[13] Although the Authority waited for an attendance at the investigation meeting by, or on behalf of, Hispec Homes and Mr Murphy there was no appearance. There was no good cause shown as to why there would be no appearance. The Authority is satisfied that both respondents knew of the date and place for the investigation meeting.

[14] The Authority therefore elected to proceed under clause 12 of schedule 2 of the Employment Relations Act 2000 (the Act) and heard evidence from Mr Thomson.

[15] Mr Mathews advised that interest on the amounts owing is no longer sought.

The Issues

[16] The Authority needs to determine the following issues in this matter:

- (a) Should the investigation be reopened?
- (b) If the investigation is reopened then what did the record of settlement require of Hispec Homes and has there been compliance with the agreement.?
- (c) Should a compliance order be made against Hispec Homes if there are outstanding obligations under the record of settlement?
- (d) Should any order be made requiring specific action by Mr Murphy to prevent further non-compliance by Hispec Homes?
- (e) Should a penalty be imposed on Hispec Homes for failure to comply with the record of settlement by the required date?
- (f) If a penalty is imposed then who should the award be paid to?
- (g) Should there be an order of costs?

Should the investigation be re-opened?

[17] Under clause 4 of the second schedule of the Act the Authority may order an investigation to be reopened upon such terms as it thinks reasonable.

[18] The application for rehearing is made on the basis that there is new evidence. The evidence is that Hipsec Homes is no longer in debt hibernation. There is no longer protection from enforcement of the compensatory and costs amounts in the settlement agreement.

[19] Proceedings were lodged in March 2022 after unsuccessful demands for payment and the application was not unduly delayed. The new evidence has an important influence on the matter and there would be the possibility of a miscarriage of justice if the application is not reopened and considered with the new evidence.

[20] There are grounds for reopening. The investigation is reopened.

What did the record of settlement require of Hispec Homes and has there been compliance?

[21] The parties entered into a record of settlement on 21 October 2020 under s 149 of the Act. The record of settlement was certified by a mediator employed by the Chief Executive of the Ministry of Business Innovation and Employment (MBIE) on the same day.

[22] The record of settlement provides that Mr Thomson's employment with Hispec Homes ended on 8 January 2020 and that he has been paid all his wages until that date.

[23] The record of settlement provided materially in clause 2 and 3 as follows:

2. Within 14 days from the date that this record is finalised through the Ministry of Business Innovation & Employment, Hispec shall:
 - (a) Pay to Trevor, on an ex gratia and denial of liability basis, a compensatory payment of \$9,000 pursuant to Section 123(1)(c)(i) of the Employment Relations Act 2000. The payment shall be made to the same bank account that Trevor's wages were paid into during his employment.
 - (b) Trevor shall advise the Employment Relations Authority at Christchurch that his personal grievance proceeding under File No. 3093792 is discontinued with no issue as to costs. Hispec shall additionally confirm to the Authority that its counterclaim is discontinued on the same basis.
 - (c) Pay to Trevor \$697.78 (less PAYE) for holiday pay to resolve a dispute between the parties about that. The payment shall be made to the same bank account that Trevor's wages were paid into during his employment.
3. Hispec shall pay a contribution to Trevor's legal fees of \$4,000 plus GST. Such contribution shall be paid to Mathews Walker within 14 days from the date that firm supplies a tax invoice for such amount.

[24] Mr Thomson confirmed in his evidence that he has not been paid the compensatory amount in clause 2(a) of the settlement agreement. I am also satisfied from the evidence that there has been no payment of the contribution to legal fees of \$4000 plus GST in clause 3. I am satisfied that Mr Mathews supplied a tax invoice. Payment of both amounts for compensation and costs was due to be made by 4 November 2020. The only amount paid since the record of settlement is the holiday pay on 9 June 2022. For completeness I observe that the holiday pay paid did not appear to be less PAYE and was \$698.78 instead of \$697.78.

[25] Hispec Homes did not dispute in correspondence to Mr Mathews and the Authority or at the case management conference on 21 July 2022 that the compensatory and cost amounts have not been paid.

[26] There has been a breach of the settlement agreement.

Should a compliance order be made against Hispec Homes?

[27] The Authority may make an order for compliance under s 137(1)(iii) of the Act with any terms of settlement that s 151 of the Act provides may be enforced by compliance order.

[28] The has been continued non-compliance since November 2020 with the terms of settlement. There was a period between March 2021 and October 2021 when Hispec Homes had protection from enforcement of the compensatory and costs amounts. That protection has ended. Of more recent times there have been promises made to Mr Mathews to pay the amounts following property settlements however payment has not eventuated from the promises.

[29] It is appropriate to make an order for compliance with the record of settlement.

Should any order be made requiring specific action by Mr Murphy to prevent further non-compliance by Hispec Homes.

[30] Mr Murphy is the sole director currently of Hispec Homes.

[31] Mr Thomson has asked for an order that requires Mr Murphy take steps to ensure Hispec Homes fulfils its obligations and makes payments to Mr Thomson under the record of settlement.

[32] The Authority has jurisdiction to make such an order under s 137(2) of the Act. That section falls within the part of the Act that deals with compliance orders. It provides:

Where this section applies, the Authority may, in addition to any other power it may exercise, by order require, or in conjunction with any matter before the Authority under this Act to which that person is a party or in respect of which that person is a witness, that person to do any specified thing or to cease any specified activity, for the purpose of preventing further non-observance of or non-compliance with that provision, order, determination, direction , or requirement.

[33] The Authority and Employment Court have made orders in reliance on this section that directors arrange funds necessary for the company to pay amounts owed. I refer a case from the Employment Court and one from the Authority as an example below.⁴

[34] It is important the Authority is satisfied that Mr Murphy can take the steps to ensure compliance by Hispec Homes and has responsibility and power to do so. It does not mean in the making of such an order that a third person is required to make payment of the amounts owing under the record of settlement.

[35] Mr Murphy is currently the sole director of Hispec Homes. In several emails to Mr Mathews, he has referred to a number of projects that are underway and promised funds once settlement had taken place. On 11 April 2022 in an email to Mr Mathews Mr Murphy advised settlement was booked for the Thursday and the money would be paid Thursday or early the following week. On 21 April 2022 after no payment was made Mr Murphy advised the early settlement date was given rather than the contract date and that settlement was to happen the following week and “we have allocated funds to make payment.”

[36] In a more recent email sent by Mr Fernando to the Authority and Mr Mathews after the investigation meeting he advised amongst other matters that Hispec Homes is awaiting a property settlement from which they are able to obtain funds as a loan into the company to pay Mr Thomson and other debts.

[37] Mr Murphy is a party to this matter. The content of the emails confirm that he can take steps to ensure compliance and has the responsibility and the power to do so as sole director of Hispec Homes. It is appropriate to require Mr Murphy to arrange the funds necessary and use them to meet payment of the outstanding amounts owing to Mr Thomson under the record of settlement and prevent further non-compliance.

Should a penalty be imposed on Hispec Homes for failure to comply with the record of settlement by the required date.

⁴ *Allen Chambers Limited v Pelabon* [2019] NZEmpC 45 and *Dickson v Starting in Fencourt Limited v Rangihuna* [2021] NZERA 405.

[38] Liability for a penalty in the event of a breach of a record of settlement arises under s 149(4) of the Act.

[39] A penalty has been sought in this matter.

[40] I am satisfied that it is appropriate to impose a penalty. It is important that there is public confidence that records of settlement under s 149 are complied with. Having heard from Mr Thomson he now regrets discontinuing his Authority proceedings and entering into the record of settlement. He says that he settled to resolve the matter quickly. Either side of the debt hibernation there has been significant non-compliance and many promises of payment have not been followed through.

[41] The maximum penalty that can be imposed in the case of a company for a breach of the Act is \$20,0000. Whilst the matter could be seen as breaches of three terms of the settlement it is appropriate to globalise the breaches as they all relate to payment of money under the settlement agreement and are materially identical breaches.

[42] In determining the amount of the penalty, I have had regard to the factors in s 133A of the Act.

[43] A failure to pay what is agreed under a settlement is not consistent with the object of the Act in s 3. The breach has been ongoing since 4 November 2020 but there was a period between March and 1 October 2021 when the record of settlement could not be enforced.

[44] Mr Thomson has been without money for a considerable time and that has impacted on him and his family including a new baby. The benefit he thought settlement would achieve has not been achieved. I accept that the impact of the breach and failure to pay has been significant. Mr Thomson said in evidence that he has not recovered financially.

[45] The only step taken by Hispec Homes was to pay the holiday pay. That only occurred after the reopening application was made and the case management conference. There was no evidence that Hispec Homes has previously been found to have engaged in similar conduct.

[46] I accept and weigh that Hispec Homes has had financial difficulties and the period of debt hibernation.

[47] Considering all matters including penalties in similar cases I conclude an appropriate penalty is \$4000 to be ordered against Hispec Homes.

If a penalty is imposed who should the award be paid to?

[48] Section 136 of the Act provides that the Authority may order the whole or any part of the penalty be paid to any person. Mr Thomson has suffered loss because of the failure to comply with the terms of his settlement. He is not compensated for this simply by ordering compliance.

[49] I consider it appropriate to direct that 80 per cent of the penalty is paid to Mr Thomson and 20 per cent sent to the Crown.

Costs

[50] Mr Mathews seeks the sum of \$750 for costs. I accept that is an appropriate award for the short meeting and in line with the daily tariff. Mr Mathews also seeks reimbursement of the filing fee of \$153.33. I considered whether the earlier investigation filing fee should be awarded however I am not of the view in the exercise of my discretion that is appropriate.

Orders

[51] I order that Hispec Homes comply with the record of settlement dated 21 October 2020 within 20 days of the date of this determination and pay to Trevor Thomson:

- (a) The sum of \$9000 for compensation under s 123(1)(c)(i) of the Act as set out in clause 2(a) of the record of settlement.
- (b) The sum of \$4000 plus GST for legal fees as set out in clause 3 of the record of settlement.

[52] I order Beau Murphy the sole director of Hispec Homes take the necessary steps to enable the company to make the payments in full as set out above within 20 days under s 137(2) of the Act.

[53] I order a penalty against Hispec Homes in the sum of \$4000 to be paid as below:

- (i) Hispec Homes is to pay \$3,200 of the penalty to Trevor Thomson s 136(2) of the Act within 20 days of the date of this determination.
- (ii) Hispec Homes is to pay \$800 of the penalty to the Crown under s 136(1) of the Act within 20 days of the date of this determination.

[54] Hispec Homes is to pay costs to Mr Thomson in the sum of \$750 and reimburse the filing fee in the sum of \$153.33.

Helen Doyle
Member of the Employment Relations Authority