IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON

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

[2022] NZERA 554
3182499

	BETWEEN	COLIN CORBY Applicant
	AND	ISOBEL CRESWELL First Respondent
	AND	BEACHFRONT MAHIA LIMITED Second Respondent

Member of Authority:	Michael Loftus
Representatives:	David Balfour, advocate for the Applicant Isobel Creswell, for the Respondent
Investigation Meeting:	On the papers
Submissions Received:	23 September and 19 October 2022 from the Applicant 28 September 2022 from the Respondent With further input up to 14 November 2022
Date of Determination:	16 November 2022

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] As originally lodged Mr Corby's application sought an order the respondent, Beachfront Mahia Limited (BML), comply with the terms of an agreement the parties concluded pursuant to s 149 of the Employment Relations Act 2000 (the Act). Penalties were also sought.

[2] In a subsequent amendment Mr Corby also raised a claim for interest.

[3] BML's response is that a compliance order is no longer necessary as it has now complied and penalties are inappropriate.

The Authorities Investigation

[4] The application cited BML's sole director, Isobel Creswell, as a respondent but in a telephone conference held on 9 September 2022 Mr Balfour advised Mr Corby was not proceeding with any claims against her and she was no longer a respondent.

[5] As well as withdrawing Ms Creswell as a respondent Mr Balfour confirmed during the telephone conference of 9 September that compliance was no longer an issue but that Mr Corby wished to pursue penalties and costs.

[6] The parties also agreed the matter could be dealt with on the papers with the addition of written submissions which were then timetabled.

[7] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received.

Background

[8] Mr Corby raised an employment relationship problem and, as already said, the parties resolved it in mediation on 30 March 2022 though the settlement was not signed by the mediator until 5 April. The settlement required a compensatory payment of a not inconsiderable sum and this was to occur via four instalments. There was also a contribution toward Mr Corby's costs.

[9] The costs were to be paid no later than 12 April and the first compensatory instalment "on or before 14 days of the date of the mediator signing off this agreement". Given the date of signature that payment was due on 19 April. Subsequent payments were then to be made at monthly intervals (ie: on or before 19 May; 19 June and 19 July).

[10] Both costs and the first compensatory payment were made though here I note the bank statement attached to the Statement of Problem suggests the first compensatory payment was

three days late yet there is no criticism of this. Indeed, the Statement of Problem records BML complied with the requirements in this regard.

[11] However, and as the second compensatory payment became came due, Ms Creswell sent an email to Mr Balfour. This occurred on 18 May and the email advised she (perhaps it should more correctly have said BML) was unable to pay in full as she had hit a "financial wall". She advised she could pay half the due amount immediately with the rest in five weekly instalments. The email acknowledges that was not the agreement but added "I just don't have that amount of funds now". It also appears from Mr Corby's submission there was prior warning this was about to occur as it is stated the mediator had already advised Ms Creswell had approached regarding possible changes to the settlement.[1]

[12] Mr Balfour replied by email on the 20th saying:

> Good morning
> S149 agreements are not changeable at the will or discretion of anyone, nor by negotiation. That was explained to both parties by the mediator before the agreement was signed. S149 agreements are legally binding in their entirety and enforceable by the Authority, with penalties for necessitating the breach action..
> As the due payment was not received in full, the breach Of the agreement is now clearly established and proven.
> If the balance already owed this month is not paid in full by the close of business today lam instructed to commence breach and enforcement action.
> As the breach is clearly established already, all actual costs and penalties ordered in the matter will fall upon you as the Respondent.
> Breach action is also published in its entirety by the Employment Relations Authority and will likely affect a credit record adversely..
> Considering the equity in your many businesses it is not inconceivable that the businesses could raise a loan to complete all payments.
> David Balfour

[13] Notwithstanding Ms Creswell's proposal regarding payment, half the second instalment was paid on the due date, 19 May, and the other half four days later.

[14] The third payment was made 9 days early on 10 June and half the fourth and final payment was made 13 days early on 6 July. That left half the fourth payment remaining due on the stated final payment date of 19 July and this remained the situation when the application was filed on 1 August. That residue was paid was paid on 11 August - 23 days after it was due.

[1] Applicant's submission of 23 September at [22]

Discussion

[15] As already said the only issue remaining before the Authority is the claim BML's failure to comply with the terms of settlement warrants the imposition of a penalty and, if so, whether a portion should be paid to Mr Corby.

[16] That there has been a failure to comply and therefore a breach is evident given half the second instalment and half the fourth were paid after the due date.

[17] That a penalty can be imposed for a breach of a s 149 settlement is also evident given that is expressly provided for in s 149(4) of the Act. The question is whether or not that should occur in this instance.

[18] For Mr Corby it is submitted the answer is yes. It is argued "repeated delays" were "unilaterally imposed and implemented by the Respondent" which meant they were deliberate breaches. It is also argued the way Ms Creswell advised her proposal on 18 May amounted to the exercise of a power imbalance which should warrant a sanction given s 3(a)(ii)of the Act.

[19] It is submitted there was no evidence of impecuniosity which might support BML's claims and this was evidenced by the fact "local knowledge reports Ms Creswell travelled overseas with family during the time the remaining payment was due".[2] Further, and notwithstanding that, it is also argued that that is probably irrelevant as "… no-one and no legal body had the power to appeal, review or otherwise alter the agreed terms".[3]

[20] The submission goes on to record:

> It is therefore submitted that it is reasonable for the Applicant to consider the breaches were cold callous and deliberate and therefore worthy of the imposition of a penalty.[4]

[21] With respect to the claim Mr Corby should share in any penalty awarded the submission focuses on the fact he has been put to cost pursuing the claim though there is also reference to his being revictimized and that was the thrust of the argument originally tendered in the Statement of Problem where it was said:

> … the respondent's indifference to the sanctity of a s 149 agreement has caused the applicant stress, hurt and humiliation and has rekindled the feeling of

[2] Statement of Problem referred to in the submission of 23 September at [28]
[3] Applicant's submission of 23 September at [18]
[4] Above n 3 at [29]

> worthlessness that he had been left with when it was necessary to commence the original personal grievance claim.

[22] BML acknowledges the terms of settlement were binding yet accepts there were delays in payment. Those delays are attributed to serious financial and personal difficulties Ms Creswell faced at the time. She says all she needed was a bit more time yet when she tried to address the issue she "hit a wall" due to the hostile and insulting response to her approach regarding a change to the payment schedule.

[23] Ms Creswell also takes issue with the comments about her overseas trip as it was related to a familial issue and was paid for by a bequest for the purpose. She paid nothing. She also takes offence with the suggestion her other interests could subsidise the payments on the grounds they can't and she has no direct financial interest in any of them.

[24] Returning to the claim for penalties. A penalty is censure for a wonton and deliberate action and the evidence causes me to doubt that is what has occurred here. While there were breaches, the evidence shows there was little wonton about them and Ms Creswell did all in her power to ensure the settlement was honoured – indeed considerable sums were actually paid ahead of schedule.

[25] By way of guidance I also look to s 133A of the Act which stipulates the grounds I should consider when determining the amount of a penalty should I conclude one is warranted. They include the objects of the Act, the nature and extent of the breach(s), whether they were intentional or not, the nature and extent of any loss or damage, steps to mitigate effects of the breach, circumstances of the breach, vulnerability of the victims and, finally, previous conduct.

[26] With respect to intent I note the explanation of the financial issues which, while relatively brief, suggest, as claimed, the issues were significant. Their existence leaves questions about whether the breaches were deliberate or forced upon BML. The papers also make it clear it was Ms Creswell and not BML that was effectively paying the settlement and that this is what Mr Corby's correspondence suggests he expected. I have to say in such circumstances and given the evidence of BML's situation, Mr Corby should consider himself lucky Ms Creswell felt personally committed to ensuring the payments were made, albeit late. If it had been left to BML I doubt, given what the papers tell me, he would have seen much, if anything.

[27] It is also clear Ms Creswell made a concerted effort to rectify the breach and did so. To that I add the fact there is little evidence of any loss given all payments were made. Any loss, if indeed there is one, was limited to interest. I say if there was one as it is debatable interest could be awarded in this case as the Act suggests an award of interest is included in a sum for which judgement is given.[5] In this instance prior settlement of the debt means there will no such judgement and Mr Corby chose not to pursue the claim for interest.

[28] It is here I also note that originally the argument Mr Corby share in any penalty was based on an assertion he had suffered additional hurt and humiliation. That also undermines the claim for a penalty as it is well established a penalty's size relates to the breach and its severity; they are not to be used to compensate unless there is no other way of doing so.[6] To that I add the fact there was no pecuniary loss with all payment being made and the Court has previously ruled that is a ground for overturning an order a penalty be paid to an applicant.[7] Third I note the overriding rationale in most recent cases where an applicant has shared in the proceeds of a penalty is the nature of the issues involved and the extent to which they engage public, as opposed to private, interests.[8] A more recent application of that approach is *Kazemi v RightWay Ltd*[9] but again the relevant factors are missing here. There is no broader public good addressed by this claim, nor benefit to others. In other words I would not, even if I granted a penalty, pass it to Mr Corby.

[29] I also note there is no evidence or suggestion of similar past behaviour.

[30] Finally I have to comment on the fact one of the beliefs that appears to underpin this claim is that s 149 agreements are involatile and cannot be altered. That is not correct and as was said by the mediator, when approached about possible amendment, "the record of settlement can be changed with the consent of the other party".[10] Furthermore I note that contrary to the assertion change cannot occur the Authority has the power to amend payment schedules in a s 149 agreement, albeit in limited circumstances linked to non-compliance.[11]

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[5] Section 11(1) of Schedule 2 to the Employment Relations Act 2000
[6] *Borsboom v Preet PVT Limited and Warrington Discount Tobacco Limited* [2016] NZEmpC 143 at [150]
[7] *G L Freeman Holdings v Livingston* [2015] NZEmpC 120 at [53]
[8] *Stormont v Peddle Thorp Aitken Ltd* [2017] NZEmpC 71 at [90]
[9] *Kazemi v RightWay Ltd* [2019] NZEmpC 59 at [124]
[10] Email mediator to Creswell dated 21 May 2022
[11] Section 138(4A) of the Employment Relations Act 2000

[31] All of these factors lead me to conclude this is not a situation in which a penalty is appropriate. It would effectively be an imposition on Ms Creswell, not BML which was the party in breach, and her actions in rectifying the situation do not warrant that.

Conclusion and orders

[32] For the above reasons I decline to award a penalty. The application fails.

[33] BML has defended the claim and in the normal course of events would therefore be entitled to costs. That said it was represented by its Director and there is no evidence of recoverable legal costs. Costs shall therefore lie where they fall.

Michael Loftus
Member of the Employment Relations Authority