

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

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

[2023] NZERA 449
3186700

BETWEEN	LEONARD WILLIAM WALKER Applicant
AND	MARANGAIROA C4 INCORPORATION Respondent

Member of Authority:	Claire English
Representatives:	Monique Rowe, counsel for the Applicant Leonard Hemi, counsel for the Respondent
Investigation Meeting:	30 May 2023 at Gisborne and by AVL
Submissions received:	30 May and 6 June 2023 from Applicant 30 May and 6 June 2023 from Respondent
Determination:	16 August 2023

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Mr Leonard (Len) Walker is employed by the respondent Marangairoa C4 Incorporation (C4), to manage its farm property. Mr Len Walker entered into a record of settlement with C4, which was countersigned by a Mediator from Mediation Services, and shared with both parties on 21 July 2022 (the record of settlement). The record of settlement provided for several items, including that a draft employment agreement would be provided and that certain payments would be made to Mr Len Walker within 7 days of the signing of the record of settlement. It also provided for an

agreed salary increase to take effect from 1 June 2022, which would be paid upon the parties agreeing and signing the new employment agreement between them.

[2] C4 did not complete those obligations within 7 days of signing the record of settlement. On 16 August 2022, it provided Mr Len Walker with a blank template employment agreement from Federated Farmers, by leaving this document in his truck. Details were later provided, but despite further mediation, the parties had not signed and completed the employment agreement until the day prior to the investigation meeting.

[3] On 19 August 2022, Mr Len Walker filed a statement of problem with the Authority, seeking that C4 comply with the record of settlement, and that penalties be awarded against C4, and costs.

The Authority's investigation

[4] For the Authority's investigation written witness statements were lodged from Mr Len Walker, and representing C4, Mr Wallace Walker. All witnesses answered questions under affirmation from me and the parties' representatives. The representatives also gave oral and written closing submissions.

[5] 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.

The issues

[6] The issues requiring investigation and determination were:

- (a) Was C4 in breach of the record of settlement between the parties?
- (b) If so, should penalties be awarded against C4, and the quantum of those penalties?
- (c) Should either party contribute to the costs of representation of the other party?

Background

[7] C4 is a Maori Incorporation, whose main business is to own and run a farm for the benefit of its various shareholders, who are all part of a wider family group. C4 is run by a Committee of Management, whose members are drawn from the family, and who serve voluntarily from time to time. Mr Len Walker has been a member of the Committee of Management, and at the Investigation Meeting, C4 was represented by Mr Len Walker's nephew, Mr Wallace Walker, who is a current member of the Committee of Management.

[8] Mr Len Walker has worked running the farm for approximately 35 years, and recalls that he became involved with C4 as a member of the Committee of Management in the late 1980's, before being employed to run the farm some 2 or so years after this. Despite this, he has not had a written employment agreement until now.

[9] The record of settlement that was the start of this claim was signed by C4 on 14 July 2022, by Mr Len Walker on 15 July 2022, and countersigned by a Mediator from Mediation Services on 19 July 2022. The completed version was shared with both parties on 21 July 2022, which I accept is the relevant date for calculating the obligations to be performed under it.

[10] Mr Len Walker therefore could have expected that by 28 July 2022, he would have received "a draft Individual employment agreement...for [his] review and consideration (as per clause 2); a contribution to his legal costs of \$1,500 plus GST (as per clause 6); and the sum of \$2,252.00 inclusive of GST to cover the repair costs of his bike and trailer (as per clause 7). In addition to this, the parties had agreed on a \$5,000 increase to Mr Len Walker's annual salary backdated to 1 June 2022, payable "upon the parties agreeing and signing the new Individual Employment Agreement" (as per clause 5).

[11] The parties agreed that these steps should occur promptly, that is within 7 days, with the exception of the back payment of the agreed salary increase, which was only payable once the new employment agreement had been agreed and signed. Nevertheless, Mr Len Walker should have been in a position to "review and consider" the draft terms by 28 July.

[12] C4 did not fulfil these requirements by 28 July. On 10 August 2022, Mr Len Walker (through his solicitor) wrote to C4, requiring its “immediate action” and advising that if the settlement remained incomplete, Mr Len Walker would seek a penalty from the Authority for breach of the record of settlement.

[13] C4 replied that these matters were being finalised. On 15 August, Mr Len Walker’s solicitor wrote again, noting that his health was suffering as a result of the delay, and noting again that if the terms were not completed by 19 August 2022, Mr Walker would seek a penalty in the Authority.

[14] On 16 August 2022, Mr Wallace Walker left a blank template Federated Farmers individual employment agreement in Mr Len Walker’s truck. C4 says this was sufficient compliance with the obligation in clause 2 of the record of settlement to provide a draft individual employment agreement for his review and consideration.

[15] On 19 August 2022, Mr Len Walker commenced proceedings in the Authority.

[16] On 25 August 2022, C4 made the agreed payments to Mr Len Walker as required under clauses 6 and 7 of the record of settlement, and provided him with a partially completed employment agreement.

[17] On 9 November 2022, a case management conference was held with the parties’ representatives. At the time of the case management conference, C4 had not yet filed a Statement in Reply, although it was represented. The parties were directed to attend mediation. Generous timetabling orders were made to allow sufficient time for this to occur, as well as for the filing of a statement in reply, and witness statements from both parties, with the investigation meeting being set for 30 May 2022.

[18] The parties attended mediation, and I am advised that the terms of the individual employment agreement were accepted by both parties on about 31 January 2023. However, the individual employment agreement was annotated again on 23 March 2023¹.

¹ I understood from evidence provided at the investigation meeting that there were two Federated Farmers template employment agreements. The first was provided blank to Mr Len Walker by leaving it in his truck on 16 August 2022. The second was provided on about 25 August 2022, partially filled out, by way of a meeting between Mr Len Walker and Mr Wallace Walker. It is not clear what portions of that agreement were filled out by C4 before presenting it to Mr Len Walker, for the simple reason that further terms were subsequently agreed, and added into the same base document by hand, so there is no way of telling when each term was inserted, except for two items explicitly dated 23 March 2023.

[19] On 25 May 2023, being 3 working days before the investigation meeting, C4 filed a witness statement from Mr Wallace Walker. This was some six weeks later than timetabled. Accompanying that witness statement was a statement in reply, which referred for all details to Mr Wallace Walker's witness statement. The Statement in Reply was some three and a half months overdue.

[20] When I asked Mr Wallace Walker why these documents were late, he advised that he was not aware of the directions or timetabling dates, he hadn't thought the matter was "serious", and he hadn't really thought the investigation meeting was going to go ahead.

[21] On Monday 29 May 2023, one day before the investigation meeting, the individual employment agreement was finally completed and fully signed by both parties.

The parties' respective positions

[22] There are now remaining two points of disagreement between the parties. First, the extent of the breach of the record of settlement; second, the amount of any penalties to be awarded.

[23] The respondent agrees that it has breached the record of settlement, by not providing a draft individual employment agreement in a timely way. It states that it provided a draft agreement on 16 August 2022, when a blank template agreement was left in Mr Len Walker's truck for him to find. It is submitted that this was a delay of some 19 days, and that any penalty should therefore be minor, in the region of \$800 to \$1,000 total.

[24] It is submitted on behalf of Mr Len Walker that a blank standardised template agreement was not sufficient, because it contained insufficient detail for Mr Len Walker to be able to "review and consider", which was what he had wanted to be in a position to do when the record of settlement was agreed. This did not happen until Mr Len Walker and Mr Wallace Walker were able to sit down and partially fill out the template agreement on about 25 August 2022. This was after Mr Len Walker had filed his claim in the Authority.

[25] I do not accept that leaving a blank template employment agreement in Mr Len Walker's truck for him to find was sufficient to meet the requirements of clause 2 of the record of settlement. The parties were in dispute about the scope of Mr Len Walker's role and his duties, and the record of settlement set out an agreed path for resolving this dispute, by requiring the employer to put forward its views in the form of a draft agreement, and then requiring Mr Len Walker to engage with his employer and express his own views. This is expressed in the record of settlement by the use of the phrase "review and consider".

[26] The reality of the situation is that this agreed process was not able to move forwards until about 25 August 2022, when a partially completed template employment agreement was provided, setting out terms personalised to Mr Len Walker. This is a delay of one month. It is also significant that Mr Len Walker had needed to engage his solicitor to follow up on the absent draft agreement, and in the end, had filed in the Authority (as he had warned he would do) before C4 acted to provide a partially completed draft.

[27] In the end, the individual employment agreement between the parties was not progressed significantly until the parties had attended mediation a second time, which was directed by the Authority, and was not in fact properly signed until 1 day prior to the investigation meeting. All of this leads me to conclude that Mr Len Walker would not have achieved the benefit of the record of settlement, that is an individualised and signed employment agreement, if he had not filed a claim with the Authority.

[28] In addition, the respondent chose not to file either a statement in reply, or any evidence, until three days prior to the investigation meeting, which Mr Wallace Walker explained was because he did not think the matter was sufficiently "serious". This is in stark contrast to Mr Len Walker's experience, who found the entire matter so serious he sought support from his doctor.

[29] In these circumstances, I accept that a breach of the record of settlement has occurred and it is appropriate to consider a penalty.

[30] I note that there is also a claim on behalf of the applicant that certain payments due under the record of settlement were made late, and these are also breaches worthy of a penalty. The respondent accepts that it made some payments late, due to a miscommunication with its accountant, but points out that this also resulted in an

inadvertent overpayment to Mr Len Walker of some \$329.00. As this matter has now been resolved, and the accountant has taken responsibility for the delay by way of written explanation to the Authority, I am of the view that it is not necessary to take this matter any further.

[31] I will accordingly assess the matter as being a single breach of the record of settlement.

[32] The law in respect to quantification is well established given the content of s 133A of the Act and cases such as *Borsboom (Labour Inspector) v Preet PVT Limited and Warrington Discount Tobacco Limited*,² *A Labour Inspector v Prabh*³ and *A Labour Inspector v Daleson Investment*.⁴ Section 133A requires I have regard to the object 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 and any vulnerability and finally previous conduct.

[33] The objects of the Act include promoting mediation as the primary problem-solving mechanism, and reducing the need for judicial intervention⁵. Neither of these objects have been achieved in this case.

[34] The requirement of intention is not necessarily about whether the party was aware they were breaching the law. Instead, it is about whether they acted intentionally, in the sense of intending to do the act in question⁶, or failed to take reasonable steps to fulfil their legal obligations.⁷ Here the evidence leads to a conclusion that the respondent consistently and repeatedly failed to take reasonable steps to fulfil its obligations. The delays are not well-explained, with submissions for the respondent stating that the Committee Members have full-time jobs and “must act by consensus”, so time was needed. With respect, this does not explain the length of the delays, or why – presumably knowing this – the respondent made commitments in the record of settlement if it was not willing or able to meet those commitments.

² *Borsboom v Preet PVT Limited and Warrington Discount Tobacco Limited* [2016] NZEmpC 143

³ *A Labour Inspector v Prabh Limited* [2018] NZEmpC 110

⁴ *A Labour Inspector v Daleson Investment Limited* [2019] NZEmpC 12

⁵ Section 3(a)(v) and (vi) of the Employment Relations Act 2000.

⁶ *Parton v Fifita*, TT 1815/00 DC Auckland, quoted in *MBIE v Sumich*, Auckland TT 4088383

⁷ *El-Agez v Comprede Limited*, TT 4121553, at para 18

[35] With respect to the breaches severity I note the judgement of the Court in *Preet* suggests failures to pay proper entitlements should be assessed at 80%.⁸ It is submitted for the respondent that there is no particular loss or damage to Mr Len Walker, specifically that any loss is “negligible”. While I accept that this factor suggests a reduction should be applied, Mr Len Walker has lost something – by signing the record of settlement he has foregone his underlying claims, in exchange for the certainty of an agreed settlement. When that settlement did not occur as and when agreed, he suffered a loss.

[36] There is no evidence of similar previous conduct by the respondent and finally I have to be cognisant of issue such as consistency and proportionality. There are multiple points that need to be properly taken into account here. The first is the relatively small and not-for-profit nature of the respondent. The second is that Mr Len Walker has worked for the respondent for many years, most of them without an employment agreement, and can be expected to have some understanding of how the respondent works in practice. Finally, I make some allowances for the delays that occurred on both sides following the weather events that impacted the Gisborne region in early 2023.

[37] Having weighed these factors I conclude the respondent should be required to pay a penalty of \$2,000. This recognises that there was no good reason for the respondent’s delay, and that Mr Len Walker should not have been required to file and progress a claim in the Authority to achieve what the respondent had already agreed with him to do. The final issue is then to whom the penalty should be paid. For these reasons, it is appropriate for the penalty to be awarded to Mr Len Walker direct.

Orders

[38] Marangairoa C4 Incorporation is ordered to pay to Leonard William Walker within 28 days of the date of this determination the sum of \$2,000 as a penalty for breaching a record of settlement.

⁸ See *Preet*, at paragraph [167] which suggests at starting point of 80% for minimum wage breaches, and paragraph [171] which suggests a starting point of 70% for failures to pay for Holidays Act entitlements.

Costs

[39] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves, noting that the starting point would be the Authority's usual daily tariff for a half-day investigation meeting.

[40] If they are not able to do so and an Authority determination on costs is needed the applicant may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of the written determination in this matter. From the date of service of that memorandum the respondent would then have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

[41] The parties could expect the Authority to determine costs, if asked to do so, on its usual notional daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.⁹

Claire English
Member of the Employment Relations Authority

⁹ Please note the Authority's Practice Note on costs, effective from 2 May, available at <https://www.era.govt.nz/assets/Uploads/practice-note-2>