NOTE: This determination contains an order prohibiting publication of certain information

IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON

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

[2023] NZERA 688
3204679

	BETWEEN	DAVID CRICHTON Applicant
	AND	DIG & TIP EARTHWORKS LIMITED First Respondent
	AND	SELWYN LANCE TORRANCE Second Respondent
Member of Authority:	Natasha Szeto	
Representatives:	Saadi Radcliffe, counsel for the Applicant Selwyn Torrance for the First Respondent	
Investigation Meeting:	25 July 2023 at Wellington	
Submissions received:	4 August 2023 from the Applicant and 21 August 2023 from the Respondent	
Date:	20 November 2023	

DETERMINATION OF THE AUTHORITY

The Employment Relationship Problem

[1] Mr Crichton started working for Dig & Tip Earthworks Limited (Dig & Tip) on 17 January 2022. His employment ended in November 2022 and he entered into a

Record of Settlement (Settlement) with Dig & Tip which the parties signed on 6 December 2022.

[2] Dig & Tip agreed to make certain payments under the Settlement. All of the payments were late, some were incomplete. The Settlement required Dig & Tip to check Mr Crichton's claims for unpaid wages and holiday pay, and to make payment of any outstanding amounts in full, which Mr Crichton says it did not do.

[3] Mr Crichton says that Dig & Tip has breached the Settlement in multiple ways, and has committed numerous statutory breaches. He seeks an order quantifying unpaid wages and holiday pay and payment of these amounts, a compliance order for wage arrears against Dig & Tip, as well as penalties against the company and its director.

Procedural History

[4] An investigation meeting was held on 25 July 2023 in Wellington. The Authority received statements and information from Mr David Crichton and Mr Selwyn Torrance (one of the two directors of the company[1]). The Authority also heard from Ms Chambers, the former office administrator for Dig & Tip. All witnesses attended the investigation meeting and answered questions from me under oath or affirmation.

[5] The effect of certification of the Record of Settlement under the Employment Relations Act 2000 (the Act) is that the agreed terms are final and binding and can only be brought before the Authority for the purposes of enforcement. While the parties agreed the terms of the Settlement were to remain confidential to them, the terms in dispute must be disclosed for the purposes of this determination. I prohibit from publication the balance of the Settlement under clause 10(1) Schedule 2 of the Act.

[6] As permitted by s174E of the Act, this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified the orders made. It has not recorded all the evidence and submissions received, however all information provided has been considered.

---

[1] There are two directors of the company: Mr Selwyn Torrance and his brother Mr Peter Torrance. References in this determination to "Mr Torrance" are to Mr Selwyn Torrance.

Relevant Background

[7] The Settlement was signed by Mr Crichton and Mr Torrance for Dig & Tip on 6 December 2022. It was certified by a Ministry of Business, Innovation and Employment Mediator under s 149 of the Act that day.

[8] Mr Crichton lodged his Statement of Problem in the Authority on 13 December 2022. By that date, Mr Crichton submits that a number of "belated but incorrect" payments had been made under the Settlement:

(a) On 8 December 2022 for wages and other monies owed (Notice and holiday pay).

(b) On 9 December 2022 for wages and holiday pay entitlements.

[9] Further belated payments were made by Dig & Tip:

(a) On 3 January 2023 for compensation (due 27 December 2022).

(b) On 4 January 2023 for costs (due 27 December 2022).

Issues

[10] Mr Crichton says Dig & Tip has breached the Settlement in that:

(a) It did not carry out the check regarding unpaid hours, nor did it pay these in full as required by clause 10 of the Settlement.

(b) It did not pay final pay (including holiday pay) due 7 December 2022 as required by clause 9 of the Settlement.

(c) All monetary amounts due under the Settlement were paid late, and some are still outstanding.

[11] The most significant dispute between the parties arises out of their respective interpretations of clauses 8 to 10 of the Settlement which state the following:

> 8. In reaching this agreement the parties confirm that neither has agreed to forego minimum entitlements (monies payable under the Minimum Wage Act 1983, the Holidays Act 2003, or the Home and Community Support (Payment for Travel between Clients) Settlement Act 2016) as specified in s 148A(3) of the Employment Relations Act.
>
> 9. Final pay including owed holiday pay will be paid on the next available pay run following the date of settlement (7th December 2022 Bank Account number: [*omitted*]).

10. Dig & Tip Earthworks Limited agree that claims for wages raised by David Crichton regarding unpaid hours will be checked and paid in full where required to meet minimum entitlements detailed in clause 8 above.

[12] Mr Crichton says that clause 10 refers to his claims in relation to "overtime" hours – that is, hours he worked in excess of the 40 hours per week for which he was paid. Mr Crichton says he should have been paid for those overtime hours.

[13] Dig & Tip says that it did not pay overtime and therefore Mr Crichton was not entitled to be paid for any hours he worked in excess of 40 hours per week.

[14] The issues identified for investigation and determination are:

(a) Whether Dig & Tip has breached the Record of Settlement, including that it did not check outstanding wages claims, or pay the full amount of wages owed to Mr Crichton as required under clause 10.

(b) Whether there have been statutory breaches of the Employment Relations Act 2000, Holidays Act 2003, Wages Protection Act 1983 and Minimum Wage Act 1983.

(c) Whether Dig & Tip has breached Mr Crichton's individual employment agreement.

(d) Whether the Authority should grant leave to Mr Crichton to recover arrears in wages or other money from Selwyn Torrance as a person involved in a breach of employment standards under Part 9A of the Act.

[15] The remedies sought by Mr Crichton are:

(a) Orders quantifying unpaid wages and holiday pay, and payment of the same under s 131 of the Act.

(b) Compliance Orders under s 137(1)(a)(iii) of the Act, ordering Dig & Tip to make payment of arrears under clause 10 of the Settlement.

(c) Penalties against both Dig & Tip and Mr Torrance personally for breaches of the Settlement, Act, minimum code legislation and

employment agreement, with a portion of these to be paid to Mr Crichton.

(d) Costs (to be reserved).

Relevant Law – approach to Orders

[16] A Record of Settlement is made under s 149 of the Act. A Mediator will only sign a settlement after the parties have affirmed their understanding that the terms are final and binding on, and enforceable by the parties, may not be cancelled under the Contract and Commercial Law Act, and except for enforcement purposes may not be brought before the Authority or the court.

[17] "Enforcement purposes" in s 149(3)(b) of the Act refers to the procedures for enforcing the terms of agreements and orders or directions, such as the procedures for recovery of wages, and for compliance orders or penalties. A person who breaches an agreed term of settlement is liable to a penalty imposed by the Authority under section 149(4) of the Act.

[18] Mr Crichton submits that despite the full and final nature of the Settlement, the Authority has jurisdiction to make findings and order compliance in respect of this dispute. Mr Crichton says that the issue of his unpaid hours was a live issue before the Settlement was entered into, and was expressly provided for by clause 10 of the Settlement, which he refers to as a "carve-out". Mr Crichton says the Settlement required Dig & Tip to check and pay wage arrears, and this was an express acknowledgement of the claims for unpaid wages. This signalled, Mr Crichton says, the objective intention of the parties that substantive claims for unpaid wages under the Settlement would not be compromised. Mr Crichton says there was a pre-existing obligation on Dig & Tip to pay him for his work done: that is the fundamental work–wage bargain, and is no sense changed by the existence of the Settlement.

[19] Because clause 10 is expressly subject to a "carve out" Mr Crichton says the Authority has jurisdiction to enforce the term by ordering compliance with the Settlement under s 137 of the Act, or by ordering the payment of wages or other money under s 131 of the Act. Mr Crichton asks the Authority to quantify amounts owed to him under the Settlement including unpaid wages and holiday pay.

[20] While Dig and Tip did not provide submissions specifically on the jurisdictional point, it says it does not owe Mr Crichton any wages or holiday pay under the Settlement.

[21] When there is a possible dispute as to the meaning of a clause in a Settlement, interpretation is a matter of ascertaining the parties' intentions derived from the plain words of the document. Because the provision of mediation services is subject to a confidentiality requirement,[2] there is little evidence before the Authority of the events leading up to the signing of the Settlement that assists in ascertaining the parties' intentions.

[22] Mr Crichton asks for Orders quantifying his unpaid wages and holiday pay under s 131 of the Act in addition to a Compliance Order under s 137(1)(a)(iii). I have considered the case law provided, and I am not persuaded it is within the Authority's jurisdiction to look behind the Settlement, and consider this claim afresh as a wage arrears claim under s 131 of the Act, which is what I would have to do to order payment of wages or other money under that section. It is a requirement of s 131 that there has been a default in payment to an employee of wages or other money payable by an employer under an employment agreement. In this case, the proximate cause of any default in payment is a breach of the Settlement, not of the employment agreement. While I agree with Mr Crichton that his substantive claims for unpaid wages under the Settlement have not been compromised by the existence of the Settlement, certainty is a critical ingredient of every mediated Settlement and the wording of the Settlement provides the remedy in the event of a breach. I consider the appropriate remedy for an established breach of a concluded Record of Settlement enforceable under s 149(3), is a Compliance Order.[3] Mr Crichton has asked me to make an Order quantifying the Applicant's unpaid wages and holiday pay and to order payment of the same under s 131 of the Act. That application is declined, and I assess Mr Crichton's claims regarding breaches, remedies and penalties as they directly relate to the Settlement.

Has Dig & Tip breached the Record of Settlement?

Did Dig & Tip check Mr Crichton's claims for wages regarding unpaid hours?

---

2 Section 148 of the Employment Relations Act 2000.

3 *South Tranz Ltd v Strait Freight Ltd* [2007] ERNZ 704 at [38].

[23] Dig & Tip produced three sets of written records in response to Mr Crichton's claims. Dig & Tip used Smartly Payroll (Smartly) to calculate Mr Crichton's pay and leave entitlements and to generate his payslips. It did not have time recording functionality. Dig & Tip also operated Fergus for part of Mr Crichton's employment. Fergus is job management software, which has some time-recording functionality for on-site purposes. Lastly, Mr Torrance kept a diary where he hand-wrote notes including (for example) Mr Crichton's leave. Mr Crichton said Dig & Tip also kept Vehicle log books but despite requests and directions to the company, no Vehicle log book entries were provided to the Authority.

[24] Mr Crichton claims Dig & Tip did not check and address his claims for unpaid hours worked where required to meet minimum entitlements (clause 10 of the Settlement).

[25] In evidence before the Authority, Mr Torrance confirmed Dig & Tip had only checked Mr Crichton's wages through Smartly. Mr Torrance said his check confirmed that Mr Crichton was only entitled to two weeks wages and a small amount for owed holiday pay. Mr Crichton says that it was inadequate for Dig & Tip to check the Smartly records because Smartly only contains a historical record of hours that have been paid, and does not show unpaid hours.

[26] Having reviewed the records, I agree that Smartly only recorded "hours paid", "leave hours", and "days worked". The "days worked" records did not exceed five per week, and the "hours paid" and "leave hours" never totalled more than 40 per week. I accept that Smartly only recorded Mr Crichton's hours paid, and not hours worked.

[27] Dig & Tip disputes that Mr Crichton worked any hours over 40 per week. No hours over 40 per week were recorded, because there was no agreement to pay overtime. Dig & Tip says that consequently there was no requirement to check Mr Crichton's hours.

[28] Based on the evidence before the Authority, I conclude that Dig & Tip did not check Mr Crichton's claim for wages regarding unpaid hours. Dig & Tip did check Smartly, but this was not a check of unpaid hours. The underpayment Dig & Tip identified in its check of Smartly related to wages in lieu of notice (clause 2 of the Settlement), not the claim for wages regarding unpaid hours (clause 10 of the Settlement). Dig & Tip's consistent position was that it did not check claims for

overtime because it did not agree to pay overtime. But the check it did carry out was not in accordance with clause 10 of the Settlement.

[29] Dig & Tip was given further opportunities to check records during the course of the Authority's investigation. In directions made on 23 February 2023 at the Case Management Conference, the Authority directed Dig & Tip to conduct a further search of records and information held by it or accessible to it through Fergus relating to the number of hours worked by Mr Crichton, as well as providing vehicle log book entries. The reason for the Authority's directions was that these sets of records may have provided a more complete record of the hours that Mr Crichton actually worked.

[30] Following the Authority's direction, some Fergus records were provided. Dig & Tip said further information had not been retrieved from Fergus because it no longer subscribed to the software and did not want to pay the fee for accessing the records. No vehicle log book entries were provided.

[31] I accept Fergus does not hold a full record of all Mr Crichton's hours. Even if Mr Crichton and other Dig & Tip workers had used Fergus accurately and consistently - and the evidence before the Authority suggested they did not use it consistently - it would not have captured the hours Mr Crichton said he worked which were not associated with specific jobs for clients, for example in the office generating trade for the business, and driving the truck on Saturdays. Dig & Tip disputes the accuracy of the Fergus records in any event, as is apparent from the hand-written notes made by Mr Torrance on the records provided to the Authority. To the extent that Fergus records Mr Crichton starting work at 6:00 am on site, or finishing at 5:00 or 5:30 pm, Dig & Tip says the records are "false".

[32] However, I conclude that there were further records available to Dig & Tip - including Fergus records and vehicle log book entries - that would have assisted Dig & Tip to conduct checks of Mr Crichton's hours even though these were not provided to the Authority.

[33] The Settlement unambiguously required Dig & Tip to check Mr Crichton's claims for wages raised by him regarding unpaid hours. Mr Torrance acknowledged that Dig & Tip did not check Mr Crichton's claims and I find that was a breach of clause 10 of the Settlement.

Were Mr Crichton's claims for wages regarding unpaid hours, paid in full?

[34] The Authority must consider whether the wages claims regarding unpaid hours have been "paid in full to meet minimum entitlements detailed in clause 8" for the purposes of determining whether Dig & Tip has complied with clause 10 of the Settlement. The relevant minimum entitlements arise under the Minimum Wage Act 1983 and Holidays Act 2003.

[35] Mr Crichton's individual employment agreement states that he will work for 40 hours each week Monday through to Friday inclusive. The hours of work each day will be 08:00am to 04:30pm.

[36] However, "Overtime" is allowed for under Mr Crichton's individual employment agreement on the following terms:

> If the employer has asked, and the employee agrees to work more than their usual hours of work in a week, the employee will get paid their normal hourly rate.

[37] Based on the records before the Authority, Mr Crichton's normal hourly rate was $35 per hour from 25 January 2022 until 19 April 2022, then $40 per hour from 26 April 2022 until 6 December 2022.[4] It is common ground between the parties that Mr Crichton was not paid for any hours over 40 per week.

[38] Mr Crichton said he was asked to, and agreed to, work at times other than Dig & Tip's normal business hours of 8:00 am until 4:30 pm. That included times before 8:00 am and after 4.30 pm on weekdays and on Saturdays. Mr Crichton's evidence to the Authority was that he worked "ten-hour days, if not more, and then some". He says his usual working week was over 50 hours and on average was about 55 hours per week including Saturday work. Mr Crichton said he was asked and agreed to work most Saturdays to make sure work – specifically driving the truck – could continue in Mr Peter Torrance's absence. At the time, Mr Crichton's view was "those are just the hours and that is just the job." Mr Crichton said that he did not work because he wanted to, he had been asked and agreed to do so.

[39] Dig & Tip disputes that Mr Crichton worked any hours in excess of 40 per week. Dig & Tip says Mr Crichton did not start early, finish late or work on Saturdays. Dig & Tip concedes that Mr Crichton was in the office early, but says that was on Mr Crichton's "own accord". It also admits that Mr Crichton made calls with contacts but

---

[4] Based on the Employee Pay (Detailed) Report produced from Smartly Payroll dated 21/12/2022.

Dig & Tip says this was not outside his 40 contracted hours per week. Mr Torrance also said that because he stayed on the site, he saw Mr Crichton leave the office before 3:00 pm most of his working days. Dig & Tip said they never asked Mr Crichton to do overtime. Mr Torrance said he never received a request by phone or text or email from Mr Crichton requesting to do overtime, and no overtime was authorised by management. Dig & Tip has consistently maintained that it did not pay overtime hours. Dig & Tip disputes Mr Crichton is entitled to any further pay in relation to clauses 9 and 10 of the Settlement.

[40] In support of its position on overtime, Dig & Tip provided records from Team Meetings where overtime has been discussed between management and workers. The arrangement was that there was no overtime unless arranged prior with Mr Crichton and workers were not to work past 4:30 pm without prior arrangement from the office. Other records suggest that overtime had to be "signed off" by management. Mr Crichton said he approved others working overtime.

[41] Ms Chambers corroborated Mr Crichton's evidence to an extent. She said that there may have been Saturdays that Mr Crichton worked but it was hard to now recall how many instances that was in the period that she had worked for Dig & Tip. Ms Chambers said that if staff needed to stay longer on jobs they would, and the whole team - including Mr Crichton - sometimes worked outside the 40 hours per week. That was her experience in looking through the Fergus records.

[42] Ms Chambers confirmed Dig & Tip put out messaging in a Team Meeting about there being no overtime. Despite this, Ms Chambers said on occasion she processed overtime that had been approved, including adjustments to start and finish times. The information in Smartly was dependent on what was put into it. Ms Chambers said it was up to Mr Peter Torrance whether he reviewed and changed hours in Smartly although Mr Peter Torrance and Mr Torrance did not do a lot on the computer side of things and it would be unusual for them to go in and change the records. Ms Chambers said that if Mr Peter Torrance capped the hours at 40, it was confirmed and that would go through the pay side of things in Smartly.

[43] Mr Crichton frankly acknowledged he did not pursue being paid for overtime hours with Dig & Tip at the beginning of his employment, because he was supporting the business and hoped to invest in it. Mr Crichton estimates he worked an additional

15 hours per week (including Saturday work) on average over the 46.3 weeks of his employment with Dig & Tip.

[44] Based on the evidence before the Authority, I do not accept Dig & Tip had a blanket rule that overtime was never paid. That position is unsupportable based on the wording of the overtime clause in Mr Crichton's individual employment agreement and the Team Meeting records that allow for overtime to be paid "if arranged prior". Mr Crichton also said that in his role as Operations Manager he approved overtime for other staff, and Ms Chambers said that Fergus records showed all staff worked overtime on occasion. Although the approval process was not a formal one - and I saw no evidence that approvals were recorded - I find it likely that overtime was worked by employees, and was paid if Dig & Tip agreed to it.

[45] Dig & Tip has an obligation to keep a wages and time record under s 130 of the Act, which shows – amongst other things – the number of hours worked each day in a pay period and the pay for those hours.[5] Based on the evidence before the Authority, it failed to do this.

[46] I accept Mr Crichton's evidence that he was asked to, and did work in excess of 40 hours per week. Dig & Tip's evidence about Mr Crichton's hours of attendance at the office was inconsistent, being either that Mr Crichton was not in the office early, or if he was, he was there of his own accord. I also accept the Fergus records (incomplete as they are) show that Mr Crichton did start work early and finish late for particular jobs. Dig & Tip says those records have been falsified, but there was no evidence before the Authority in support of that allegation.

[47] Mr Crichton submits that he should have been paid his normal hourly rate for overtime hours, being the rate recorded in his individual employment agreement of $35.00 per hour. However, clause 10 of the Settlement refers to unpaid hours being paid in full "where required to meet minimum entitlements detailed in clause 8 above". There is no reference to Mr Crichton's contractual rate in the terms of Settlement. The effect of applying the minimum entitlement under the Minimum Wage Act 1983 means

---

5 Section 130 of the Employment Relations Act 2000.

that Mr Crichton was entitled to be paid for his unpaid hours at not less than the minimum rate.[6]

[48] Following on from Dig & Tip's failure to check claims for wages raised by Mr Crichton regarding unpaid hours, I also find Mr Crichton has not been paid his wages in full where required to meet minimum entitlements, and this is a breach of clause 10 of the Settlement.

Has owed holiday pay been paid?

[49] Having concluded that Mr Crichton was not paid in full where required to meet minimum entitlements, it follows that I accept Mr Crichton's submission that because he was not paid in full for hours worked, he was also not paid the correct amount of holiday pay under clause 9 of the Settlement.

[50] The starting point for calculating annual holiday entitlements is that employees who have been employed for less than 12 months at the time their employment ends are not entitled to annual holidays.[7] If the employee takes annual holidays in advance, they are to be paid the greater of ordinary weekly pay or average weekly earnings.[8] If the employee leaves their employment within 12 months, the employee is to be paid 8% of their gross earnings, less any amount paid in advance.[9]

[51] Mr Crichton accepted that he was not entitled to take annual leave as he had not been employed by Dig & Tip for 12 months. Mr Crichton was paid 1.75 days of annual leave when he left Dig & Tip, but says this was an underpayment because he took no more than a week's worth of annual leave in advance in the 11 months he worked for Dig & Tip. Mr Torrance said Mr Crichton never requested time off from him personally although he did have to authorise Mr Crichton's pay through Smartly.

[52] While Mr Crichton does not have any records to contradict the records of annual leave that Dig & Tip says he took, he says his holiday pay has been unlawfully deducted by at least 6.5 days based on the following:

---

6 Section 6 of the Minimum Wage Act 1983.

7 Section 16 of the Holidays Act 2003.

8 Section 22 of the Holidays Act 2003.

9 Section 23 of the Holidays Act 2003.

(a) An internal inconsistency in the Smartly records: deficit of 2 days annual leave.

(b) Rounding errors by Dig & Tip where seven half days of leave were rounded up to full days: deficit of 3.5 days annual leave.

(c) Absence of record in diary for 21 October 2022, recorded as a full day and resulted in a further one-day deduction in Smartly records: 1 day of annual leave.

[53] I have reviewed the records provided by both parties, and I accept that there is a conflict in the records between Smartly (which records Mr Crichton's annual holidays taken as between 2.8 and 3.2 weeks), Mr Torrance's diary entries (which record Mr Crichton's annual holidays taken as approximately 13 days), Mr Torrance's summary of "days taken in advance of leave entitlement" (which records Mr Crichton's annual holidays taken as 16.5 days), and Mr Crichton's statements to the Authority (that he took no more than 5 days annual leave in his 11 months of employment with Dig & Tip).

[54] At the Authority's investigation meeting, Dig & Tip was given further time to acquire and produce payslips it said it had already requested from Smartly that would assist to resolve the annual leave issue. Following the investigation meeting, Dig & Tip advised the Authority it was not obtaining the records and was not planning to produce any further information. Mr Crichton invites me to draw an adverse inference from Dig & Tip's failure to provide this information.

[55] Dig & Tip has an obligation to keep a holiday and leave record under s 81 of the Holidays Act 2003.[10] Based on the evidence before the Authority, it failed to keep a compliant record. In the absence of reliable records from Dig & Tip, I accept Mr Crichton's evidence that he is entitled to be paid at least a further 6.5 days' pay for annual holidays that he did not take, as well as 8% on any amounts owing in relation to unpaid overtime hours which follow from the checking requirement in clause 10 of the Settlement.

[56] I find Mr Crichton was not paid the correct amount of owed holiday pay and this was a breach of clause 9 of the Settlement.

---

[10] Section 81(4) of the Holidays Act 2003.

Other breaches of the Settlement

[57] Dig & Tip had agreed to pay certain amounts to Mr Crichton under the Settlement as follows:

(a) Wages and other monies owed under clauses 2 and 9: Notice and holiday pay – due 7 December 2022 (paid 8 December 2022).

(b) Wages and holiday pay entitlements under clause 9 - due 7 December 2022 (partially paid 9 December 2022).

(c) Compensation under clause 5 – due 27 December 2022 (paid 3 January 2023).

(d) Costs under clause 6 – due 27 December 2022 (paid 4 January 2023).

[58] These payments were between one and seven days late.

[59] Dig & Tip breached clause 3 of the Settlement providing for the exchange of property by 20 December 2022, which occurred in 2023.

[60] Mr Crichton also alleges Mr Torrance personally breached the Settlement by disparaging Mr Crichton in written correspondence to the Authority on 26 April 2023. Based on the evidence before the Authority, I find there has been a technical breach of the Settlement's non-disparagement clause (clause 4). However Mr Torrance's communications with the Authority were in defence of claims made against Dig & Tip and there is no evidence that Mr Torrance disparaged Mr Crichton outside of the Authority's proceedings.

[61] Dig & Tip accepts the payments made under the Settlement were late and Mr Torrance provided various reasons for this including an unexpected accounting issue, and that he did not have the money available to pay the amounts owed under the Settlement and had to borrow money from a family member. Mr Torrance also attributed the payments that were late by a day or two to weekend banking and blamed his (then) advocate for the late payment of costs. It is not disputed that payments agreed to under the terms of the Settlement were paid late.

[62] I find there were seven breaches of the Settlement relating to clauses 2, 3, 4, 5, 6, 9 and 10. All breaches of the Settlement will be addressed further in terms of penalties.

Has Dig & Tip breached statutory requirements?

[63] Mr Crichton claims that Dig & Tip have breached minimum entitlements as follows:

(a) Failure to pay not less than the minimum wage under the Minimum Wage Act 1983 for not paying Mr Crichton for hours worked in excess of 40 per week; and against Mr Torrance personally for directing the totals in Smartly.

(b) Failure to pay the entire amount of wages without deduction under the Wages Protection Act 1983.

(c) Failure to keep accurate wages and time records (ss 4B and 130 of the Act).

(d) Failure to pay entitlement to annual holidays (ss 75 and 21-28 of the Holidays Act 2003).

(e) Failure to keep accurate holiday and leave records (ss 81-83 of the Holidays Act 2003).

[64] The claims relating to failures to make payments under the Minimum Wage Act 1983, Wages Protection Act 1983, and Holidays Act 2003 arise out of the failure by Dig & Tip to pay Mr Crichton "in full" under the terms of the Settlement. I therefore consider these claims to be covered by breaches of the Settlement. Separate findings on these claims would be unnecessary or even duplicitous.

[65] I have found Dig & Tip failed to keep a compliant wages and time record under s 130 of the Act[11] and it failed to keep a compliant holiday and leave record under s 81 of the Holidays Act 2003[12] for the reasons set out above. By failing to record all Mr Crichton's hours, Dig & Tip did not keep compliant records that included "the number of hours worked each day in a pay period and the pay for those hours" as required by s 130(1)(g) of the Act and s 81(2)(c) of the Holidays Act 2003. It has failed to keep

11 Section 130 of the Employment Relations Act 2000.

12 Section 81(4) of the Holidays Act 2003.

compliant records relating to minimum entitlement provisions as required by s 4B of the Act.[13]

Has Dig & Tip breached Mr Crichton's employment agreement?

[66] Mr Crichton says the various breaches he has alleged against Dig & Tip in relation to employment standards were also breaches of his individual employment agreement. He says he was entitled to be paid his wages in full for each hour he worked, to be paid holiday pay properly, not to have had unlawful deductions made from his minimum holiday entitlements, and for Dig & Tip to have kept proper wages and time, and holiday and leave records. He seeks penalties for breaches of his individual employment agreement.

[67] Again, the claims relating to paying Mr Crichton properly under the terms of his employment agreement are already covered by the claims relating to breaches of the Settlement because they arise out of Dig & Tip's failure to pay Mr Crichton "in full" under the terms of the Settlement as above, and accordingly separate findings on these claims would be unnecessary or even duplicitous.

[68] I also do not think it would be appropriate to consider imposing a separate penalty on Dig & Tip for breaching Mr Crichton's individual employment agreement when I am not persuaded on the evidence that Mr Crichton adhered strictly to the terms of his employment agreement in seeking pre-approval for every instance that he worked in excess of 40 hours per week. While I have no hesitation accepting Mr Crichton's evidence that he did actually work extra hours above the 40 hours per week he was paid for (for the reasons set out above), the overtime arrangements were less formal in practice than Mr Crichton's individual employment agreement would suggest. In the circumstances, it would not be fair to penalise Dig & Tip for breaches of Mr Crichton's individual employment agreement, separately and in addition to the breaches of Settlement which are addressed below.

Interest

[69] Mr Crichton claims payment of interest on sums owed to him. The Authority has discretion to order interest in any matter involving the recovery of any money, such

---

[13] Section 4B of the Act requires an employer to keep records in sufficient detail to demonstrate they have complied with minimum entitlement provisions.

interest to be calculated in accordance with Schedule 2 of the Interest on Money Claims Act 2016.[14] The matter before the Authority is a breach of Settlement matter, not a money recovery matter and the discretion to order interest is not invoked.

Penalties

Approach

[70] The Authority has full and exclusive jurisdiction to deal with actions for the recovery of penalties under s 133 of the Act.

[71] Mr Crichton submits that the exercise of the Authority's jurisdiction to order penalties is not precluded by the existence of the Settlement and that any attempt to circumvent provisions of the Act (including in a Record of Settlement) will have no effect.[15]

[72] Mr Crichton asks the Authority to impose penalties against both Dig & Tip and Mr Torrance personally, for:

(a) Breaches of the agreed terms of the Settlement (s 149(4) of the Act).

(b) Breaches of minimum entitlements.

(c) Breaches of Mr Crichton's individual employment agreement.

[73] As I set out above, the claims relating to failures to make payments under the Minimum Wage Act 1983, Wages Protection Act 1983, and Holidays Act 2003 arise out of the failure by Dig & Tip to pay Mr Crichton "in full" under the terms of the Settlement. I declined to make separate findings, and accordingly decline to order penalties.

[74] The core breaches I have identified in relation to the claim for penalties, are the breaches of the Settlement under s 149(4) of the Act, and the failure to keep compliant records under sections 4B and 130 of the Act, and section 81 of the Holidays Act 2003, for the reasons set out above.

---

14 Clause 11, Schedule 2 of the Employment Relations Act 2000.

15 Section 238 of the Employment Relations Act 2000.

[75] In relation to whether penalties should also be imposed on Mr Torrance personally, Mr Crichton submits that any provision of the Act for which a penalty can be imposed on "any person" provides that a penalty can be imposed on Mr Torrance personally. This includes breaches relating to the Settlement, because the word "person" is not to be read down or constrained to the parties to the settlement.[16]

[76] While I agree with Mr Crichton's submission on personal liability, even if a penalty is technically available, I have to be satisfied that the imposition of any penalty would meet the purposes and principles of penalties. The core breaches that I have identified above are more appropriately categorised as Dig & Tip's failures, rather than failures of Mr Torrance personally. This includes the disparagement which relates to statements made by Mr Torrance, but in defence of claims against Dig & Tip. Although Mr Torrance signed the Settlement on behalf of Dig & Tip, he was not named as a party to the Settlement. In the circumstances of this case, I find it would be disproportionate to impose penalties on both Dig & Tip and Mr Torrance personally for the same breaches.

[77] In deciding whether to impose a penalty, and if I decide to, how much that penalty should be, I need to consider the factors in s133A of the Act and the approach set out by the Full Court in *Borsboom v Preet PVT Limited and Warrington Discount Tobacco Limited*.[17] These principles have been elaborated on and followed since.

[78] The law in respect of quantification is well established given the content of s 133A of the Act and requires that regard is given to the object of the Act; the nature and extent of any breach; whether it was intentional, inadvertent or negligent; the nature and extent of any loss or damage, steps taken to mitigate the effects of the breach, circumstances of the breach, including vulnerability of the employee; and previous conduct. This is a non-exhaustive list of considerations.

Object of the Act

---

16 *Musa v Whanganui District Health Board* [2010] NZEmpC 120, [2010] ERNZ 236.

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

[79] The purpose of penalties is punitive. They are not imposed to remedy a loss, but to punish the person who has breached a duty under the Act and to condemn that behaviour.

[80] The main breaches by Dig & Tip are inconsistent with two of the objects of the Act: to promote mediation as the primary problem-solving mechanism, and to promote the effective enforcement of employment standards.

[81] The Act contains provisions encouraging parties to resolve their employment relationship issues between themselves. The Settlement represents such a resolution and therefore the failure by one party to honour the terms of any resulting agreement is a serious matter. Public confidence in s 149 settlements will be undermined if it is perceived that parties are permitted to breach these settlements with impunity. It is important that the parties can have confidence in the enforceability of the terms of agreed settlements.

[82] Employers have a duty to keep compliant wages and time records, as well as holiday and leave records. The failure by Dig & Tip to fulfil these requirements in this case, hampered Mr Crichton's ability to calculate the wages and holiday pay owed to him following the termination of his employment. I conclude that it would be appropriate to impose penalties on Dig & Tip for these failures.

[83] In determining the penalty claim I follow the four-step approach as set out by the Employment Court in *Borsboom v Preet*.[18]

Step 1: Identify the nature and number of the breaches and the maximum penalty available

[84] I start with an assessment of the nature and extent of the breaches. There have been seven breaches of the Settlement. A person who breaches an agreed term of Settlement is liable to a penalty.[19] The failure to keep compliant records amounts to two breaches of the Act (one of which is liable to a penalty), and one of the Holidays Act 2003. Each of these Acts allows for penalties to be imposed with the maximum penalty for a single breach by a company of $20,000.00 and $10,000.00 for individuals.

---

18 Above n17 at 137 – 151.

19 Section 149(4) of the Employment Relations Act 2000.

[85] Mr Crichton acknowledges that globalisation is an appropriate approach in the circumstances of this case. I consider the classes of breaches to be sufficiently interrelated to be reduced to two breaches when globalised appropriately for one employee. These are:

(a) Breaches of the Record of Settlement; and

(b) Record-keeping breaches.

[86] This amounts to a maximum starting point of $40,000.00.

Step 2: Assessment of the severity of the breaches

[87] In terms of aggravating factors, I am not persuaded that Dig & Tip's failures to comply with the terms of the Settlement were unintentional. Even if I give the company the benefit of the doubt as to its intention, it is clear Dig & Tip negligently agreed to make payments by certain dates when it did not have the funds available. I am also not satisfied there was a valid explanation for why Dig & Tip agreed to check Mr Crichton's claims for wages regarding unpaid hours under the terms of the Settlement when its view was that Mr Crichton did not have any valid claims based on the overtime dispute. Dig & Tip's non-compliant record-keeping in relation to Mr Crichton's actual hours of work and annual holidays taken, was negligent. This failure has resulted in Mr Crichton facing extreme difficulty in trying to accurately assess his entitlements.

[88] The impact on Mr Crichton was significant. He referred in evidence to needing the money from the Settlement to feed his whānau over Christmas. The late and incomplete payments created major problems for him and he has now been without his full wages and holiday pay for a considerable time after his employment ended. Dig & Tip's non-compliance with the Settlement has also put Mr Crichton to the cost of bringing this matter to the Authority.

[89] In terms of mitigating or ameliorating factors, there is no evidence before the Authority regarding previous conduct by Dig & Tip. However, there is some need for specific deterrence to ensure Dig & Tip appreciates the significance of its obligations to comply with basic legislative requirements – particularly if it continues to be an employer. Mr Torrance is and has been the director of a number of companies currently or formerly registered on the public Companies Register. He ought to be familiar with the requirements of minimum standards employment legislation to ensure Dig & Tip

meets these requirements. As observed by the Full Court in *Borsboom*[20] it is a matter of common knowledge within the community generally that minimum holiday entitlements and other statutory minima are applicable to all employment. This is not a case where Dig & Tip failed to keep records at all, but the credit it can be given for keeping some records is negligible given the records were incomplete and non-compliant with statutory requirements. While the tenor of Mr Torrance's evidence was that any breaches by the company were inadvertent (and that other people were responsible for inadequacies in the records) Dig & Tip had the ultimate responsibility to meet its obligations as an employer. Record keeping obligations are critically important as they enable employees and their representatives to assess whether proper entitlements have been provided. In terms of general deterrence, a message should be sent to other like-minded employers who might be tempted to treat legislative requirements as optional.

[90] I assess the seriousness of these matters as justifying a starting point for the breaches of 30% percent of the maximum. This brings the working total to $12,000.00 before considering ability to pay and proportionality.

Step 3: Financial circumstances of Dig & Tip

[91] Mr Torrance's evidence suggests that Dig & Tip may be in a financial position which would make it difficult to pay a penalty. Dig & Tip is still trading and registered on the Companies Office Register. The Authority has no information to take into account regarding any reduction that may be appropriate based on the Respondent's ability to pay.

Step 4: Proportionality or totality test

[92] Penalties should be set at a level which both punishes a party for its breaches and deters it from future non-compliance. The Authority must take into account whether any penalty would be significantly out of proportion to the gravity of the breaches, and whether there is a real risk that a penalty could be of such magnitude as to create a significant risk of non-payment.[21]

---

20 Above n17.

21 Above n17 at 147.

[93] I have considered an appropriate figure in comparison to other cases – particularly relating to breaches of mediated settlements - considering the seriousness of the breaches and the impact on Mr Crichton. Standing back and looking at the matter in totality and taking a proportionate approach, I consider a fair penalty to be $6,000.00.

Whether some of the penalty should be awarded to Mr Crichton

[94] I have considered whether Mr Crichton should receive some of the penalty. The lack of adequate records contributed to his difficulty in assessing his proper entitlements. There is also a public interest element.

[95] In *Borsboom v Preet*[22] the Court held that a decision under s 136(2) will be based on the facts, but where a breach has resulted in a non-compensable loss to the employee (that is where the breach claimed is in the nature of 'performing a public duty') it may be more appropriate to order some of the penalty be paid to the employee, especially to the extent that costs may not adequately compensate the employee. Both the breach of settlement and the failure to keep accurate records are such breaches. Mr Crichton has also been directly affected by Dig & Tip's failures, in that he was a party to the Settlement and the intended recipient of payments made under its terms. On that basis, I consider it appropriate to award 50% of the penalty to Mr Crichton.

[96] Dig & Tip is to pay a penalty of $6,000.00 within 14 days of the date of this determination, with $3,000.00 being paid to the Crown and $3,000.00 to Mr Crichton.

Leave to recover wage arrears and other money payable under Part 9A

[97] Mr Crichton has sought leave from the Authority to recover wage arrears and other money from Mr Torrance personally under Part 9A of the Act to the extent that Dig & Tip is unable to pay.

[98] To decide whether leave should be granted, I must answer the following:[23]

a) Has there been a default in the payment of wages or other money payable to the employee?

---

22 Above n17.

23 Sections 142W and 142Y of the Employment Relations Act 2000.

b) If so, is the default due to a breach of employment standards (s 5 of the Act)?

c) If so, is Mr Torrance a person involved in a breach of employment standards?

d) If so, is the employer unable to pay the arrears in wages or other money?

[99] The breach of employment standards in this case relates to record-keeping failures. The proximate cause of any default in payment to Mr Crichton relates to breaches of the Settlement, which are not breaches of employment standards. Accordingly, the statutory test is not met and I decline to grant leave for Mr Crichton to recover arrears from Mr Torrance personally.

Orders

[100] I make the following orders:

a) Pursuant to s 137(1)(a)(iii) and s 137(2) of the Employment Relations Act 2000 Dig & Tip Earthworks Limited is to comply with clause 10 of the Record of Settlement in relation to claims for wages raised by David Crichton regarding unpaid hours, in that Dig & Tip Earthworks Limited is ordered to check and pay in full where required to meet minimum entitlements detailed in clause 8 of the Record of Settlement, within 14 days of the date of this determination.

b) Pursuant to s 137(1)(a)(iii) and s 137(2) of the Employment Relations Act 2000 Dig & Tip Earthworks Limited is ordered to comply with clause 9 of the Record of Settlement by paying Mr David Crichton his owed holiday pay, within 14 days of the date of this determination.

c) Dig & Tip Earthworks Limited must pay a total penalty of $6,000.00 as follows:

i. $3,000.00 is to be paid to the Employment Relations Authority within 14 days of the date of this determination. In accordance with s 136 of the Act, that amount will be paid to the Crown bank account.

ii. $3,000.00 is to be paid to David Crichton within 14 days of the date of this determination.

Costs

[101] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves. If they are not able to do so and an Authority determination of costs is needed, any party seeking costs 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 other party will 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.

[102] The parties could expect the Authority to determine costs based on its usual notional daily rate, unless particular circumstances or factors required an upward or downward adjustment of that tariff.[24]

Natasha Szeto
Member of the Employment Relations Authority

[24] Practice Direction of the Authority Te Ratonga Ahumana Taimahi at: https://www.era.govt.nz/assets/Uploads/practice-direction-of-era.pdf