

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE**

[2024] NZERA 161
3265239

BETWEEN JASON-KARL HARE-HURU
Applicant
AND CORPORATE SCAFFOLDING
LIMITED
Respondent

Member of Authority: Eleanor Robinson
Representatives: Hayley Johnson, advocate for the Applicant
Charl Engelbrecht, for the Respondent
Investigation Meeting: On the papers
Submissions: 13 March 2024 from the Applicant
14 March 2024 from the Respondent
Determination: 20 March 2024

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Applicant, Jason-Karl Hare-Huru, claims that the Respondent, Corporate Scaffolding Limited (CSL), did not comply with clauses 2 and 3 of a mediated Record of Settlement.

[2] CSL confirms that it did not comply with the payment timeframe set down for the payments in clauses 2 and 3 of the ROS, but claims that this was due to financial difficulties in the business occasioned by Mr Hare-Huru's actions.

The Authority's investigation

[3] During a case management conference call held on 5 March 2024 it was agreed by the parties that this matter would be heard 'on the papers'. The Authority had received a Statement of Problem and submissions from the Applicant. The Respondent did not lodge a Statement in Reply but did provide submissions.

[4] 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, although these have been fully considered prior to the finalisation of this determination.

Issues

[5] The issues requiring investigation are:

- Has there been a breach of the terms of the Record of Settlement?
If there has been a breach:
- Should a penalty be awarded against the Corporate Scaffolding Limited, and if so, in what quantum?

Relevant Background

[6] Mr Hare-Huru was employed by CSL prior to the termination of his employment.

[7] Following the termination of his employment, Mr Hare-Huru and CSL entered into a Record of Settlement which was certified by a mediator employed by the Ministry of Business, Innovation and Employment on 31 August 2023 under s 149 of the Employment Relations Act 2000 (the ROS).

[8] The ROS was signed by the Applicant and on behalf of CSL by Charl Engelbrecht, Director. Clause 2 of the ROS set out that the sum of \$8,224.00 gross was to be paid to Mr Hare-Huru in weekly instalments of \$500.00 from 6 September 2023 until a final payment which was to be made on 27 December 2023.

[9] Clause 3 CSL set out that it would pay Mr Hare-Huru's legal costs, payable in weekly instalments from 3 January to 21 February 2024, upon receipt of an invoice.

[10] The ROS was certified under s 149 of the Act by the Mediator. That certification confirmed that before making the agreement, the parties were advised and accepted they understood the agreed terms were subject to s 148A, s 149(1) and s 149 (3), i.e. that they:

- a. were final, binding and enforceable; and
- b. could not be cancelled; and
- c. could not be brought before the Authority or the court for review or appeal, except for the purposes of enforcing those terms.

[11] Mr Hare-Huru said that although the amounts agreed have now been paid in full, the payments to him were not made in accordance with the agreed schedule, and from 20 September 2023 he had been attempting to obtain payment as agreed by enlisting the services of his representative, Ms Johnson.

[12] Ms Johnson sent emails to CSL on behalf of Mr Hare-Huru on several occasions with some payments being made by CSL thereafter, but these were sporadic and not in accordance with the timetable which had been agreed.

[13] On 28 November 2023 Mr Hare-Huru lodged a Statement of Problem seeking a compliance order . At that stage the balance owing to Mr Hare-Huru was \$4,224.00.

[14] On 19 December 2023 CSL advised that a payment of \$2,000.00 would be made that week, and \$2,000.00 two weeks later. However on 27 December 2023 Mr Hare-Huru advised his representative that he had not received the promised payments.

[15] Ms Johnson wrote to CSL on 9 January 2024 following which on 31 January 2024 the final payment of \$4,224.00 was made to Mr Hare-Huru, and a payment in full made to Sacked Kiwi, a total of \$4,000.00 plus GST.

[16] On behalf of CSL Mr Englebrecht claimed that CSL had suffered significant hardship which it attributed to certain actions by Mr Hare-Huru when Mr Englebrecht had placed him in charge of the CSL Auckland branch.

[17] As a result Mr Englebrecht said he had been obliged to sell a number of assets in order to operate CSL on an ongoing basis. The Auckland branch had been forced to close due to the financial issues, and Mr Englebrecht stated it was a financial struggle to keep the Christchurch branch in operation.

[18] He stated that the situation had not been assisted by the difficulties experienced by the construction sector as a whole.

[19] Mr Englebrecht confirmed that CSL had not maintained the payments in accordance with the agreed schedule, however the payments were all made by the final date for payment.

Has there been compliance with clauses 2 and 3 of the ROS?

[20] It is submitted for Mr Hare-Huru there has been no compliance with the terms of the ROS requiring payments to be made by CSL as itemised in clauses 2 and 3 of the ROS.

[21] It is submitted on behalf of CSL that it agrees that payments had not been made in accordance with the agreed timetable.

[22] Having considered this matter I am satisfied that CSL had not complied with clauses 2 and 3 of the ROS.

Remedies

Compliance Order

[23] I am satisfied that the payments itemised in clauses 2 and 3 of the ROS were not paid to Mr Hare-Huru and Sacked Kiwi in accordance with the timetables set out in the ROS, although I observe that Sacked Kiwi had received full payment in advance of the final date for payment set out in clause 3 of the ROS.

[24] Since all payments have now been paid in full, I make no order for compliance.

Penalties

[25] Mr Hare-Huru has sought a penalty in respect of the breach of the ROS.

[26] It is submitted on behalf of Mr Hare-Huru that the breaches were intentional and designed to cause him distress. It is submitted that Mr Hare-Huru had to engage in an extensive process to receive the agreed settlement payments, and that the failure to adhere to the agreed schedule of payments was an ongoing act of serious bad faith.

[27] Mr Englebrecht submits for CSL that it had struggled to maintain the agreed schedule but all payments were made by the final date for the payments to be made.

Should a penalty be awarded against the CSL, and if so, in what quantum?

[28] Mr Hare-Huru seeks a penalty in respect of the breach by CSL of the ROS.

[29] Pursuant to s150 (4) of the Act, a person who breaches a Record of Settlement is liable to a penalty. A single breach of a settlement agreement by an individual may attract a penalty up to \$10,000.00 and for a company a penalty not exceeding \$20,000.00 may be awarded for a solitary breach.

[30] The Act includes provisions encouraging parties to resolve their employment relationship issues between themselves. The Record of Settlement represents such a resolution and therefore the failure by one party to honour the terms of any resulting agreement is a serious matter.

[31] 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.

[32] As observed, the primary purpose of a penalty is to punish the wrongdoing and to act as a deterrent to further breaches by the relevant party and the deterrence of others with respect to obligations of good faith and fidelity.

[33] The level of penalty is determined by an assessment of the factors set out in s 133A of the Act alongside judgments of the Employment Court, notably in *Borsboom and Preet PVT Limited*.¹

[34] In the circumstances of this case there was one breach, namely the failure to adhere to the ROS terms. It is submitted for Mr Hare-Huru that the breach of the ROS caused him hurt, frustration and embarrassment.

[35] It is submitted for CSL that the delays in making the payments in line with the agreed schedule were a result of financial difficulties, but that the payments although delayed, were made in full by the final date for payment.

[36] The schedule of payments had been agreed by the parties and recorded in the ROS. Parties are expected to adhere to terms entered into freely. CSL did not adhere to the payment schedule and I accept that the delayed nature of the payment caused Mr Hare-Huru frustration and embarrassment.

[37] Mr Englebrecht submits that financial circumstances made it difficult for CSL to adhere to the payment schedule, and he had been compelled closed the Auckland branch, selling assets to meet operational expenses.

[38] In the circumstances of this case I consider a penalty of \$750.00 to be appropriate. Of that amount \$350.00 is to be paid to Mr Hare-Huru.

[39] **I order that CSL pay a penalty of \$750.00 to the Authority to be paid to the Crown account, of which \$350.00 is to be paid to Mr Hare-Huru. Payment is to be made within 28 days of the date of this Determination.**

Costs

[40] Mr Hare-Huru has applied for costs in the sum of \$960.00.

¹ *Borsboom v Preet PVT Limited* [2016] NZEmpC 143

[41] The matter was considered on the papers with no investigation meeting taking place, and in the circumstances of this case, I consider that the costs claimed are reasonable.

[42] **I order that CSL pay the sum of \$960.00 to Mr Hare-Huru as a contribution to costs within 28 days of the date of this Determination.**

Filing Fee

[43] **CSL is to pay Mr Hare-Huru the filing fee of \$71.56 within 28 days of the date of this Determination.**

Eleanor Robinson
Member of the Employment Relations Authority