

paid by way of direct credit to Mr Te Autu Van Hout's nominated bank account in two equal instalments as follows:

(a) \$2,500.00 on 20 April 2024; and

(b) \$2,500.00 on 20 May 2024.

[3] Clause 4 of the record of settlement provided that payment was to be made by Wyatt to Sacked Kiwi Limited (Sacked Kiwi) of the sum of \$4,500.00 plus GST in respect of costs. This amount was to be paid by Wyatt directly to Sacked Kiwi upon receipt of a GST invoice within seven days of the mediation certification.

[4] Wyatt made the payments under clause 2 outside of the agreed timeframes as follows:

(a) \$2,500.00 paid on 30 April 2024 (ten days late).

(b) \$2,500.00 paid on 21 May 2024 (one day late).

[5] Wyatt made the payment in clause 4 on 4 April 2024 which was seven days late.

[6] On 5 June 2024, an application was lodged the Authority that Wyatt had breached the record of settlement because of the late payments. Mr Te Autu Van Hout seeks penalties and costs related to making the application.

[7] Wyatt accept that the payments were made outside of the agreed timeframes but say that their limited cashflow delayed payment and they made payment as soon as they were able. Wyatt says that the Authority should not award additional penalties and costs which would only cause further financial hardship to Wyatt.

The investigation process

[8] By agreement with the parties the matter was dealt with by the Authority on the papers by way of submissions directed to identified issues.

[9] The Authority gave the parties the opportunity to confirm whether or not there were any applications for non-publication. Mr Kersjes confirmed on behalf of Mr Te Autu Van Hout there was no application for non-publication. There was no response from Wyatt.

The issues

[10] The Authority needs to determine the following issues:

- (a) Was there a breach of the record of settlement?
- (b) If so, should the Authority award a penalty and in what amount?
- (c) If there is a penalty ordered, then who should it be paid to?
- (d) Should there be an order as to costs and reimbursement of the filing fee?

Was there a breach of the record of settlement?

[11] There was a breach of clause 2 of the record of settlement because the two payments by instalment of \$2,500 were not paid to Mr Te Autu Van Hout on the agreed dates of 20 April 2024 and 20 May 2024. The first instalment was paid ten days late and the second instalment one day late.

[12] There was a breach of clause 4 of the record of settlement because Sacked Kiwi Limited was not paid its costs of \$4,500 plus GST on the agreed date. Payment was seven days late on 4 April 2024.

Should the Authority award a penalty for the breach and, if so, in what amount?

[13] The person in breach of agreed terms of settlement certified by an MBIE mediator under s 149 of the Act is liable to a penalty under the Act.¹

[14] Section 135(2)(b) of the Act provides that a company in breach is liable to a penalty of up to \$20,000. Whilst there are three separate breaches which could result in a starting point for an assessment of a penalty of \$60,000, it is appropriate to globalise the breaches as they are materially similar.

¹ Employment Relations Act 2000; section 149(4).

[15] In determining whether to award a penalty and the quantum of any penalty the Authority must have regard to the factors in s 133A of the Act together with guidance from the Employment Court about penalties.²

Object of the Act

[16] The object of the Act includes the promotion of mediation as the primary problem-solving mechanism which includes certified records of settlement. A breach of a record of settlement does not further the object of the Act in this respect.

Intentional, inadvertent or negligent breaches?

[17] Ms Mathieson refers in her submission to pressure Wyatt was under at the time the settlement agreement was entered into to agree with demands made on behalf of Mr Te Autu Van Hout. The submission suggests an element of duress.

[18] Section 149 restricts the ability to go behind a settlement agreement.³ The Employment Court has observed there may be circumstances where it may be permissible to go behind a settlement agreement. The Authority is not persuaded of the appropriateness of looking behind the settlement agreement in the current matter.⁴ Both parties were represented. The record of settlement was certified by the mediator on 21 March 2024. The payment under clause 4 which was Sacked Kiwi's costs was due in late March 2024. The first instalment under clause 2 of the compensatory payment to Mr Te Autu Van Hout was not due until 20 April 2024 and the second instalment not until 20 May 2024. There was time because of the staggered payments for Wyatt to make sure it had enough to meet the payments when they fell due.

[19] Ms Mathieson submits that the delay in making payment was not intentional and that Wyatt was reliant on incoming cashflow from third parties. A letter from an accountant has been provided to support that submission and the financial situation facing Wyatt. Further it is submitted that the construction industry is suffering financial

² *Borsbom (Labour Inspector) v Preet PVT Ltd v Warrington Discount Tobacco Ltd* [2016] ERNZ 514 and *Lumsden v SkyCity Management Limited* [2017] ERNZ 96.

³ Employment Relations Act

⁴ *Lumsden v SkyCity Management Ltd* [2015] ERNZ 389 at [42].

hardship that has impacted Wyatt and the business has had to make redundancies to manage unaffordable overheads.

[20] The reasons advanced by Ms Mathieson for the three late payments fall to be considered more appropriately as circumstances in which the breaches took place rather than supporting a lack of intention. Wyatt knew what it had agreed to pay and by when in the record of settlement. The explanations for the failure to pay do not support inadvertence or negligence.

Nature and extent of any loss or damage

[21] Mr Te Autu Van Hout was deprived of the use of money that Wyatt agreed was to be paid by specific dates under clause 2 in particular. From emails attached to the statement of problem between Mr Kersjes and Ms Mathieson payments were required to be chased up several times. A level of concern and frustration can be discerned from the emails about the overdue payments.

Steps taken to mitigate any actual or potential adverse effects of the breach

[22] Ms Mathieson submits that Wyatt made payment immediately upon receiving sufficient income to do so and it would cause further hardship for Wyatt to be penalised unnecessarily. She submits the timeframe to meet the obligations in the settlement agreement was not excessive and the circumstances causing the delay were beyond the control of Wyatt.

Should a penalty be awarded?

[23] The Authority accepts that there were cashflow challenges for Wyatt and payments to Mr Te Autu Van Hout were made within a fairly short timeframe after the date they were due to be paid. The duration of the breaches was limited. Payments were made before the statement of problem in this matter was lodged claiming penalties and costs. The object of the Act includes the reduction of judicial intervention. There was no information provided that Wyatt has previously engaged in similar conduct. These matters mean that whether or not a penalty should be awarded is more balanced than in some other cases.

[24] It is important that there is public confidence for parties entering into certified settlement agreements under s 149 of the Act. The maintenance of confidence that both parties will abide by the agreed terms is important. Payments were overdue on three separate occasions rather than simply one occasion. The settlement agreement had a staggered payment regime that enabled payment over an extended period. Mr Kersjes has directed the Authority to a determination where the Authority awarded a penalty in similar circumstances where full payment was made but outside of the agreed period. The need for a penalty to function as a deterrent was referred to.⁵ Consistency is important both in assessing the amount of a penalty and the exercise of the discretion as to whether a penalty should be awarded at all. There was some discernible impact on Mr Te Autu Van Hout from the late payments made to him.

[25] On balance the Authority should impose a penalty at an appropriate level to recognise the factors set out above.

[26] In *Whitewood* there were seven overdue payments that were paid one day outside of the agreed period. The last payment was paid a week late. The Authority imposed a penalty of \$500.⁶

[27] In this matter there were three overdue payments. One was a day late and the other two between seven and ten days late. The penalty imposed in this matter should reflect that there were fewer breaches but one was a breach of a longer duration than in *Whitewood*. I take into account the financial situation of Wyatt as described by Ms Mathieson in her submissions.

[28] Mr Kersjes seeks a penalty of not less than \$5000. Such an award would not be consistent or proportionate with penalty awards in other determinations for breaches of s 149 records of settlement where the Authority had not been required to order compliance. Mr Kersjes refers the Authority to a determination where a penalty of \$3000 was awarded for a breach of the record of settlement.⁷ In that matter the

⁵ *Whitewood v Stevenson* [2019] NZERA 348.

⁶ Above n 5.

⁷ *David Elliot v All Coat Painters Limited* [2019] NZERA 165.

Authority was required to additionally make an order for compliance with the record of settlement. Three instalment payments that were due had not been paid as at the date of the determination.⁸ That matter is distinguishable from this on that basis.

[29] An appropriate penalty in all the circumstances that is proportionate and consistent is \$350.

Payment of the penalty?

[30] Mr Kersjes has asked that the penalty be paid to Mr Te Autu Van Hout.

[31] There is public interest in deterring such breaches. Payments have been made and Mr Te Autu Van Hout did not have to make an application to the Authority for compliance with the record of settlement. He was however deprived of the use of the money from the agreed dates. 75 percent of the penalty should be paid to the Crown to recognise the public interest in compliance with records of settlement under s 149 of the Act. 25 percent of the penalty is to be paid to Mr Te Autu Van Hout.

Costs

[32] Mr Kersjes seeks costs in the amount of a quarter of the daily tariff of \$4,500 and reimbursement of the filing fee. The Authority has been provided with an invoice dated 21 October 2024 to Mr Te Autu Van Hout for related professional services in the sum of \$2,604 exclusive of GST and the filing fee.

[33] Mr Te Autu Van Hout has been successful in his application. Costs are to follow the event. Wyatt is to pay the sum of \$1,125 being costs and reimburse the sum of \$71.55 being the filing fee.

Findings and orders made

[34] Wyatt Construction Limited has breached the record of settlement it entered into with Latrell Te Autu Van Hout under s 149 of the Act.

⁸ Above n 7.

[35] The Authority has made the following orders:

- (a) Wyatt Construction Limited is ordered to pay a penalty of \$350 under s135 of the Act.
- (b) Payment of the penalty is to be made as follows. The sum of \$262.50 is to be paid to the Crown and the sum of \$87.50 to Latrell Te Autu Van Hout within 20 days of the date of this determination under s136 of the Act.
- (c) Wyatt Construction Limited is ordered under clause 15 of the second schedule of the Act to pay to Latrell Te Autu Van Hout costs in the sum of \$1,125 and to reimburse the filing fee of \$71.55.

Helen Doyle
Member of the Employment Relations Authority