

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

**[2012] NZERA Auckland 253  
5381422**

BETWEEN                      AG WALTERS LTD  
   Applicant  
  
AND                                JODY POUWHARE  
   Respondent

Member of Authority:        Eleanor Robinson  
  
Representatives:              Richard Upton, Counsel for Applicant  
   No appearance by or for Respondent  
  
Investigation Meeting:        25 July 2012 at Auckland  
  
Determination:                25 July 2012

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1]        On 20 March 2012 a Record of Settlement (the Settlement) was signed under s149 of the Employment Relations Act 2000 (the Act). The parties to the Settlement were the Applicant, AG Walters Ltd (AG Walters), and the Respondent, Ms Jody Pouwhare. The Settlement was signed on behalf of AG Walters by Mr Mike Tibbs, Authorised Signatory. The Record was also signed by a Mediator employed by the Department of Labour.

[2]        The issue now brought before the Authority by AG Walters is that Ms Ppuwhare has not complied with any of the terms of the Settlement. The relevant terms are as set out in clauses 1 and 2 of the Settlement:

1. *The Employee accepts that she owes the Employer the sum of \$1052.22 ("the overpayment").*
2. *The Employee agrees to repay the Employer the overpayment in the following manner:*
  - 2.1 *By 5pm 18 March 2012, she will pay the sum of \$100*
  - 2.2 *By 5pm 18 April 2012, she will pay the sum of \$100*
  - 2.3 *By 5pm 18 May 2012, she will pay the sum of \$100*

- 2.4 *By 5pm 18 June 2012, she will pay the sum of \$100*
- 2.5 *By 5pm 18 July 2012, she will pay the sum of \$100*
- 2.6 *By 5pm 18 August 2012, she will pay the sum of \$100*
- 2.7 *By 5pm 18 September 2012, she will pay the sum of \$100*
- 2.8 *By 5pm 18 October 2012, she will pay the sum of \$100*
- 2.9 *By 5pm 18 November 2012, she will pay the sum of \$100*
- 2.10 *By 5pm 18 December 2012, she will pay the sum of \$50.22*

[3] The Settlement 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:

- (i) were final, binding and enforceable; and
- (ii) could not be cancelled; and
- (iii) could not be brought before the Authority or the court for review or appeal, except for the purposes of enforcing those terms.

[4] The Authority set a hearing date of 25 July 2012, which was communicated to the parties by a Notice of Investigation Meeting; however the Authority was unable to establish that effective service had been made on Ms Pouwhare. As a result AG Walters effected personal service on Ms Pouwhare, which was confirmed by way of an affidavit sworn and dated 18 July 2012.

[5] As no confirmation of attendance was received from Ms Pouwhare following personal service, Ms Pouwhare was contacted by a Support Officer of the Authority at 10.00 a.m. on 25 July 2012. Ms Pouwhare confirmed to the Support Officer that she did not intend to attend the Investigation Meeting.

[6] Given the difficulties encountered in progressing this case, I was satisfied that no good cause had been shown for Ms Pouwhare's failure to attend and I consequently proceeded with the Investigation Meeting pursuant to clause 12 of Schedule 2 of the Act.

### **Determination**

[7] From the evidence available to the Authority, I am satisfied that Ms Pouwhare has made only one payment of \$100 in accordance with the scheduled repayment schedule set out in the Settlement, this being received by AG Walters on 2 April 2012.

[8] Ms Pouwhare has failed to comply with the Settlement. I am further satisfied that unless a compliance order is made, Ms Pouwhare is unlikely to comply with the agreed Settlement.

[9] A compliance order pursuant to s 137(1)(a)(iii) of the Employment Relations Act (“the Act”) is therefore necessary and appropriate.

**[10] In order to effect compliance with the terms of the Settlement, I therefore order Ms Pouwhare to comply with the Parties’ agreed terms of settlement which were entered into under s.149 of the Act.**

**[11] Ms Pouwhare is to make payment of all the outstanding sums to date, being \$400, by 31 July 2012.**

**[12] Ms Pouwhare is ordered to comply with the repayment schedule as set out in the Settlement and to pay all further payments on the due date.**

*Interest*

[13] AG Walters has applied for interest on the outstanding sums as set out in the Settlement.

[14] The Authority has the power to award interest pursuant to clause 11 of the Second Schedule of the Act at the rate prescribed by the Judicature Act 1908, which is currently 5% per annum<sup>1</sup>.

[15] I consider that it is appropriate that Ms Pouwhare is ordered to pay interest on the outstanding sums owed to AG Walters.

**[16] Ms Pouwhare is to pay interest of 5% on the outstanding sums due to 18 July 2012, and to pay interest of 5% on each subsequent amount unless it is paid in full in accordance with the schedule of payment dates set out in the Settlement**

*Penalties*

[17] AG Walters has applied for a penalty against Ms Pouwhare.

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<sup>1</sup> Judicature (Prescribed Rate of Interest) Order 2011 (SR2011/177)

[18] Pursuant to s 149(4) of the Act, a person who breaches an agreed term of settlement to which the Act applies, is liable to a penalty of up to \$10,000.00 for an individual or up to \$20,000.00 for a company.

[19] As the then Chief Judge observed in *Xu v McIntosh*<sup>2</sup>, a penalty: “*is imposed for the purpose of punishment of a wrongdoing which will consist of breaching the Act ...*”

[20] Ms Pouwhare is an individual who has breached the terms of an agreed settlement certified under s 149 of the Act by the Mediator. As such Ms Pouwhare is liable to a penalty not exceeding \$10,000.00.

[21] The Employment Court in *Xu v McIntosh*<sup>3</sup> said that the first question to be asked in contemplating the award of a penalty is “*how much harm has the breach occasioned?*”

[22] I find that AG Walters have suffered some harm in this case. AG Walters agreed to settle its claim for repayment of the salary overpayment in the sum of \$1050.22 by way of stage payments. This agreement deprived AG Walters of the immediate use of monies to which it was entitled. However the schedule of stage payments has not occurred due to the failure of Ms Pouwhare to comply with the terms of the Settlement.

[23] Further AG Walters has been put to additional time and expense trying to obtain payment.

[24] The Employment Court said in *Xu v McIntosh*<sup>4</sup> that the next question to be examined is the culpability of the perpetrator. Was “*the breach technical and inadvertent or was it flagrant and deliberate?*”

[25] I find that the breach by Ms Pouwhare was flagrant and deliberate. Ms Pouwhare was aware of her obligations since she had signed the Settlement, and has been contacted and reminded of her obligations under the Settlement via emails and letters sent by Mr Upton on behalf of AG Walters. Ms Pouwhare has failed to comply with the terms of Settlement and has provided no explanation for this.

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<sup>2</sup> [2004] 2 ERNZ 448

<sup>3</sup> Ibid at para [47]

<sup>4</sup> Ibid at para [48]

*Public Interest*

[26] The Act includes 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.

[27] 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 parties can have confidence in the enforceability of the terms of agreed settlements.

[28] It is consequently in the public interest to impose a penalty which not only punishes Ms Pouwhare for her wilful breach of the agreed Settlement, but which will additionally act a deterrent to others who may contemplate engaging in such behaviour.

[29] I have found the breach by Ms Pouwhare to be significant, and the penalty should be set to reflect the Authority's disapproval of such behaviour. I determine that a penalty of \$1,000.00 is appropriate in the circumstances.

[30] **I order Ms Pouwhare to pay \$1,000 as a penalty pursuant to s 149(4) of the Act.**

[31] **The Settlement allowed for the payment of the salary overpayment, I consider it is reasonable to assume this repayment schedule was agreed in recognition of Ms Pouwhare financial position. Accordingly I order payment of the penalty in accordance with the following schedule pursuant to s. 149(4A) of the Act:**

- i.) By 18 August 2012: \$200**
- ii.) By 18 September 2012 \$200**
- iii.) By 18 October 2012, \$200**
- iv.) By 18 November 2012, \$200**
- v.) By 18 December 2012: \$200**

[32] **Ms Pouwhare is ordered to pay the penalty amounts to AG Walters.**

## Summary of Orders

[33] Ms Pouwhare is ordered:

- a. to comply with the Parties' agreed terms of settlement which were entered into under s.149 of the Act;
- b. to make payment of all the outstanding sums to date, being \$400, by 31 July 2012;
- c. to comply with the repayment schedule as set out in the Settlement and to pay all further payments on the due date;
- d. to pay interest of 5% on the outstanding amount due to 18 July 2012, and to pay interest of 5% on each subsequent amount unless it is paid in full in accordance with the schedule of payment dates set out in the Settlement.
- e. to pay \$1,000.00 as a penalty to AG Walters in accordance with the schedule set out in paragraph [31] of this determination

## Costs

[34] Mr Upton has claimed costs in relation to this proceeding. The details of the reasonably incurred costs have been heavily discounted, but I take note of the fact that these costs include the cost incurred as a result of AG Walters having to effect personal service of the Notice of Investigation Meeting on Ms Pouwhare. I also note that personal service was effected on Ms Pouwhare at the address to which the Authority's notification had been sent, thus that the need by AG Walters to effect personal service may have been avoided.

[35] The matter took less than half a day of meeting time. In these circumstances I am minded to follow the Authority's usual practice of a notional daily tariff basis, this being now accepted to be at a rate of \$3,500.00 per day.

[36] Accordingly, Ms Pouwhare is ordered to pay AG Walters \$600.00 as a contribution towards its costs pursuant to clause 15 of Schedule 2 of the Employment Relations Act 2000.

[37] I am satisfied that AG Walters has been put to some additional expense in bringing this claim, and order Ms Pouwhare to reimburse AG Walters the \$71.56 filing fee..

**Eleanor Robinson**  
**Member of the Employment Relations Authority**