

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2020] NZERA 148
3094452

BETWEEN MACAULAY BONHAM
Applicant

AND CANNON SIGNAGE
CONCEPTS LIMITED
Respondent

Member of Authority: Eleanor Robinson

Representatives: Jennifer Silva, Advocate for the Applicant
Cannon Smith, Representing the Respondent

Investigation Meeting: By telephone on 9 March 2020

Determination: 09 April 2020

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Applicant, Mr Macaulay Bonham, claims that the Respondent, Cannon Signage Concepts Limited (Cannon), failed to adhere to clauses 2, 3 and 5 of a mediated settlement agreement (the Record of Settlement).

[2] On 30 January 2020 the Record of Settlement was entered into under s. 149 of the Employment Relations Act 2000 (the Act). The Record of Settlement was signed by the Applicant and by Mr Cannon Smith on behalf of Cannon. The Record of Settlement was also counter-signed by a Mediator employed by the Ministry of Business, Innovation and Employment (MBIE) on 4 February 2020.

[3] Under terms 2 and 3 of the Record of Settlement Mr Bonham was to be paid a total sum consisting of \$6,000.00 pursuant to s 123(1)(c)(i) of the Employment Relations Act 2000 (the Act) and \$3,000.00 less PAYE in respect of Mr Bonham's annual leave entitlement.

[4] The parties agreed that the amounts due to Mr Smith could be paid by instalments as set out in clause 4 of the Record of Settlement. In accordance with clause 5 of the Record of

Settlement the instalments would be at the rate of \$1,000.00 per month and commence on 28 February 2020.

[5] The issue which had been brought before the Authority by the Applicant is that the Respondent has not complied fully with clauses 2, 3 and 5 of the Record of Settlement, which state:

2. CANNON SIGNAGE CONCEPTS LIMITED shall, without admission of liability, pay Macaulay Bonham the sum of \$6,000 in terms of the provisions of s 123(1)(c)(i) of the Employment Relations Act 2000.

3. CANNON SIGNAGE CONCEPTS LIMITED shall pay Macaulay Bonham the amount of \$3,000 less PAYE to Macaulay Bonham in respect of his annual leave. The parties agree there are no further Kiwisaver entitlements owed to Macaulay Smith.

5. The payments shall commence on the 28th February 2020 and shall be paid at the rate of \$1,000 per month until such time as the total has been paid in full.

[6] The Record of 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:

- 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.

Note

[7] The parties agreed to the Authority determining this issue based on the Statement of Problem and the Statement in Reply, and by means of a telephone investigation.

Issues

[8] The issue for determination is whether or not Cannon failed to comply with clauses 2, 3 and 5 of the Record of Settlement.

Background

[9] The payments set out in clauses 2 and 3 of the Record of Settlement were to be paid to Mr Bonham by instalments on the 28th February 2020 and thereafter per month. Mr Bonham has received no payments to date.

[10] Mr Smith accepted that he had not paid the outstanding instalments due to be paid on 28 February and 28 March 2020.

[11] Mr Smith said that his failure to pay the outstanding instalments were the result of health problems he had suffered and because his business was experiencing financial difficulties exacerbated by the Covid-19 situation.

[12] Whilst I accept that Cannon has experienced financial difficulties which have been compounded by the Covid-19 business effects, and have sympathy with Mr Smith in regard to his health issues, and also accept therefore that the breach of the terms of the Record of Settlement was not deliberate, nonetheless Cannon has not complied with clauses 2, 3 and 5 of the Record of Settlement.

Compliance Order

[13] The Record of Settlement refers in clause 5 to the dates when payment should be made. I find that this has not occurred in two instances.

[14] As stated above, I accept that the non-compliance situation was not deliberate intention on Cannon's part. However I determine that there has been a default in the agreed payment.

[15] From the evidence available to the Authority, I am satisfied that Cannon has failed to comply with clause 2, 3 and 5 of the Record of Settlement.

[16] **In order to effect compliance with the Record of Settlement, I therefore order Cannon to pay Mr Bonham, no later than 14 days from the date of this determination, the outstanding instalments totalling \$2,000.00 pursuant to s 137(1)(iii) of the Act.**

Penalty

[17] 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.

[18] 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.

[19] Having considered the principles which should govern the imposition of a penalty¹, I determine that a penalty of \$200.00 is appropriate in all the circumstances of this case.

[20] **I order that Cannon is to pay a penalty of \$200.00, to be paid to the MBIE Trust Account. Payment is to be made within 14 days of the date of this Determination.**

Filing Fee

[21] **Cannon is also ordered to pay Mr Bonham the filing fee of \$71.56 within 14 days of the date of this Determination.**

Costs

[22] Mr Bonham has applied for costs.

[11] Costs are at the discretion of the Authority. The principles applicable to awards of costs in the Authority are well established. It is a principle set out in *PBO Limited (formerly Rush Security Ltd) v Da Cruz*² that costs are modest. Costs are also reasonable as observed by the Court of Appeal in *Victoria University of Wellington v Alton-Lee*³ at para [48] “As to quantification, the principle is one of reasonable contribution to costs actually and reasonably incurred.”

[23] The matter was considered via telephone conferences with no investigation meeting taking place, and I take this into consideration in assessing costs.

[24] The telephone conferences occupied approximately half an hour of hearing time and based on the Authority’s usual notional tariff based approach⁴, and adopting as a starting point the notional daily tariff of \$4,500.00, this would equate to \$321.00.

[25] **Accordingly, Cannon is ordered to pay to Mr Bonham the sum of \$321.00 as a contribution towards costs within 14 days of the date of this Determination.**

¹ *Borsboom (Labour Inspector) v Preet PVT Ltd and Warrington Discount Tobacco Ltd* [2016] NZEmpC 143

² [2005] 1 ERNZ 808

³ [2001] ERNZ 305

⁴ *Cliff v Air New Zealand Ltd* (AC47A/06, (unreported) per Judge Shaw at para [10]

Filing Fee

[26] Cannon is also ordered to pay Mr Bonham the filing fee of \$71.56 within 14 days of the date of this Determination.

Eleanor Robinson
Member of the Employment Relations Authority