

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

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

[2022] NZERA 523
3128845

BETWEEN	HARRY CARR Applicant
AND	HAMILTON CIVIL PLANT LIMITED Respondent

Member of Authority:	Sarah Kennedy
Representatives:	Graeme Ogilvie, advocate for the Applicant Richard Negri for the Respondent
Investigation Meeting:	On the papers
Submissions received:	11 July, 29 June and 2 June 2022 from Applicant 11 July, 6 July, 30 March and 29 March 2022 from Respondent
Determination:	11 October 2022

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Harry Carr was previously employed by Hamilton Civil Plant Limited (HCPL). Richard Negri is the sole director and shareholder of HCPL. HCPL is registered with the Companies Office and carries out the business of civil engineering and road and bridge construction.

[2] On 6 March 2020, the parties attended mediation to resolve issues that had arisen in the employment relationship and entered into a Record of Settlement (the settlement agreement) in accordance with s 149 of the Employment Relations Act 2000 (the Act).

[3] A Ministry of Business, Innovation and Employment mediator certified their agreement under s 149 of the Act. The effect of certification is that the terms agreed were final and binding and could only be brought before the Authority for the purposes of enforcement.

[4] Mr Carr says he is still owed holiday pay and notes that the mediator advised the parties that unpaid holiday pay still had to be paid because that was a statutory obligation.

[5] Mr Carr says no payment has been made to him in accordance with the settlement agreement and Mr Carr's representative has requested wage, time and holiday records but not supplied them.

[6] At the first case management conference, the parties wished to discuss a payment plan and provision of the wage, time and holiday records between them. They were unable to agree and due to a series of delays on the part of HCPL, the matter has not been able to be considered by the Authority until now.

[7] Mr Negri provided a summary of the wages (as opposed to the wage and time records) earned by Mr Carr on 31 May 2021 and accepts that HCPL has not paid any money to Mr Carr in accordance with the settlement agreement. He provides several reasons for not paying including:

- the accuracy of the resume provided by the applicant
- the terms of engagement between the HR recruiter and the applicant
- the employment contract between the parties
- total payments made to the applicant by the respondent including those made in error
- all advances or loans made to the applicant, at the applicant request, during the five week period of engagement by the respondent
- breaches of the engagement, including the actions by the applicant under contract after termination date
- lost income to the respondent because of the resume provided by the applicant

- and whether there are any reasonable grounds for an “extra over” payment to the applicant by the respondent now all the facts of the employment of the applicant are known.

[8] Mr Negri says, in fact, Mr Carr owes HCPL money now that he has completed a fully reconciliated pay roll record (provided to the Authority on 31 May 2021 and later updated), that a trial period existed that could be “reduced for serious misconduct”, and he says Mr Carr has engaged in serious misconduct. He also relies on the fact that all advances and payments made to Mr Carr must be repaid on termination to HCPL in accordance with the individual employment agreement between the parties.

[9] Mr Negri also now seeks a review and adjustment to any compliance order from the Authority.

The Authority’s investigation

[10] The Authority’s investigation was conducted on the papers. All the material provided to the Authority was considered. The representatives provided written submissions.

[11] 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.

The issues

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

- (a) Has there been a breach of the settlement agreement?
- (b) Should a compliance order be made?
- (c) Should there be an order for costs?

Has there been a breach of the settlement agreement?

[13] The settlement agreement between the parties recorded that HCPL would pay Mr Carr compensation of \$9,250.00 and costs amounting to \$3000.00 (plus GST).

[14] It is recorded in the settlement agreement that the mediator confirmed the parties had advised him that no minimum entitlements had been foregone in the reaching of

the settlement and I understand there to have been agreement between the parties that this was to be calculated at a later date, but I have no information about that aspect of any agreement at mediation other than what the parties have provided.

[15] None of the additional matters are statutory entitlements owed to HCPL.

[16] Mr Carr says he was not paid holiday on termination and is also seeking \$684.80 holiday pay being 8 per-cent of the \$8560.00 gross wages paid as stated in Mr Negri's letter to the Authority on 31 May 2021.

[17] The amounts that HCPL were to pay Mr Carr were due to be paid by 3 April 2020 which means HCPL had been in breach of Clause 2 of the settlement agreements for over 2 years.

[18] In essence Mr Negri says settlement discussions happened too early and before he was able to fully calculate the financial position however, the effect of certification is that the terms agreed were final and binding and could only be brought before the Authority for the purposes of enforcement.

[19] In these circumstances, there has been a breach of the settlement agreement between the parties and failure by HCPL to pay Mr Carr holiday pay on termination of employment.

Should a compliance order be made?

[20] A compliance order may be made when any person has not observed or complied with the provision of an employment agreements or any terms of settlement or a decision that is a breach of s 149(3) and s 151 of the Act.

[21] To the extent that there was agreement between the parties at mediation that the holiday pay figure could be adjusted to take into account monies owing in accordance with the individual employment agreement, that is not recorded in the agreement and is outside the jurisdiction of the Authority. Unlike holiday pay, it is not a statutory entitlement which means it is treated differently.

[22] I have already dealt with the issue of breach. I am satisfied the compliance order is necessary given the amount of time that has passed and there is no suggestion that HCPL was not a willing participant to the settlement agreement.

Orders

[23] Hamilton Civil Plant Limited is ordered to comply with all the obligations under the terms of the settlement agreement with Harry Carr and the timeframe for compliance is within 21 days.

[24] Hamilton Civil Plant Limited is also ordered to pay the outstanding holiday pay under section 131 of the Employment Relations Act 2000.

[25] For avoidance of doubt the amounts owing are:

- (a) \$684.80 holiday pay
- (b) \$9250.00 compensation
- (c) \$3000.00 costs

Costs

[26] Mr Carr also seeks \$690.00 towards his legal costs for lodging this application for compliance plus the filing fee of \$71.56.

[27] Mr Negri opposes costs.

[28] I am satisfied that a contribution to costs is appropriate given the amount of time that has passed and the efforts of Mr Ogilvie in communicating with Mr Negri on behalf of his client.

[29] Hamilton Civil Plant Limited is also ordered to pay Mr Carr \$690.00 in costs and \$71.56 filing fee.

Sarah Kennedy
Member of the Employment Relations Authority