

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

[2013] NZERA Wellington 102  
5421820

BETWEEN            RAYMOND FINDLAY ESAU  
                                 Applicant  
  
AND                    K AND J PATEL LIMITED  
                                 Respondent

Member of Authority:    Michele Ryan  
  
Representatives:        The Applicant in person  
                                 No appearance for the Respondent  
  
Investigation Meeting:    13 August 2013 at Wellington  
  
Determination:         20 August 2013

---

**DETERMINATION OF THE AUTHORITY**

---

**Employment relationship problem**

[1]     Mr Esau says that the respondent, K and J Patel Limited has not complied with an agreed Record of Settlement. He requests a compliance order. He asks that a penalty be imposed in accordance with s.149(3) of the Employment Relations Act 2000 (the Act) and to have the penalty paid to him, instead of the Crown. Mr Esau seeks also to recover disbursements/expenses he has incurred to progress his claims.

**The investigation**

[2]     Mr Esau's statement of problem was sent by courier post to the respondent's trading address on 7 June 2013. No statement in reply was received by the Authority and on 25 June 2013 the Authority's support staff contacted one of the respondent's two directors, Mr Kanu Patel, and inquired as to when a statement of reply would be received. Mr Patel asked for an extension to file a statement in reply.

[3] Further reminders requesting a response to Mr Esau's application were sent to Mr Patel but these were unanswered.

[4] The respondent did not participate in a pre-scheduled conference call.

[5] A 'Notice of Investigation Meeting' was sent to the respondent's trading address and to its registered address on 18 July 2013 advising that an investigation meeting had been scheduled for 13 August 2013. The notice stated "*If the respondent does not attend the investigation meeting, the Authority may, without hearing evidence from the Respondent, issue a determination in favour of the Applicant.*"

[6] A track and trace record reflects the notice was delivered at 2.30pm on 19 July 2013 to its trading address and was signed by K Patel. I am satisfied service on the respondent occurred on 19 July 2013.

[7] The respondent was not in attendance at the beginning of the investigation meeting. At 10.15am the Authority sought to contact the respondent at its trading address and again at 10.25am but the phone was engaged during both instances. An email was sent to Mr Patel advising that the investigation meeting would progress.

[8] No good cause has been provided as to why the respondent did not attend the meeting and as a consequence the investigation proceeded.

### **Terms of settlement**

[9] On 14 November 2012 Mr Esau and the respondent agreed to terms to settle their employment relationship problem. These were recorded in a Record of Settlement of the same date and certified by a mediator employed by the Ministry of Business, Innovation and Employment (MBIE).

[10] Despite the presence of a confidentiality provision within the Record of Settlement it has been necessary to set out the detail of the relevant term Mr Esau says has been breached to establish whether enforcement action should be taken. Clause 6 of the Record of Settlement provides:

*The applicant will be paid all entitlements due to him in accordance with the Holidays Act 2003 no later than 5pm Friday 23 November 2012. Upon payment of holiday pay, the respondent will post all time and wage records, tax summaries and certificate of earnings relevant to calculating the applicant's holiday pay. In addition to this, upon payment of holiday pay, the respondent will post a detailed*

*calculation to the applicant clearly explaining holiday pay due to him...*

[11] Mr Esau says he received a payment of holiday pay (albeit sometime after the expressed agreed date). He says he has not been provided with the documentation recorded at clause 6 of the agreement. Without wage and time records he says he is unable to ascertain if he has been paid his holiday pay entitlement correctly and considers there is a strong possibility that there has been a shortfall in the payment.

[12] In the absence of any evidence to challenge Mr Esau's application I am satisfied that the respondent has not complied with clause 6 of the Record of Settlement and has not provided Mr Esau with the agreed documentation.

### **Compliance order**

[13] Pursuant to s. 151(2) and s.137 of the Employment Relations Act I order the respondent to comply with clause 6 of the Record of Settlement and supply Mr Esau with the documents listed within that provision. The documents must be delivered within 14 days of this determination.

### **Penalty**

[14] Section 149(4) of the Act states:

A person who breaches an agreed term of settlement to which subsection (3) applies is liable to a penalty by the Authority.

[15] The Employment Court has given guidance to the Authority when considering the imposition of penalties. In *Xu v McIntosh*<sup>1</sup> the court stated the following:

A penalty is imposed for the purpose of punishment of a wrongdoing which will consist of breaching the Act or another Act or an employment agreement. Not all such breaches will be equally reprehensible. The first question ought to be, how much harm has the breach occasioned? How important is it to bring home to the party in default that such behaviour is unacceptable or to deter others from it?

The next question focuses on the perpetrator's culpability. Was the breach technical and inadvertent or was it flagrant and deliberate? In deciding whether any part of the penalty should be paid to the victim of the breach, regard must be had to the degree of harm that the victim suffered as a result of the breach.

[16] Section 135(2)(b) provides that a company can be liable to a penalty not exceeding \$20,000.

---

<sup>1</sup> [2004] 2 ERNZ 488 at para [47]-[48]

*How much harm has the breach occasioned?*

[17] Separate to any formal agreement between the parties I note s. 130 of the Act requires an employer to keep wage and time records for every person employed by it and is liable for a penalty if it fails to keep such records<sup>2</sup>.

[18] An aspect of the employment relationship problem between Mr Esau and the respondent related to Mr Esau's difficulties, in the absence of pay slips or wage and time records being made available, in calculating holiday entitlements. Mr Esau says a factor which led to his agreement to the Record of Settlement was that the respondent would provide him with wage and time records. He says he remains unable to ascertain if he has been properly paid his entitlement to holiday pay and that the purpose of mediation and the Record of Settlement has been defeated by the respondent's failure to supply wage and time records. Further, he has been unable to provide Inland Revenue with reliable details as to income earned for the year 2011/2012 so as to ensure he has complied with his tax liabilities. In the circumstances of this matter I find Mr Esau has been harmed.

*Was the breach technical and inadvertent or was it flagrant and deliberate?*

[19] I also consider the failure by the respondent to comply with clause 6 of the Record of Settlement has been wilful and deliberate. Mr Esau provided copies of a series of emails after execution of the Record of Settlement where he advises the Mediator that he has not received the documents. He supplied an email dated 17 January 2013 where the Mediator informs that that she has been in contact with Mr Patel who advised that he had posted the agreed documents to Mr Esau in November, but that he would re-send the documents again. No documents were received by Mr Esau.

[20] I regard the breach by the respondent as serious and deliberate. I consider the respondent was aware of its obligations because it had signed the Record of Settlement, and Mr Kanu, as the respondent's director, had engaged with the Mediator on 17 January 2013 and asserted that the respondent had complied with its obligations. I have already found that the respondent failed to comply with its obligations and I consider the breach to be sustained and on-going.

---

<sup>2</sup> S. 130(4) Employment Relations Act

[21] The Employment Relations Act 2000 actively encourages parties to in an employment relationship to resolve their problems. Public confidence in s. 149 settlement agreements are likely to be undermined if there is a perception that settlement agreements can be breached without consequence. I consider it in the public interest to impose a penalty which punishes the respondent for its wilful breach of the s. 149 Record of Settlement between the parties and also to deter others from engaging in similar behaviour.

[22] I find a penalty of \$2,500 is appropriate and necessary. I consider it appropriate that the penalty be paid to Mr Esau personally to reflect the effects the respondent's deliberate breach has had on him.

### **Costs and disbursements**

[23] Mr Esau has not incurred legal costs as he was self-represented.

[24] On the day of the investigation meeting Mr Esau travelled by car from his home in Bulls to Waikanae and then caught a train to Wellington city. I am satisfied that Mr Esau incurred and paid the following expenses to progress his claim:

- \$71.56 filing fee;
- \$55.00 for the cost of petrol to travel between Bulls and Waikanae (and return) to attend the investigation;
- \$25.00 for a return train trip between Waikanae and Wellington to attend the investigation.

[25] The respondent is ordered to reimburse Mr Esau \$151.56 for disbursements.

### **Summary of orders**

[26] The respondent, K and J Patel Limited, is ordered to:

- (i) comply with clause 6 of the Record of Settlement dated 14 November 2012 and supply Mr Esau with the documents listed within that provision. The documents must be delivered to Mr Esau within 14 days of this determination.
- (ii) pay Mr Esau \$2,500 as a penalty for breach of the Record of Settlement;  
and

(iii) reimburse Mr Esau the sum of \$146.56 for disbursements incurred in pursuing this application.

Michele Ryan  
**Member of the Employment Relations Authority**