

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2016] NZERA Auckland 263
5600380

BETWEEN FELIX FLEMING
 Applicant

AND MAGMA ROCK LIMITED
 Respondent

Member of Authority: Vicki Campbell

Representatives: Abolfazl Moghadam and Greg Bennett for Applicant
 Alan Brown for Respondent

Investigation Meeting: 3 August 2016

Determination: 3 August 2016

DETERMINATION OF THE AUTHORITY

- A. Magma Rock Limited is ordered to pay to Mr Fleming within seven (7) days of the date of this determination, the sum of \$1,126.91 gross in accordance with the Record of Settlement dated 30 November 2015.**
- B. Magma Rock Limited is ordered to pay interest on the total sum of \$1,426.91. Interest is to be calculated from 7 December 2015 at 5% per annum until the date payment is made in full.**
- C. Magma Rock Limited is ordered to pay a penalty of \$1,500 to Mr Fleming within seven (7) days of the date of this determination.**
- D. Costs are reserved.**

Employment relationship problem

[1] Mr Felix Fleming claims Magma Rock Limited (MRL) has failed to comply with a Record of Settlement (ROS) dated 30 November 2015. Mr Fleming seeks a compliance order against MRL, the payment of interest on the outstanding amounts due under the ROS, the imposition of a penalty against MRL and a contribution to his costs.

[2] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has not recorded all the evidence and submissions received from Mr Fleming and MRL but has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter, and specified orders made as a result.

Background

[3] Mr Fleming and MRL attended mediation on 30 November 2015 and entered into a final, binding and enforceable ROS which was signed by a Mediator employed by the Ministry of Business, Innovation and Employment on 30 November 2015.

[4] The relevant terms of the ROS were:

- a) Payments to Mr Fleming of:
 - i. \$1,426.91 within 7 days of the date of the ROS; and
 - ii. \$1,500.00 on or before 20 January 2016.

- b) Payment of costs of \$2,000.00 plus GST on receipt of a GST invoice as follows:
 - i. \$1,000.00 plus GST to be paid within 7 days of the date of the ROS;
and
 - ii. The balance to be paid on or before 20 January 2016.

- c) Provision of a certificate of service for Mr Fleming.

[5] Mr Fleming claims the money payable under the ROS that was required to be paid by 7 December 2015 was not paid despite requests for payment to be made. Mr Fleming lodged his application for compliance and penalties on 14 December 2015.

[6] Mr Alan Brown, Managing Director, has acknowledged and accepted MRL's obligations under the ROS.

Issues

[7] The issues for determination are whether:

- a) A compliance order should be made;
- b) Interest on the unpaid sums should be ordered;
- c) A penalty should be imposed; and
- d) Costs should be awarded.

Compliance order

[8] The Authority has the power to order compliance with any provision of any agreed terms of settlement that are enforceable by the parties under section 149(3) of the Act.¹ The wording of the act contemplates that compliance can only be ordered after the non-observance of the agreed terms.²

[9] This application was lodged in the Authority on 14 December 2015. At the time of lodgement the 20 January 2015 payment was not due or payable and there was no breach in respect of that amount at that time.

[10] In a Notice of Direction dated 9 March 2016 I noted the issues with respect to the claim for compliance with respect to future breaches and invited Mr Fleming to lodge and serve an amended statement of problem. Mr Fleming has chosen not to do so.

[11] Mr Brown told me that after this application was lodged in the Authority, on 12 May 2016 Mr Fleming and MRL entered into a variation to the ROS whereby MRL would pay the outstanding payments under the ROS by instalment. In consideration for that agreement Mr Fleming agreed to withdraw these proceedings. I am satisfied that while the parties were in discussion about the possibility of a payment schedule there was no concluded agreement between the parties.

¹ Employment Relations Act 2000 sections 137(1)(a)(iii) and 151(1)(a).

² Above n 1 at section 137(1).

[12] Mr Brown says that the company remains prepared to undertake its obligations under the variation to the ROS. However, that agreement is outside the ambit of the Authority. Firstly, it is not a section 149 agreement and is not a matter that is currently properly before the Authority.

[13] The only matter that is properly before the Authority is the payment due to be paid to Mr Fleming on 7 December 2015. Mr Fleming accepted that he received a part payment of the outstanding amount on 2 August 2016 (the day before the investigation meeting). The amount paid to him was \$247.40 being \$300.00 gross.

[14] Mr Brown has not provided any evidence to support his contention that MRL is not in a financial position to pay to Mr Fleming the sum of \$1,126.91 (\$1,426.91 - \$300.00).

[15] Magma Rock Limited is ordered to pay to Mr Fleming within seven (7) days of the date of this determination, the outstanding amount of \$1,126.91 in accordance with the Record of Settlement dated 30 November 2015.

Interest

[16] The Authority has the power to award interest under clause 11 of the Second Schedule of the Act at the rate prescribed by s 87(3) of the Judicature Act 1908, which is currently 5% per annum.³

[17] There were no legal grounds for payment under the ROS not to be paid. The money should have been paid to Mr Fleming who was entitled to the use of it from 7 December 2015.

[18] I consider it reasonable and fair that Mr Fleming is paid interest on the amount payable under the settlement agreement. Because Mr Fleming has not had the use of the whole of the amount due on 7 December 2015 Magma Rock Limited is ordered to pay interest on the total sum of \$1,426.91. Interest is to be calculated from 7 December 2015 at 5% per annum until the date payment is made in full.

³ Judicature (Prescribed Rate of Interest) Order 2011.

Penalty

[19] Mr Fleming seeks the imposition of penalties against MRL for its breach of the ROS pursuant to section 149(4) of the Act. The maximum penalty the Authority can impose on a company is \$20,000.⁴ The imposition of a penalty under section 149(4) of the Act is at the discretion of the Authority.

[20] It is generally accepted that a penalty should be imposed for the purpose of punishment and deterrence. MRL entered into an agreement to pay Mr Fleming \$1,426.91 by 7 December 2015. MRL has failed to meet its obligations.

[21] Mr Brown told the Authority that after the agreement was entered into the MRL's financial position changed. Mr Brown has provided no supporting evidence of his statement regarding the financial position of the company. In its statement in reply MRL says that there was little work done prior to Christmas 2015 and this was exacerbated as a result of the close down from the end of December until mid-January 2016 as there were no fees generated during this time.

[22] When the terms of the ROS were entered into MRL knew it was facing a close down period during which time it would not generate any income but would continue to incur the usual costs associated with maintaining an office. That this event occurred does not excuse MRL from making the payment required under the ROS.

[23] It is important that the Authority continue to send strong messages to parties entering into Records of Settlement, that failure to adhere to them will not be tolerated. Parties who breach Records of Settlement can expect to face financial consequences for their breaches.

[24] The breach was for payment to Mr Fleming personally in settlement of a personal grievance raised by him. He has been disadvantaged by not receiving the payment and he has been deprived of his money.

[25] Taking all the factors into account including the level of the breach I consider an appropriate penalty to be \$1,500. Pursuant to section 136(2) the whole of the penalty is to be paid to Mr Fleming.

⁴ The Employment Relations Act 2000 section 135(2).

[26] Magma Rock Limited is ordered to pay a penalty of \$1,500 to Mr Fleming within seven (7) days of the date of this determination.

Costs

[27] Costs are reserved. The parties are invited to resolve the matter. If they are unable to do so Mr Fleming shall have 28 days from the date of this determination in which to file and serve a memorandum on the matter. MRL shall have a further 14 days in which to file and serve a memorandum in reply. All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

[28] The parties could expect the Authority to determine costs, if asked to do so, on its usual 'daily tariff' basis unless particular circumstances or factors require an adjustment upwards or downwards.

Vicki Campbell
Member of the Employment Relations Authority