

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

CA 72/10
5289493

BETWEEN RICHARD FOGDEN
 Applicant

AND DRAINS AND
 DEVELOPMENTS LIMITED
 Respondent

Member of Authority: Philip Cheyne

Representatives: Jonny Sanders, Advocate for Applicant
 Peter Sutherland, Advocate for Respondent

Investigation Meeting: 18 March 2010

Determination: 19 March 2010

DETERMINATION OF THE AUTHORITY

[1] Richard Fogden and Drains and Developments Limited entered into a record of settlement pursuant to s149 of the Employment Relations Act 2000 on 5 November 2009. It required Mr Fogden to return some items to the company and the company to pay compensation by 12 November 2009 and pay holiday pay by the same date. This is Mr Fogden's application for various remedies to enforce the record of settlement.

[2] A claim sought in a memorandum lodged and served on Mr Fogden's behalf but not mentioned in the statement of problem is the imposition of a penalty on the company for a failure to provide time and wages records in response to a request first made on 8 May 2009. That matter is caught by the full and final nature of the settlement and can not be pursued in the Authority even if it had been properly raised in the statement of problem.

[3] When the problem was lodged in the Authority only half of the compensation due on 12 November 2009 had been paid but the remainder was paid before the investigation meeting. I am asked to order interest on the delayed payment.

However, that money having been paid, I am not dealing with an action for the recovery of money so the power to award interest does not arise: see clause 11 of the 2nd schedule to the Employment Relations Act 2000.

[4] A term of the settlement was that all holiday pay must be paid. The company paid holiday pay of \$374.25 to Mr Fogden on 12 November 2009. The present dispute is about quantum. Mr Sutherland gave me calculations of holiday pay based on \$11,731.28 gross earning between January and March 2009, so holiday pay of \$938.55 gross less tax of \$207.47 gives a net of \$731.08 holiday pay from which was deducted a sum for two days pay and a further sum for a debt Mr Sutherland says that Mr Fogden owed to the company. I asked Mr Sutherland if these deductions were caught by the full and final nature of the settlement just as the penalty claim mentioned above. He agreed that was so. I also accept Mr Fogden's evidence that he did not take any annual leave in advance during the brief period of his employment with the company. The company was not entitled to make any deduction from holiday pay.

[5] There is still a disagreement about the gross earnings. The company's calculations seem to have left out the final month's earnings. Mr Fogden's hand written payslips matched against his bank statements show that he received gross \$17,313.00 from January to April 2009. That includes an estimate of the gross in two pay periods but I am satisfied with the accuracy of the estimate. The holiday pay due on \$17,313.00 is \$1,385.04. The company must pay the balance not paid from its calculations (\$356.83 net) and difference between the two calculations (\$446.49 less tax).

[6] There is a claim for a penalty pursuant to s.149(4) of the Act for the company's breach of the record of settlement by not paying all the holiday pay and by the delay in paying the other money. That delay was about 3 weeks for half the payment and about 10 weeks for the other half. Mr Fogden says and I accept that the delay caused him financial difficulties and frustration. He says that the apparent certainty of an agreed payment at the agreed time was an important part of his decision to agree to the settlement. Certainty is a critical ingredient in every mediated settlement.

[7] Mr Sutherland does not dispute that the payment was delayed. When I asked him why he told me that the materials returned by Mrs Fogden as part of the

settlement agreement were not the same materials that had been taken and were of lesser value to the tune of about \$490.00. He also complained about some damage to a client's property he thinks Mr Fogden caused during the employment but which he did not find out about until after the settlement. Mr Sutherland accepted that he had never contacted Mr Fogden's representative about these matters nor responded to the representative's communications about compliance with the terms of settlement. The company did not even lodge a statement in reply despite having been served with the statement of problem and being contacted by a support officer about that failure. The initiation of the proceedings was sufficient to prod the company into paying the balance of the compensation but not enough to get it to reconsider its position about the holiday pay.

[8] Mr & Mrs Fogden's evidence is that the materials that were returned were identical in quality to those that he had taken with permission and on the basis that he would be invoiced.

[9] There are two aspects to the company's breach of the record of settlement. To an extent the breach arising from non payment of holiday pay appears to have been inadvertent or careless in that there was a miscalculation of the gross earnings so a miscalculation of the holiday pay due. For present purposes the blameworthy part of that is the failure to explain the calculations and engage in trying to resolve the difference. Provided the default is remedied promptly now I do not intend to deal with that default by way of a penalty.

[10] The second aspect is more fundamental. The record of settlement was an opportunity for these parties to put behind them their dispute about their employment relationship problems. Mr Sutherland did not do so. Instead, he deliberately delayed paying the compensation, paid it in two tranches rather one and withheld part of the holiday pay against issues that had been fully and finally settled. If Mr Sutherland was not satisfied with the material returned by Mrs Fogden he should have contacted Mr Fogden's representative and/or the mediator to discuss that with a view to resolving the disagreement rather than not communicating and breaching the record of settlement. That conduct by Mr Sutherland on behalf of the company merits condemnation by the imposition of a penalty.

[11] There is also a public interest in punishing wilful non-compliance with settlements. Mediation is intended to be the primary problem solving mechanism

under the Act. Parties must have confidence in the enforceability of mutually agreed settlements if mediation is to work.

[12] For these reasons, I impose a penalty of \$1,500.00.

Orders

[13] Pursuant to s.137 of the Employment Relations Act 2000 the respondent is to comply with the record of settlement by paying to Mr Fodgen holiday pay of \$356.83 (net) and a further \$446.49 (gross) within 10 days of service on it of this order.

[14] The respondent must pay interest on these two sums at the rate of 4.5% per annum starting on 12 November 2009 until paid in full.

[15] I will adjourn the claim for a penalty for non compliance with this part of the record of settlement for 10 days to allow the respondent the opportunity to comply with its obligations. If the respondent does not comply I will consider whether there should be a further penalty imposed.

[16] Pursuant to s.149(4) of the Employment Relations Act 2000 I impose a penalty of \$1,500.00 on the respondent for its breach of the record of settlement being the delay in payment of the compensation and the deductions from Mr Fogden's holiday pay.

[17] I am asked to order that the penalty be paid to Mr Fogden. It is appropriate to require part of the penalty to be paid to Mr Fogden to reflect the effects on him of the wilful non-compliance but the other part should be paid to the Crown. The respondent is to pay half of the penalty to Mr Fogden and the other half to the Crown.

[18] I am asked to order full costs against the respondent. I will not go that far since part of the application was without merit. The respondent is to pay Mr Fodgen the sum of \$1,500.00 in legal costs and a further \$70.00 to reimburse him for the lodgement fee.

Philip Cheyne
Member of the Employment Relations Authority

