

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2018] NZERA Wellington 117
3031292

BETWEEN CHLOE MAY FOSTER
Applicant

AND ROGER MAUGHAN
Respondent

Member of Authority: Michele Ryan

Representatives: The applicant in person
The respondent in person

Investigation Meeting: 12 December 2018 at Palmerston North

Determination: 19 December 2018

**DETERMINATION OF
THE EMPLOYMENT RELATIONS AUTHORITY**

Employment Relationship Problem

[1] The applicant, Ms Chloe Foster, claims the respondent, Mr Roger Maughan, is in breach of a Record of Settlement signed by each of them at the conclusion of a mediator assisted meeting on 6 June 2018.¹

[2] Ms Foster asks the Authority to issue an order to have Mr Maughan comply with clauses 3 and 4 of the Record of Settlement. She also seeks a penalty for the breaches, and payment of the filing fee associated with this application.

[3] Although the Record of Settlement contains a confidentiality provision it is necessary to set out each of the clauses at issue to determine whether enforcement action is required, as follows:

¹ Pursuant to s 149 of the Employment Relations Act 2000.

3. The Respondent will calculate all leave owing to the Applicant and pay the balance due to the Applicant by 31st August 2018.
4. The parties agree that the amount owing for notice in lieu of weeks salary of \$300 (net) and the Respondent will pay the Applicant this amount by 31st July 2018.

Should an order for compliance be made?

[4] Mr Maughan's acceptance that he is in default of terms agreed at cl. 3 or cl. 4 of the Record of Settlement leads me to conclude that a formal order for compliance is necessary.

Should the order for compliance allow for instalment payments?

[5] Where the compliance order relates in whole or in part to the payment to an employee of a sum of money, s 138(4A) of the Employment Relations Act 2000 (the Act) allows the Authority to order payment by instalments "*but only if the financial position of the employer requires it*".

[6] On the day of the Authority's investigation meeting Mr Maughan pointed to the contents of his banking application held on his smart phone to assert impecuniosity. That information suggests Mr Maughan's financial circumstances are strained. Despite that evidence I am not persuaded that it is appropriate to order payment by instalments for the following reasons:

- (i) The sum owed (\$618.18 plus PAYE) is relatively modest.
- (ii) The financial information provided to the Authority was insufficient to establish the debt could not be repaid without an order for payment by instalments. For example, no evidence regarding Mr Maughan's assets was furnished, nor whether any of these could be liquidated to meet the obligation.
- (iii) Mr Maughan conceded he was prioritising other financial commitments over that owed to Ms Foster.
- (iv) Mr Maughan reluctantly advised he could pay the debt at \$30 per week. Ms Foster has waited over 3 months for Mr Maughan to honour cl. 3 of the Record of Settlement and over 4 months in respect of cl 4. I find it unreasonable that she should

have to wait a further 6 months (or thereabouts) for wages to be fully paid, particularly where her financial situation is as compromised as Mr Maughan's, if not more so.

- (v) There is evidence the business was scheduled to be open for a day on a cash-only basis within a week of the Authority's investigation meeting, and that the business may be back in operation in 2019.
- (vi) The circumstances which Mr Maughan says have prevented payment of the sums owed at cl. 3 and cl. 4 existed at the time he entered into the Record of Settlement.

Should a penalty be ordered?

[7] Breaches of the Record of Settlement have been established. Section 149(3) provides that a person who breaches an agreed term of settlement (certified by a mediator under s 149) is liable for a penalty. When assessing whether a penalty should be imposed and the quantum of that sanction I have taken into account the statutory considerations at s 133A, together with the methodology established in *Borsboom v Preet PVT Ltd.*²

[8] Relevant to this matter, there were two breaches of the Record of Settlement. A penalty for a single breach by an individual is \$10,000.³ The total maximum penalty in this matter is therefore \$20,000.

[9] Mr Maughan's failure to meet his obligation under a mediator certified Record of Settlement undermines the confidence employers and employees are entitled to have in the effectiveness of the dispute resolution mechanisms promoted in the Act. It follows that the breaches are serious.

[10] Having heard from Mr Maughan as to his personal circumstances I consider the failure can be characterised as negligent rather than intentional. Nevertheless the impact of the breaches has not been insignificant for Ms Foster. She had reasonably anticipated she would receive the monies agreed, at the time they agreed, to pay for (at least in part) necessities needed as a new mother.

² [2016] NZEmpC 143

³ Employment Relations Act 2000 s 135(2)(a)

[11] Mr Maughan's limited financial situation is an issue of which I must be mindful.

[12] Having considered the aggravating and mitigating factors, as well the requirement for proportionality when imposing a sanction, and further that it would be counterproductive to compliance if an ordered penalty is too high, a penalty of \$300 is appropriate. The penalty is to be paid to Ms Foster.⁴

Orders

[13] Pursuant to s 151(2) and s 137 of the Act Roger Maughan is ordered to comply with the s 149 Record of Settlement and, no later than 28 days after the date of this determination pay Chloe Foster;

- (i) pay \$618.18 plus PAYE in accordance with cl 3 and cl 4; and
- (ii) a penalty sum of \$300; and
- (iii) \$71.56 for the filing fee associated with this application.

Comment

[14] Mr Maughan needs to aware that should he fail to comply with the orders set out at [13] Ms Foster is entitled to pursue the breach in the Employment Court or the District Court. The Employment Court has powers to impose a fine not exceeding \$40,000, order property to be sequestered, or sentence imprisonment not exceeding 3 months.⁵ Alternatively, a certificate of determination may be obtained from the Authority and enforcement obtained through the mechanisms and remedies available under the District Courts Act 1946 and District Courts Rules 2014.

Costs

[15] Neither party was represented. Costs are not at issue.

Michele Ryan
Member of the Employment Relations Authority

⁴ Above n 3 at s 136(2)

⁵ Above n 3 at ss 139 and 140(6)