

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**[2013] NZERA Auckland 491
5429033**

BETWEEN PETER HILL
Applicant

AND TECK PROPERTIES LIMITED
Respondent

Member of Authority: Eleanor Robinson

Representatives: Jessica Ruddlesden, Counsel for Applicant
Erana Shattock, Advocate for Respondent

Investigation Meeting: On the Papers

Determination: 29 October 2013

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] On 4 July 2013 a Record of Settlement (the Settlement) was signed under s 149 of the Employment Relations Act 2000 (the Act). The parties to the Settlement were the Applicant, Mr Peter Hill, and the Respondent, Teck Properties Limited (Teck). The Settlement was signed by Mr Hill and Ms Erana Shattock, a Director of Teck. The Record was also signed by a Mediator employed by the Ministry of Business, Innovation and Employment.

[2] The issue which had been brought before the Authority by Mr Hill is that Teck has not complied fully with clauses 6 and 7 of the Settlement, which state:

6. The employee shall receive the sum of \$4,000.00 pursuant to s 123(1)(c)(i) of the Employment Relations Act 2000 and to be received in his nominated bank account by no later than 31 July 2013.

7. For the purposes of enforcement of this agreement, the parties agree that

(i) Interest shall be paid on any amount owed after 31 July 2013;

And

ii) Interest shall be calculated at the rate of 7.5% per annum on the outstanding amount.

[3] The Settlement was certified under s 149 of the Act by the Mediator. That certification confirmed that before making the agreement, the parties were advised and accepted they understood the agreed terms:

- a. were final, binding and enforceable; and
- b. could not be cancelled; and
- c. could not be brought before the Authority or the court for review or appeal, except for the purposes of enforcing those terms.

[4] Ms Ruddlesden, on behalf of Mr Hill, stated that Teck had made three payments of \$200.00 to Mr Hill in monthly increments, the last payment being made on 2 October 2013. The amount outstanding is currently \$3,400.00.

[5] Ms Ruddlesden stated that no payment arrangement had been entered into, or agreed to, by Mr Hill.

[6] Ms Shattock, on behalf of Teck, claims that Teck had verbally agreed to the Settlement on the basis that payment after 1 July 2013 would incur penalty interest after that date. Ms Shattock states that Teck is not financially capable of paying the remainder of the monies due as set out in clause 6 of the Settlement in one lump sum payment, but agrees to make payment as soon as funds are available.

[7] Ms Shattock states that Teck will continue to make payments at the rate of \$200.00 minimum per month until the residue amount of the payment due under clause 6 can be paid in full, which is anticipated to be on 24 December 2013.

[8] Ms Ruddlesden claims that Teck was aware of its obligations under the Settlement at the time of signing it, and has the ability to meet its obligations thereunder.

[9] Further Ms Ruddlesden states that Teck had requested a payment plan be entered into after the due date had passed, and Mr Hill had not agreed to that request, the interest clause having been included in the Settlement simply as a protective measure.

Determination

[10] In the circumstances of this case, I accept that Teck may have been under the misapprehension that the inclusion of an interest clause may have indicated some acknowledgment by Mr Hill that payment might not be made in a timely manner.

[11] However it would have been open to the parties to have made provision for payment by instalments. Such a provision is not included in the Settlement. Consequently I find that clause 6 of the Settlement is binding on Teck.

[12] From the evidence available to the Authority, I am satisfied that Teck has breached clause 6 of the Settlement. Although the Settlement provides for an interest payment at clause 7, I do not find that this overrides and supersedes the agreement in clause 6 that Mr Hill was to receive payment of the sum of \$4,000.00 into his nominated bank account no later than 31 July 2013.

[13] I determine that Teck has failed to comply with clause 6 of the Settlement.

[14] In order to effect compliance with clauses 6 and 7 of the Settlement, I therefore order Teck to pay Mr Hill, no later than 14 days from the date of this determination, the outstanding sum of \$3,400.00, plus interest on that sum at the rate of 7.5% interest.

Penalty

[15] The Act includes provisions encouraging parties to resolve their employment relationship issues between themselves. The Settlement represents such a resolution and therefore the failure by one party to honour the terms of any resulting agreement is a serious matter.

[16] Public confidence in s 149 settlements will be undermined if it is perceived that parties are permitted to breach these settlements with impunity. It is important that the parties can have confidence in the enforceability of the terms of agreed settlements.

[17] It is in the public interest to impose a penalty which not only punishes Teck for its wilful breach of the agreed Settlement, but which will additionally act a deterrent to others.

[18] I determine that a penalty of \$1,000.00 is appropriate in the circumstances.

Payment of the penalty to Mr Hill

[19] In accordance with the observation of the Employment Court in *Xu v McIntosh*¹, whether a penalty is paid to the victim of the breach, should be decided with respect to the degree of harm suffered as a result of the breach.

[20] Whilst reference has been made in submissions to Mr Hill suffering stress as a result of the breach of clause 6 of the Settlement, no further details have been provided as to the effect of the stress on him.

[21] However I note that while some payments have been made by Teck to Mr Hill, Mr Hill was entitled in accordance with the Settlement to payment in full, and I also acknowledge there has been some delay on the part of Teck in addressing the matter before the Authority, which may have resulted in Mr Hill suffering some stress.

[22] In the circumstances I consider it appropriate that a proportion of the penalties is paid to Mr Hill. Teck is ordered to pay Mr Hill \$500.00 of the \$1,000.00 penalty, the remaining \$500.00 to be paid to the Crown.

[23] For the information of Teck, failure to comply with an order such as this one made by the Authority under s 137 of the Act may provide a basis for an application to be made by Mr Hill to the Employment Court for enforcement of the order. Under s140 of the Act, where the Court is satisfied that any person has failed to comply with a compliance order made under s137, the Court may order remedies, including a fine not exceeding \$40,000 and/or the seizure of property and for the proceeds of sale to be distributed to the person enforcing the Authority's order.

Costs

[24] Ms Ruddlesden has applied for costs on behalf of Mr Hill.

[11] Costs are at the discretion of the Authority, as observed by the current Chief Judge Colgan in *NZ Automobile Association Inc v McKay*².

[12] The principles applicable to awards of costs in the Authority are well established. It is a principle set out in *PBO Limited (formerly Rush Security Ltd) v Da Cruz*³ that costs are

¹ [2004] 2 ERNZ 448

² [1996] 2 ERNZ 622

³ [2005] 1 ERNZ 808

modest. Costs are also reasonable as observed by the Court of Appeal in *Victoria University of Wellington v Alton-Lee*⁴ at para [48] “As to quantification, the principle is one of reasonable contribution to costs actually and reasonably incurred.

[13] Although an investigation meeting was not held, Mr Hill has submitted that he has incurred costs in the sum of \$1,031.56 consisting of \$920.00 in legal fees, disbursements of \$40.00, and the Authority filing fee of \$71.56.

[14] Based on the Authority’s usual notional tariff based approach⁵, and adopting as a starting point the notional daily tariff of \$3,500.00, I find it reasonable taking into consideration the time spent by the Authority on this matter given its ‘on the papers’ nature, to award the sum of \$900.00 as a contribution towards Mr Hill’s actual costs.

[15] Mr Hill has claimed disbursements of \$40.00 but has not provided evidence of what constitutes these disbursements. Without evidence of actual disbursements, I am unable to assess whether such costs have been properly incurred, and consequently cannot award an amount in respect of disbursements.

[25] I order that Mr Hill be reimbursed for the Authority’s filing fee by Teck in the sum of \$71.56.

Eleanor Robinson
Member of the Employment Relations Authority

⁴ [2001] ERNZ 305

⁵ *Cliff v Air New Zealand Ltd* (AC47A/06, (unreported) per Judge Shaw at para [10]