

**Attention is drawn to the
order prohibiting publication
of certain information in this
determination**

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI
TE WHANGANUI-Ā-TARA ROHE**

[2023] NZERA 163
3183779

BETWEEN IEN
 Applicant

AND ACF
 Respondent

Member of Authority: Rowan Anderson

Representatives: Alastair Hall, counsel for the Applicant
 Prakash Mani, counsel for the Respondent

Investigation Meeting: 28 February 2023 at Wellington

Submissions received: 3 March 2023 and 8 March 2023 from the Applicant
 3 March 2023 and 20 March 2023 from the Respondent

Determination: 4 April 2023

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] IEN seeks a compliance order relating to an alleged breaches of a record of settlement agreed with ACF as to an employment relationship problem resolved in accordance with s 149 of the Employment Relations Act 2000 (the Act).

[2] IEN claims that ACF breached the terms of settlement by failing to pay sums due under that agreement and also by failing to provide a required certificate of service. In addition to seeking a compliance order in terms of ss 137 and 138 of the Act, IEN claims that penalties should be imposed upon ACF in terms of s 149(4) of the Act.

[3] IEN also seeks permanent non-publication orders in relation to evidence given, pleadings filed, names of the parties and witnesses and identifying details.

Non-publication order

[4] At the investigation meeting on 28 February 2023, after hearing submissions from the parties, I made an interim non-publication order pursuant to clause 10 of schedule 2 of the Act prohibiting the publication of the evidence given, pleadings filed, names of the parties and witnesses and identifying details. I invited the parties to make submissions as to any permanent non-publication orders in line with timetable directions made for the lodgement of final submissions.

[5] IEN seeks permanent non-publication orders reflecting the orders that were made on an interim basis. Whilst accepting the principle of open justice, IEN submits that a departure from the principle is warranted in this case and that it is in the interests of justice to do so. In support of those submissions, IEN referred to their role a senior manager employed elsewhere, the record of settlement having been reached on a confidential basis, their attempts to resolve matters on a confidential basis with ACF, and what are said to be breaches of the settlement by ACF.

[6] In addition to those reasons put forward by IEN in their written submissions, I also consider relevant submissions made by IEN at the investigation meeting. Those submissions included that IEN was not at fault and that the proceedings seeking compliance were necessary due to AFC's actions. Further, IEN submitted that there were significant unsubstantiated claims made in the evidence that had no foundation at all, including of alleged theft, and that publication of those details or identification of the parties or witnesses in a public forum would be a perverse result.

[7] ACF opposes the non-publication orders sought but recorded in its written submissions that it agreed to interim non-publication orders. ACF did not provide any detailed written submissions as to the proposed permanent non-publication orders other than noting it opposes them.

[8] I am satisfied that the making of permanent non-publication orders is appropriate. I consider there is a real potential risk of harm to IEN's reputation if he were to be publicly associated with the untested allegations made by ACF. I do not

consider there to be any significant wider public interest in the publication of those matters.

[9] The pleadings made and evidence given by ACF and their witness in this matter include allegations I do not consider relevant to the Authority's investigation and that are likely to be the subject of separate proceedings. It is appropriate in my view that those matters be dealt with in the context of those separate proceedings without the significant risk of IEN's reputation being tarnished by the publication of irrelevant or unproven allegations made in these proceedings.

[10] I consider the making of non-publication orders to be in the interests of justice and the making of such orders, only to the extent necessary, to otherwise be appropriate in this particular case.

[11] I order a prohibition on the publication of the names of the parties and witnesses and any identifying details of the parties and witnesses in relation to these proceedings. This order is made pursuant to clause 10 of schedule 2 of the Act and is made on a permanent basis.

[12] A random generator has been used and the parties are referred to in this determination as IEN and ACF, those are randomly generated names not resembling the names of the actual parties.

The Authority's investigation

[13] The Authority held an initial case management conference (CMC) on 7 October 2022. It was made clear at the CMC that any claims made by ACF seeking compliance or remedies for other alleged breaches would need to be the subject of a separate statement of problem. At that CMC, counsel for ACF advised that ACF intended to lodge a statement of problem with the Authority as to its own claims for compliance orders and alleged breaches the following day, 8 October 2022.

[14] I advised at the CMC that timetable directions would be put in place for the application lodged by IEN and that any application made by ACF, including as to the proceedings being joined, would be dealt with in the ordinary course once received. As such, I issued timetable directions and an investigation meeting was scheduled for 29 November 2022.

[15] Written directions were issued following the CMC and the following issues were identified as matters that required investigation and determination by the Authority:

- (a) Has ACF breached the section 149 record of settlement (Settlement Agreement)?
- (b) If ACF has breached the Settlement Agreement, should a compliance order be made in terms of ss 137 and 138 of the Act?
- (c) If ACF has breached the Settlement Agreement, should any penalty be imposed in terms of s 149(4) of the Act?
- (d) Should either party contribute to the costs of representation of the other party?

[16] An urgent CMC was held on 28 November 2022 following advice from counsel for ACF that the Director of ACF, being their only witness, would be unable to attend the investigation meeting on 29 November 2022 and including a request for an adjournment.

[17] Having regard to the information provided by ACF, I advised, as also recorded in a Minute issued on 28 November 2022, that I was not satisfied that reasonable grounds existed for the granting of an adjournment, but that the investigation meeting would be rescheduled in order to ensure the witness would be present and noting that the issue was one that might be dealt with in the context of costs.

[18] The investigation meeting was rescheduled on two further occasions at late notice having regard to exceptional circumstances concerning the availability of ACF's counsel.

[19] On 20 February 2023 IEN lodged an amended statement of problem dealing with two amendments, those being the addition of claims as to indemnity costs and interest on the claimed unpaid settlement sums. After reviewing the changes in the amended document, I directed that any amended statement in reply was to be lodged by ACF by 5.00pm 24 February 2023, that being an abridged timeframe from the usual 14 days.

[20] Notwithstanding the direction including the abridged timeframe ACF did not lodge an amended statement in reply, nor did it raise any objection to the direction issued until the commencement of the investigation meeting on 28 February 2023.

[21] The investigation meeting was held on 28 February 2023. The commencement time was ultimately delayed on account of unforeseeable exceptional circumstances delaying the arrival of IEN.

[22] At the commencement of the investigation meeting, counsel for ACF objected to ACF not being provided 14 days to lodge an amended statement in reply and sought that the investigation meeting be adjourned.

[23] I declined to adjourn the investigation meeting further, whilst noting that the proceedings were delayed by approximately three hours on account of IEN's delayed arrival. In declining the application made by ACF I provided reasons, including the following:

- (a) That despite the direction issued on 20 February 2023, ACF had not raised any issue as to inadequate time for its statement in reply until the commencement of the investigation meeting;
- (b) That, having regard to the minor nature of the amended changes in the statement of problem, that I did not consider IEN was obligated to lodge an amended statement of problem, and that even if that were the case, any relevant amendment required would only have been relevant to the claim of interest on unpaid sums;
- (c) Notwithstanding the direction of 20 February 2023, eight full days had passed since receipt of the amended statement of problem and ACF could have sought leave to respond if it had intended to; and
- (d) I did not consider there was any significant issue of prejudice given the minor nature of the amendments and noting the time that had been provided.

[24] Notwithstanding the above and given ACF asserted that prejudice arose from an inability to obtain instructions and draft a response, I provided counsel for ACF the opportunity to take instructions in the period prior to commencement of the evidence at the investigation meeting, that being approximately three hours. Counsel for ACF was invited to provide any response orally at the investigation meeting notwithstanding non-compliance with the direction of 20 February 2023. The parties were also invited to

address the issue as to interest in submissions. I further advised that issues as to costs would be reserved.

[25] Counsel for ACF raised suggestions of bias on the part of the Authority on at least two occasions. I directed, on two separate occasions, that any relevant application as to perceived bias, or assertions of bias, be made in written form. No written application was received.

[26] For the Authority's investigation written witness statements were lodged from IEN and the Director of ACF. Both witnesses answered questions under oath or affirmation.

[27] During the investigation I raised two concerns regarding the questioning of IEN by counsel. The first of those, as to alleged theft based on a police report made by ACF and the potential interference with the right against self-incrimination, was resolved by counsel for IEN confirming that the police investigation had concluded and advising that IEN would not assert the right in those circumstances.

[28] The second concern I raised related to the relevance of questions as to the alleged theft or retention of company property given those issues did not arise from consideration of the record of settlement. That concern was raised on the basis that ACF had raised a number of allegations that they advised would be the subject of its own claims of breach and for compliance orders. I advised that any questions would need to be relevant to the proceedings that were the subject of the investigation meeting.

[29] An issue arose during the questioning of ACF's Director by counsel for IEN. Counsel for ACF objected to questioning as to issues relating to property said not to have been returned by IEN. I advised that I did not consider the questioning by IEN's counsel to lack relevance on the basis that whilst I had earlier indicated questioning on the subject matter generally may not be relevant, that the questions were directed at the motivations of ACF in withholding payment of the settlement sum and were therefore relevant to the issue of penalties.

[30] At the conclusion of the evidence, I reserved my determination and timetable directions were made for the lodgement and exchange of written submissions. Both parties confirmed at the investigation meeting that they did not wish to make oral submissions in addition to the written submissions.

[31] ACF did not comply with the timetable for the lodgement and exchange of written reply submissions. Directions were ultimately varied notwithstanding that non-compliance and reply submissions were received from ACF.

[32] In reply submissions, ACF referred to a separate application lodged by ACF submitting that the applications should be joined "...to ensure that the interest of justice is protected."

[33] As a matter of the Authority's procedure, I decline to delay the issuing of my determination in this matter on the basis sought by ACF. There is no further information being sought in relation to these proceedings and my determination was reserved. In those circumstances there can be no utility or efficiency in the joining of the proceedings.

[34] I consider delaying my determination would be inconsistent with the interests of justice, particularly having regard to the time at which the separate proceedings were lodged by ACF, that being the day of the investigation meeting convened for this matter and approximately five months after counsel for ACF advised that the separate proceedings would be lodged. ACF is responsible for any delay in lodging the separate proceedings.

[35] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received.

ACF breached the section 149 record of settlement

[36] Clause 2 of the record of settlement required ACF to make payment of \$29,500 to IEN within five days of the record of settlement being signed by both parties. ACF breached the record of settlement by failing to make payment of the settlement sum.

[37] Clause 4 of the record of settlement required ACF to provide a positive certificate of service to IEN within 14 days. ACF breached the record of settlement by failing to provide IEN the certificate of service.

[38] ACF accepts that it did not comply with its obligations as required under the record of settlement.¹ I am otherwise satisfied that ACF did not comply with clauses 2 and 4 of the record of settlement, by failing to make payment and by failing to provide the certificate of service respectively.

Should a compliance order be made?

[39] Whilst ACF accepts that it did not pay the settlement sum, it submits that IEN also failed to meet their obligations and that on that basis a compliance order should not be made against ACF.

[40] ACF referred to several matters in submitting that IEN had breached the record of settlement or other purported obligations. Those matters included files said to have been deleted from a laptop prior to its return by IEN, assets said to have been retained by IEN, and a failure to provide passwords associated with the business. Additionally, ACF allege IEN acted in bad faith by returning an old damaged mobile phone rather than the one belonging to AFC.

[41] ACF were advised, as noted elsewhere in this determination, that it would need to make a relevant application to the Authority if it were asserting breach and seeking compliance orders. It failed to do so, at least until the day of the investigation meeting (noting the investigation meeting had already been delayed three times). Those matters are now the subject of separate proceedings, they go to matters which are said to arise out of obligations other than in those in the record of settlement, and I need not deal with them here in terms of any alleged breaches by IEN.

[42] In so far as ACF asserts that IEN's actions should be taken into account as to whether the Authority should make an order for compliance against ACF, I disagree.

[43] If ACF had wanted the record of settlement to deal with the matters it now contests, it could have sought to do so in the record of settlement. It did not do so and its failure to do so should not be visited upon IEN. ACF were required to comply with the record of settlement and any alleged default by IEN does not entitle ACF to breach their obligations.

¹ ACF closing submissions dated 3 March 2023.

[44] In all the circumstances I am satisfied that compliance orders should be made requiring ACF to comply with clauses 2 and 4 of the terms of settlement.

[45] I am also satisfied that IEN are entitled to interest on the settlement sum from 21 July 2022 to the date of payment.

Should a penalty be imposed upon ACF for breach of the record of settlement?

[46] Two breaches of s 149(3) of the Act by ACF have been established. The first relates to non-payment of the settlement sum in accordance with clause 2 of the record of settlement. The second relates to non-provision of the certificate of service required by clause 4 of the record of settlement.

[47] In considering penalties I must have regard to the matters at s 133A of the Act.

[48] The object of the Act includes recognition and the promotion of good faith behaviour and the promotion and effective enforcement of employment standards. The object of the Act supports the imposition of an appropriate penalty in this case.

[49] The breach is significant in its nature having regard to the mechanisms in place in terms of s 149 of the Act. The record of settlement was clear it what it required ACF to do and it failed to comply. The situation has persisted since July 2022 despite very clear communications pointing to the non-compliance and the need for it to be rectified. Failure to comply with s 149 agreements has the potential to seriously undermine public confidence in such agreements and the relevant statutory resolution processes.

[50] I consider the breaches were deliberate and intentional. Despite being on notice that compliance was required, ACF have continued to refuse to comply. In questioning at the investigation meeting, the Director of ACF confirmed that the allegations relating to IEN's retention of company assets was a reason for the non-payment of the settlement sum.

[51] IEN has been denied the benefit of the agreed record of settlement for more than six months. I accept that IEN has been damaged as a result of the breach, including in that he has been denied payment and the certificate of service. IEN has also been required to spend time and energy, with resulting impacts on his family life, dealing with these proceedings which have arisen as a direct result of ACF's breach.

[52] No steps have been taken by ACF in mitigation and there is no evidence that ACF has engaged in other similar conduct. There is no evidence that ACF would be unable to pay any penalty that might be ordered.

[53] I now turn to the application of the four-step consideration of penalties as outlined by the Full Court in *Borsboom (Labour Inspector) v Preet PVT Ltd*². In doing so, I have taken into account the relevant factors detailed above.

Nature and number of breaches (Step 1)

[54] There are two breaches of the Act, both relating to the breach of terms of the record of settlement. The total maximum penalty for each of the two breaches is \$20,000,³ being a total of \$40,000 for both. I consider it appropriate to globalise the breaches with the total effective maximum penalty being reduced to \$20,000.

Assessment of severity of breach (Step 2)

[55] As to Step 2 of the *Preet* test, having weighed the aggravating and mitigating factors, including the seriousness of the breaches, AFC's ongoing failure to comply despite being put on notice multiple times, the absence of reasonable grounds for its non-compliance, ACF's deliberate approach to non-compliance, and the absence of any evidence of similar conduct by ACF, I consider the starting point to be 60%.

[56] I have also taken into account the evidence of ACF as to having provided their counsel with the settlement sum at an early stage in contemplation of payment. There was no valid legal basis on which to withhold payment or the certificate of service. To at least some extent, it appears that the decision to withhold payment was based on legal advice received. Absent those circumstances I would have considered the starting point significantly higher.

[57] On that basis, I find the provisional penalties having considered severity, to be \$12,000.

Financial circumstances of the respondent (Step 3)

[58] In relation to the financial circumstances of ACF, there is no evidence suggesting an inability to pay any penalties ordered. Given the absence of any evidence

² [2016] NZEmpC 143.

³ Employment Relations Act, s 135(2)(b).

as to an inability to pay, no reduction is made as to financial capacity. As such, in terms of Step 3 of the *Preet* test, the provisional penalties remain at \$12,000.

Proportionality of outcome (Step 4)

[59] Applying the proportionality or totality test I consider the following factors relevant:

- (a) Proportionality in terms of the sums withheld by ACF;
- (b) Ensuring that the final penalties are not so substantial as to incentivise non-compliance; and
- (c) Having overall regard to all of the circumstances and considering and the need to specific and general deterrence.

[60] Taking all the above matters into account, ACF is ordered to pay penalties totalling \$7,000.

[61] IEN has been put to significant unnecessary time, stress and expense in having to seek enforcement of matters that should have been resolved some significant time ago. Having considered the circumstances relating to the breaches, I consider it appropriate that 50% of the penalty imposed be payable to IEN.

Orders

[62] To effect compliance with the record of settlement ACF are ordered, by no later than 12 April 2023, to:

- (a) make payment to IEN of the settlement sum of \$29,500;
- (b) make payment to IEN of interest, using the civil debt interest calculator, on the settlement sum calculated from 21 July 2022 to the date of payment; and
- (c) Provide IEN the certificate of service required by clause 4 of the record of settlement.

[63] ACF is ordered to pay, within 28 days, a total of \$7,000 in penalties. \$3,500 is to be paid into the Crown account via the Authority, and \$3,500 to be paid to IEN.

Costs

[64] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[65] If they are not able to do so and an Authority determination on costs is needed IEN may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of the written determination in this matter. From the date of service of that memorandum ACF would then have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

[66] The parties could expect the Authority to determine costs, if asked to do so, on its usual notional daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.⁴

Rowan Anderson
Member of the Employment Relations Authority

⁴ For further information about the factors considered in assessing costs, see www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1.