

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2018] NZERA Auckland 161
3019081

BETWEEN AMIR AGHEL MASJEDI
Applicant

A N D PHOENIX PUBLISHING
LIMITED
Respondent

Member of Authority: T G Tetitaha

Representatives: Applicant in person
No appearance for Respondent

Investigation Meeting: 15 May 2018 at Auckland

Date of Oral Determination: 15 May 2018

**ORAL DETERMINATION OF THE
EMPLOYMENT RELATIONS AUTHORITY**

- A. I order Phoenix Publishing Limited to comply with clauses 2 and 3 of the record of settlement dated 19 July 2017 by payment to Amir Aghel Masjedi of \$4,865.38 within seven days of the date of this Determination by way of direct credit to his bank account.**
- B. I order Phoenix Publishing Limited to pay a penalty \$5,000 to the Crown to be paid into the Ministry of Business Innovation and Employment's bank account within 28 days of this Determination.**
- C. I order Phoenix Publishing Limited to pay a penalty of \$5,000 to be paid to Amir Aghel Masjedi by way of direct credit within 28 days of this Determination.**
- D. I order Phoenix Publishing Limited to pay Amir Masjedi \$71.56 being his filing fee as a contribution to his legal costs within 28 days of this determination.**

Employment Relationship Problem

[1] Amir Masjedi was employed by Phoenix Publishing Limited (PPL). The parties settled an employment relationship dispute by way of a record of settlement agreement dated 19 July 2017 (ROS).

[2] Both parties now allege breaches of the settlement agreement by the other. Both seek compliance orders and only Mr Masjedi seeks penalties.

Non-appearance by Respondent

[3] At the start of the hearing only Mr Masjedi was present with his father, Akbar Masjedi. There is no appearance by the respondent employer, PPL.

[4] I am empowered to continue to hear this matter without the respondent if there is no good cause shown for its absence. No good cause has been shown for its non-attendance at this hearing. Therefore I shall continue to hear evidence and determine this matter today in PPL's absence.

Settlement agreement

[5] Mr Masjedi has filed a copy of the ROS. He alleges breaches of clauses 2 and 3 below:

2. Phoenix Publishing Limited shall pay Amir Aghel Masjedi on or before 18th August 2017, the compensatory sum of \$4,500 in terms of section 123(1)(c)(i) of the Employment Relations Act 2000.
3. Phoenix Publishing Limited shall also pay Amir Aghel Masjedi on or before the 18th August 2017 the annual leave owed to him in the amount of \$365.38 gross. Both these amounts will be paid to the applicant by the way of direct credit.

[6] Mr Masjedi gave evidence today that neither sum has been paid. He seeks compliance orders, penalties for breach of the settlement agreement and to recover his costs in filing this application.

[7] I accept Mr Masjedi's evidence that he has received no payment. The respondent's statement in reply also confirms no payment has been made and under those circumstances Mr Masjedi is entitled to seek compliance orders.

[8] Accordingly I order Phoenix Publishing Limited to comply with clauses 2 and 3 of the record of settlement dated 19 July 2017 by payment to Amir Aghel Masjedi of \$4,865.38 within seven days of the date of this Determination by way of direct credit to his bank account.

Counterclaim

[9] PPL has withheld payment under clauses 2 and 3 above because it alleges in the statement in reply that Mr Masjedi breached clause 5 of the ROS below:

5. Amir Aghel Masjedi also agrees to provide whatever information, including passwords etc, may be necessary to enable Phoenix Publishing Limited ready access to the website and magazine.

[10] PPL alleges that there has been a breach of clause 5 of the settlement agreement because it does not have “ready access” to the website. Mr Masjedi has attested today that he has provided the passwords and the other information they required for access to the website. PPL appears to be alleging that this is not enough because Mr Masjedi was instructed to develop the website in WordPress but did not. This is alleged to give rise to a breach of clause 5.

[11] I understand WordPress is free online software for businesses to develop a blog or website. There is no reference in the ROS to Mr Masjedi having to ensure the respondent had access to a website using WordPress software. Clause 5 only refers to Mr Masjedi providing “*all information*” including passwords to enable ready access to the website and magazine. I accept Mr Masjedi’s evidence that he has done so and PPL should have access to its current website irrespective of the software running it. He was not required to produce access to a website using WordPress in the ROS.

[12] Mr Masjedi has attested to the fact that PPL had not constructed any website using WordPress at the time his employment was terminated. This was scheduled to be done at a later date. Mr Masjedi states that he never worked on a website using WordPress because this work was not been scheduled to occur until after the date of his termination. He also states that when he was employed, he was to set up a shopping portal for PPL that could not be constructed using WordPress.

[13] I accept Mr Masjedi has not breached clause 5. PPL’s counterclaim is dismissed.

Penalties

[14] Mr Masjedi seeks penalties. Given the respondent has failed to pay Mr Masjedi the two disputed sums within the timeframe set out in the record of settlement at clauses 2 and 3, there are two breaches of the ROS.

[15] A person who breaches a ROS is liable to a penalty under s.149(3) of the Employment Relations Act 2000 (the Act). There have been two proven breaches of the ROS by PPL. Section 133A of the Act sets out the matters that I am required to have regard to in respect of quantum of any penalty:

133A Matters Authority and court to have regard to in determining amount of penalty

In determining an appropriate penalty for a breach referred to in section 133, the Authority or court (as the case may be) must have regard to all relevant matters, including—

- (a) the object stated in section 3; and
- (b) the nature and extent of the breach or involvement in the breach; and
- (c) whether the breach was intentional, inadvertent, or negligent; and
- (d) the nature and extent of any loss or damage suffered by any person, or gains made or losses avoided by the person in breach or the person involved in the breach, because of the breach or involvement in the breach; and
- (e) whether the person in breach or the person involved in the breach has paid an amount of compensation, reparation, or restitution, or has taken other steps to avoid or mitigate any actual or potential adverse effects of the breach; and
- (f) the circumstances in which the breach, or involvement in the breach, took place, including the vulnerability of the employee; and
- (g) whether the person in breach or the person involved in the breach has previously been found by the Authority or the court in proceedings under this Act, or any other enactment, to have engaged in any similar conduct.

[16] I also take into account the need for deterrence and consistency with other Authority and Court decisions.

[17] Breaches of ROS are considered to be serious and warranting penalty. This is especially where one breach involves non-payment of annual leave entitlements under the Holiday Act 2003 (HA). The ROS settled what appears to have been a breach of s27 HA. Section 27 HA required PPL to have paid the annual leave owed when Mr Masjedi's employment came to an end. It did not.

[18] All of these breaches appear to be intentional because PPL believed it could off-set the payments to Mr Masjedi under the ROS against what it alleged were

breaches of clause 5. There was no legal basis for it to withhold payments especially of the HA entitlements in this manner.

[19] I also take note of Mr Masjedi's evidence of financial difficulties. He attests to having to borrow off relatives to meet shortfalls in income. He also referred to stress and having to seek some medical assistance for increased anxiety about this issue. It has also affected his current employment. He has had to take a day off work to attend today's hearing on unpaid leave.

[20] From the material filed by Phoenix Publishing before me today, there is little mitigation of losses or remorse shown. No payment has been made even on the day of hearing. The respondent has also failed to appear. There is no evidence about PPL's ability to pay a penalty.

[21] A relevant fact under s.133A is the number of times a respondent has been before the Authority. PPL has been before the Authority at least three times for similar breaches of unpaid wages and HA entitlements. I am also aware that it has been before the Employment Court once on appeal for a judgment it failed to prosecute. There are currently three other applications before the Authority involving this employer.

[22] There is a need for deterrent of this type of behaviour. Previous cases involving breaches of records of settlements have imposed penalties ranging from \$250 up to \$7,000. This matter requires a response at the higher end of the penalty range.

[23] Accordingly I impose a penalty upon PPL of \$5,000 for each of the breaches of the record of settlement (\$10,000 in total).

[24] The Court has held that an objective of a penalty may include "compensation of a victim of a breach" given s136(2) of the Act.¹ Given the proven losses by Mr Masjedi as a result of breaches and prosecution of this matter, it is appropriate that half of the penalty be paid to him.

¹ *Jeanie May Borsboom (Labour Inspector) v Preet Pvt Limited and Warrington Discount Tobacco Limited* [2016] NZEmpC 143 at [62].

[25] I order Phoenix Publishing Limited to pay a penalty \$5,000 to the Crown to be paid into the Ministry of Business Innovation and Employment's bank account within 28 days of this Determination.

[26] I order Phoenix Publishing Limited to pay a penalty of \$5,000 to be paid to Amir Aghel Masjedi by way of direct credit within 28 days of this Determination.

Costs

[27] I deal with the issue of costs. Mr Masjedi has represented himself but also incurred a filing fee in seeking his compliance orders.

[28] I order Phoenix Publishing Limited to pay Amir Masjedi \$71.56 being his filing fee as a contribution to his legal costs within 28 days of this determination.

Addendum

[29] After the giving of the oral determination at 10 am this morning but prior to the release of the written decision, PPL emailed the Authority below:

From: Stephen Bennison [<mailto:stephen.zemagazine@gmail.com>]
Sent: Tuesday, 15 May 2018 3:49 p.m.
To: Zedora Reddy
Subject: FW: 3019081 - Employment Relationship Problem - Reminder - you have a scheduled event - Amir Aghel Masjedi & Phoenix Publishing Limited, Phoenix Publishing Limited

I am severely ill in Christchurch and could not make the meeting

[30] Given this matter has already been disposed of, the late notice of PPL's attendance, the lack of any medical evidence of illness, the fact there is another director who could have attended by telephone (if necessary) or the company instruct a representative I decline to postpone the release of the written determination. I note PPL has previously failed to appear before the Court and Authority.

TG Tetitaha
Member of the Employment Relations Authority