

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

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

[2023] NZERA 341
3205979

BETWEEN ANNA McLOUGHLIN
Applicant

AND BROOKLYN EDWARDS
Respondent

Member of Authority: Sarah Kennedy-Martin

Representatives: Lars Hansen, counsel for the Applicant
No appearance for the Respondent

Investigation Meeting: On the papers

Submissions Received: 20 March and 4 April 2023 from the Applicant

Date of Determination: 28 June 2023

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Ms McLoughlin was employed on 24 June 2022 by Brooklyn John Paul Edwards as an Administration Manager for Little River Building Limited. Shortly after, due to a change in circumstances, Mr Edwards was in a situation where Ms McLoughlin's services were no longer required as Mr Edwards had been released from a contract and he no longer had work available for Ms McLoughlin.

[2] The parties held a meeting to discuss the change in circumstances and reached agreement for Ms McLoughlin's position to become redundant. The parties' agreement was recorded in a written settlement agreement (the agreement) under s 149 of the Employment Relations Act 2000 (the Act) and it is dated 1 September 2022. A Ministry of Business, Innovation and Employment (MBIE) mediator certified their agreement under s 149 of the Act.

The effect of that certification is that the terms agreed were final and binding and could only be brought before the Authority for the purposes of enforcement.

[3] The agreement set out that Mr Edwards was to pay Ms McLoughlin a specified amount described as a redundancy package within ten working days of the agreement being signed.

[4] Despite a series of requests for payment by email and a letter of demand from mid September to 12 December 2022 on behalf of Ms McLoughlin, from her father acting as her agent and then from her representative, Mr Edwards has not paid the agreed amount to Ms McLoughlin that he is obliged to pay in accordance with the settlement agreement.

[5] In light of his failure to pay, Ms McLoughlin seeks a compliance order against Mr Edwards requiring him to pay the money due under the agreement. Ms McLoughlin also requests a penalty be imposed on Mr Edwards for being in breach of the settlement agreement and interest in relation to the unpaid sum under the Interest on Money Claims Act 2016 and costs.

Authority's investigation

[6] For the Authority's investigation written witness statements were lodged from Anna McLoughlin and her father, David McLoughlin. Ms McLoughlin agreed the matter could be heard on the papers.

[7] There was no attendance by Mr Edwards at the case management conference (CMC). The statement of problem and the notice of direction were served on Mr Edwards using a signature required courier. The notice of direction was also served by way of substituted service on Mr Edwards' email address. Mr Edwards had previously corresponded with Ms McLoughlin's representative using that email.

[8] The notice of direction informed Mr Edwards that if he did not participate in the investigation of the claims against him, the Authority may, without hearing any evidence from him, issue a determination in favour of Ms McLoughlin. Mr Edwards was given an opportunity to indicate whether he wished to respond to the statement of claim and to request an in-person hearing. The Authority did not receive any information or response from Mr Edwards.

Who is the employer?

[9] While Little River Building Limited is recorded as the employer in the individual employment agreement there is no company registered with the Companies Office by that name. The employer is recorded in the settlement agreement as Brooklyn John Paul Edwards trading as Little River Building. It is submitted on behalf of Ms McLoughlin that the employer is Brooklyn John Paul Edwards operating as a sole trader under the name “Little River Building”. This is based on the following additional information:

- Little River Building does not have a website and all communications are through Mr Edwards’ personal email address.
- A payslip was attached to the settlement agreement which states payment is by Little River Building with “limited” not appearing in the name.
- A search of the Companies Office website shows a similar company with its registered offices in Canterbury and Ms McLoughlin’s place of employment was New Plymouth.
- The settlement agreement records the employer as Brooklyn John Paul Edwards (trading as Little River Building) and was drafted by a lawyer.

[10] I am satisfied that Brooklyn John Paul Edwards entered into the settlement agreement with Ms McLoughlin.

Has there been a breach of the settlement agreement?

[11] While the parties agreed their terms of settlement were to be confidential, clause 2 had to be disclosed for the purposes of this determination. I prohibit from publication the balance of the settlement agreement. Clause 2 provides:

The employer agrees to pay the Employee as a redundancy package within 10 working days after the date of signing the Agreement the sum of \$116,500.00 (after tax) by way of direct credit. The final payment statement is annexed hereto.

[12] The settlement agreement was dated 1 September 2022. While the agreement provided for payment from Mr Edwards to Ms McLoughlin within 10 working days of the date of signing Ms McLoughlin says she has never received payment. Payment had still not been made when the MBIE mediator certified the agreement on 13 December 2022.

[13] There were multiple emails between the parties including more than one email promising payment from Mr Edwards. Mr Edwards was initially represented, and that representative assisted with the settlement agreement and confirmed in writing that Ms McLoughlin would receive the payment on 15 September 2022. Then a Paul Edwards started communicating with Ms McLoughlin's father about releasing the funds from a Trust to pay Ms McLoughlin. No payment was made.

[14] A demand letter was sent to Mr Edwards on 15 December 2022. Mr Edwards responded to the demand letter by sending Ms McLoughlin's representative an email that stated, "*yes good see you in court this will be disputed.*" He also corresponded with Ms McLoughlin's father about bank details.

[15] There has been and continues to be a breach of Clause 2 of the settlement agreement.

Should a compliance order be made?

[16] A compliance order may be made when any person has not observed or complied with the provision of an employment agreement or any terms of settlement or a decision that is a breach of s 149(3) and s 151 provides it may be enforced by compliance order.

[17] I have already found there has been a breach of s 149(3) of the Act. I am satisfied a compliance order is necessary given Mr Edwards' response to the demand notice.

Should a penalty be awarded?

[18] Ms McLoughlin seeks a penalty and given my finding above that Mr Edwards is in breach of the settlement agreement, he is liable to a penalty.¹ The maximum penalty is \$10,000 in the case of an individual.² The standard of proof for the imposition of a penalty in this jurisdiction is on the balance of probabilities.³ The primary purpose of a penalty is to punish the wrongdoing and act as a deterrent to further breaches.⁴

[19] It is important that parties ought to have confidence in settlement agreements under s 149 of the Act and in this case, there has been a breach of the settlement agreement. There is one breach, and it is ongoing, it appears to be intentional and the response to the demand

¹ Employment Relations Act 2000, s 149(4).

² Above n1, s135(2)(a).

³ *Xu v McIntosh* [2004] 2 ERNZ 448 at [29].

⁴ *Borsboom v Preet PVT Ltd* [2016] NZEmpC 143 at [51] – [52].

letter indicates Mr Edwards does not intend to comply with his obligations under the settlement agreement.

[20] Taking into account the relevant matters the Authority must have regard to in s 133A of the Act (when awarding penalties) and the further guidance on penalties for breaches of settlement agreements set out in *ITE v ALA*,⁵ I consider a penalty is appropriate in order to protect the finality and integrity of s 149 agreements.

Interest

[21] Interest is sought under the Interest on Money Claims Act 2016 but I decline to order interest at this time.

Orders

[22] Brooklyn John Paul Edwards is ordered to:

- (a) comply with clause 2 of the settlement agreement with Anna McLoughlin within 14 days of this determination; and
- (b) pay a penalty of \$1,000.00 to Anna McLoughlin.

Costs

[23] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves. If they are not able to do so and an Authority determination on costs is needed, Ms McLoughlin may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of this determination. From the date of service of that memorandum Mr Edwards 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.

[24] If the Authority were asked to determine costs, the parties could expect the Authority to apply its usual daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.⁶

Sarah Kennedy-Martin
Member of the Employment Relations Authority

⁵ *ITE v ALA* [2016] NZEmpC 42 at [61].

⁶ www.era.govt.nz/determinations/awarding-costs-remedies