

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2015] NZERA Wellington 110
5564892

BETWEEN GAVIN ANTHONY NAFTEL
 Applicant

AND IBM NEW ZEALAND LIMITED
 Respondent

Member of Authority: M B Loftus

Representatives: Philip Mitchell, Counsel for Applicant
 Richard McIlraith, Counsel for Respondent

Investigation Meeting: By telephone conference on 5 October 2015 and
 subsequent written memoranda

Submissions Received: Memoranda from Applicant on 16 October and
 9 November 2015
 Memoranda from Respondent on 9 and 20 October
 2015, along with affidavit dated 28 October

Determination: 11 November 2015

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] This is a claim for penalties to be imposed on the respondent, IBM New Zealand Limited (IBM), and payable to the applicant, Gavin Naftel.

[2] IBM's response is the application should be dismissed as frivolous and vexatious.

Background

[3] Mr Naftel was dismissed by IBM. He challenged the dismissal and the parties settled the dispute on 25 May 2015. The settlement was affirmed by a

mediator in accordance with section 149 of the Employment Relations Act 2000 on 3 June 2015.

[4] Under the agreement, and along with other terms, IBM was required to pay two sums. The first was a section 123(1)(c)(i) payment to Mr Naftel. It was to be made by direct credit in the pay run following the mediator's signature. The second was a contribution towards Mr Naftel's legal fees which was to be made within 14 days of receipt of a tax invoice sent to IBM's solicitors, Russell McVeigh. Mr Mitchell forwarded the invoice on 29 May.

[5] On 16 June Mr Mitchell emailed Mr McIlraith advising IBM had failed to make either payment and was now in breach of the settlement. He advised he had instructions to file a compliance application immediately but as a matter of courtesy had chosen to raise the issue with Mr McIlraith and ask he address the failure with IBM.

[6] Mr McIlraith responded the following day. He advised the payment process had been delayed by a secretarial error within his firm. He also advised Mr Naftel's payment would be made on 25 June and Mr Mitchell's costs would be met via a payment IBM would shortly make to Russell McVeigh. Mr Naftel's payment was duly made.

[7] On 30 June Mr Mitchell filed a statement of problem in the Authority seeking compliance with that part of the mediated settlement which related to his costs and a penalty for the failure to do so. The statement of problem was served on IBM on 1 July which was also the day upon which the costs payment was made.

[8] IBM's response was:

The late payment of Mr Naftel's legal fees was not deliberate and through no fault of IBM's. It is not appropriate to award a penalty against IBM in such circumstances.

[9] IBM also asked the application be dismissed as frivolous and vexatious on the grounds it had, by then, complied with its obligations and Mr Naftel was aware of that.

[10] During the teleconference of 5 October the issues were discussed and Russell McVeigh undertook to write to Mr Naftel confirming it was responsible for the late payment and apologising. It did so on 9 October 2015.

[11] In the interim Mr Mitchell was to consult Mr Naftel as to whether or not he wished to continue with the application for penalties. If he chose to do so the claim would be determined on the papers.

[12] Mr Naftel chose to proceed.

Determination

[13] Mr Naftel's position is it is appropriate a penalty be imposed given there was a breach and that it be payable to Mr Naftel to offset the additional cost of addressing the breach. It is argued IBM's claim it should not bear the cost of its breach is wrong as that would mean, as a consequence, an innocent party (Mr Naftel) is left out of pocket and, in any event, knowledge of Russell McVeigh's part in the failure did not come to light until after the compliance action was filed.

[14] As already said IBM's position is the errors were not of its making but the result of an administrative oversight at Russell McVeigh exacerbated by an unusual approach to the payment regime designed to protect Mr Naftel's confidentiality. That the delay was occasioned by Russell McVeigh's errors was confirmed by both the letter of 9 October and a subsequent affidavit.

[15] A penalty is exactly that - punitive. It is something to be applied in condemnation of egregious behaviour and while there are exceptions¹ the generally applied rule is that penalty provisions should be construed strictly.²

[16] The problem here, as Mr McIlraith repeatedly points out, is IBM is not responsible for the breach – Russell McVeigh was. I find it difficult to impose a penalty on a party that was not responsible for the breach in an environment where strict application is the norm. This is especially true where the breach stems, as it did here, from convoluted procedures being adopted in order to comply with the terms of settlement (in this instance one providing that the fact of settlement be hidden). It

¹ *Xu v McIntosh* [2004] 2 ERNZ 448 at [29]

² *Northern Drivers IUOW v Walling Ltd* [1971] BA 921

may well be that had IBM been responsible for making payment directly as is normally the case the breach may never have occurred.

[17] Turning to the argument Mr Naftel incurred costs he should not, as an innocent party, be forced to incur. This submission fails to persuade if, for no other reason, I conclude the cost was avoidable. This application reeks of using the proverbial sledgehammer to crack a nut. Mr Naftel would have been better off following the course of action initially adopted – namely calling Russell McVeigh and asking they action the payments. That this would ultimately be successful was already known to Mr Naftel as at the date of this application given the fact he had received his payment and Mr McIlraith had advised the costs payment would follow (which it did).

[18] In any event I note Mr Naftel appears to have twice jumped the gun. First I note the invoice, the late payment of which gives rise to this claim, was actually sent prior to the mediator's affirmation of the settlement. It is therefore arguable there is no valid invoice and therefore no breach. Second the Authority only has power to enforce section 149 agreements. Such an agreement cannot exist until the mediator has signed and its provision cannot be enforceable until that date. Signature occurred on 3 June so it follows the 14 day period for payment could not expire until 17 June. It therefore follows Mr Naftel initially alleged a breach when none had actually occurred.

[19] Finally I note I advised fairly clearly during the conference call this claim was going to struggle. Despite that Mr Naftel chose to continue and as a result incurred further, in my view unnecessary, cost. He seems to have shown a disregard for costs accruing which undermines his attempts to now use their existence to show he has been hard done by.

[20] For the above reasons I decline to impose the penalty sought.

Costs

[21] Both parties seek costs in respect to this matter.

[22] Having considered the issue I advise that I am of the view the costs of pursuing / defending this compliance and penalty action should lie where they fall.

[23] With respect to Mr Naftel I have already observed that his costs were, to a large extent, avoidable. With respect to IBM I must be cognizant of the fact there was a breach and it was their representative who was responsible. In the same way I have declined an application I penalise IBM for something for which it was not responsible it would be unjust to similarly penalise Mr Naftel by awarding costs in IBM's favour as he did no wrong.

M B Loftus
Member of the Employment Relations Authority