

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE**

[2023] NZERA 23
3187579

BETWEEN	BENJAMIN PRESLING Applicant
AND	FOUNDATION ADVICE LIMITED Respondent

Member of Authority:	Eleanor Robinson
Representatives:	Darren Gunasekara, Counsel for the Applicant Kathryn Dalziel, Counsel for the Respondent
Investigation Meeting:	17 January 2023
Submissions:	17 January 2023 from the Applicant 16 January 2023 from the Respondent
Determination:	19 January 2023

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Applicant, Mr Benjamin Presling, claims that the Respondent, Foundation Advice Limited has not complied with clauses 2, 3 and 4 of a mediated Record of Settlement (ROS).

[2] Foundation Advice Limited does not oppose the application. It claims it was opposed to compliance due to an alleged breach of confidentiality of the ROS by the Applicant, however it has been unable to secure the evidence of such a breach, so no counterclaim has been filed.

The Authority's investigation

[3] During a case management conference call held on 9 November 2022 Foundation Advice Limited committed to filing a Statement in Reply or to filing a Counterclaim as

indicated on the call. The Directions minute of the Authority set out that agreed date for these to be filed as being 15 November 2022.

[4] No Statement in Reply or counterclaim was received and therefore on 23 November 2022 it was advised to the parties that the Investigation Meeting would address only the Applicant's claim as set out in the Statement of Problem.

[5] The Applicant and his representatives attended the Investigation Meeting and presented evidence and submissions in person.

[6] Ms Dalziel stated by email that she had not been instructed to appear, and Foundation Advice Limited would also not be appearing in person. However Ms Dalziel had filed submissions on behalf of the Respondent on 16 January 2023.

[7] 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, although these have been fully considered prior to the finalisation of this determination.

Issues

[8] The issues requiring investigation are whether or not Foundation Advice Limited has complied with clauses 1, 2(a), 2 (b), 3 and 4 of the ROS.

Relevant Background

[9] Mr Presling was an employee of Foundation Advice Limited. Mr Presling resigned and his last working day with Foundation Advice Limited was 20 May 2022.

[10] Following the termination of his employment, Mr Presling and Foundation Advice Limited entered into a ROS which was certified by a mediator on 22 August 2022 under s 149 of the Employment Relations Act 2000 (the ROS).

[11] The ROS was signed by the Applicant and by Michael Moran, Chief Executive of Foundation Advice Limited. The ROS was also signed by a Mediator employed by the Ministry of Business, Innovation and Employment (MBIE).

[12] The relevant clauses of the ROS in respect of this issue are:

1. The Employee's employment terminated on 7 August 2022. The company will pay the Employee the holiday pay that he would have accrued if he had worked out this notice period.

2. The following payments will be made to the Employee without any admission of liability by the Company:
 - (a) 1 months' salary in lieu of notice. The Company will also pay the Employee the holiday pay that he would have accrued if he had worked out this notice period.
 - (b) A lump sum payment to the Employee of \$15,000 without deduction pursuant to section 123 (1)(c)(i) of the Employment Relations Act 2000.
3. The Company will provide a contribution of \$5,000 plus GST towards the Employee's legal fees on receipt of an invoice from Simpson Grierson.
4. The payments referred to in clauses 1, 2(a) and 2 (b) above will be made in two equal instalments of 50% of the total amount with the first instalment being paid to the Employee's nominated bank account by 30 August 2022, and the second instalment being paid to the employee's nominated bank account by 30 September 2022.

[13] The Record of 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 were subject to s 148A, s 149(1) and s 149 (3), i.e. that they:

- 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.

[14] Mr Presling said he did not receive payment of the sums due under clauses 1, 2(a) and 2(b) of the ROS on either of the dates set out in clause 4 of the ROS, nor did Simpson Grierson receive the payment due to it despite having provided an invoice in accordance with clause 3 of the ROS.

[15] On 31 August 2022 by email to Mr Moran, Simpson Grierson contacted Foundation Advice Limited advising it that Mr Presling had not received the first payment instalment set out in the ROS and enquiring if payment had been made.

[16] In response Mr Moran provided screenshots of text message details which he claimed had been sent to Mr Presling requesting details for information in order that the payments could be finalised.

[17] Mr Presling said that he had not received any text messages and that Foundation Advice Limited already had his nominated account details.

[18] Simpson Grierson responded on behalf of Mr Presling, stating that Mr Presling had not received the purported text messages, but providing an email address to which the relevant payslips and confirmation of payment could be sent.

[19] No response was received from Mr Moran.

[20] On 1 September 2022 Simpson Grierson wrote to Mr Moran, demanding that the payments agreed to be paid under the ROS be made by 2 September 2022. Upon receipt of an automated response, Simpson Grierson forwarded the correspondence to Mr Moran's assistant. However no response or payments were made.

Has there been compliance with clauses 1, 2(a), 2 (b), 3 and 4 of the ROS?

[21] It is submitted for Mr Presling that there has been no compliance with the terms of the ROS requiring payments to be made by Foundation Advice Limited as itemised in clauses 1, 2 (a), 2 (b), 3 and 4 of the ROS.

[22] It is submitted on behalf of Foundation Advice Limited that it is solvent, and it is anticipated that payment will be made in February 2023.

[23] Having considered this matter I am satisfied that Foundation Advice Limited has not complied with clauses 1, 2(a), 2 (b), 3 and 4 of the ROS.

Remedies

Compliance Order

[24] I am satisfied that none of the payments itemised in the ROS have been paid to Mr Presling and Simpson Grierson.

[25] In order to effect compliance with clauses 1, 2(a), and 2 (b) of the Record of Settlement, I therefore order Foundation Advice Limited to pay Mr Presling, **no later than 24 February 2023, the following amounts:**

- a. **All outstanding holiday pay and salary up to and including 7 August 2022;**
- b. **One months' salary in lieu of notice; and**
- c. **\$15,000.00 gross (as subject to s 123(1)(c)_(i) of the Act.**

[26] In order to effect compliance with clause 3 of the ROS, I therefore order Foundation Advice Limited to pay Simpson Grierson, **no later than 24 February 2023, the sum of \$5,750.00 (being \$5,000.00 plus GST).**

[27] I consider that the parties should be able to agree the amounts owed between them, but leave is granted to revert to the Authority for orders if necessary.

Penalties

[28] Mr Presling has sought a penalty of \$10,000.00 in respect of the breach of the ROS Foundation Advice Limited.

[29] It is submitted on behalf of Mr Presling that the breaches were ongoing and knowing and as such a deterrence effect is merited.

[30] It is submitted for Foundation Advice Limited that there is effectively only one breach of the ROS being non-payment of monies and costs to Mr Presling. Accordingly the maximum penalty to be awarded is \$20,000.00 pursuant to s 135 ((2)(b) of the Act.

[31] The relevant principles for the Authority to follow when assessing the level of penalty are set out in *ITE v ALA* as being

- To protect the finality and integrity of [s 149](#) settlement agreements by deterring the individual transgressor and others from similar breaches;
- To punish the transgressor;
- Consistency with penalties imposed on others in similar circumstances;
- An assessment of the nature and extent of the breach, including whether it was deliberate, one-off or sustained, with the maximum penalty being reserved for the worst cases;
- Any steps taken by the transgressor to remedy the breach;
- Proportionality in the circumstances.¹

[32] It is submitted for Foundation Advice Limited that it accepts the monies are owing and it offers no defence to the application made. It is confident that the monies due and owing will be paid in February 2023.

[33] It is also submitted for the Respondent that penalties should be proportionate and reflect that Foundation Advice Limited is doing its best to pay the monies owed. Citing *Mahieu v*

¹ *ITE v ALA* [2016] NZEmpC 42 at [61]

Gilbert & Associates Ltd as a case in which there were similar circumstances to this case, it is submitted that penalties should be set at \$3,000.00.²

[34] I find that the breaches were intentional and caused some stress to Mr Presling who has been put to additional cost in having to apply to the Authority to obtain compliance with an agreement freely entered into by the Respondent.

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

[36] 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.

[37] I order that Foundation Advice Limited is to pay a penalty of \$2,500.00 to the Authority to be paid to the Crown Trust Account. Payment is to be made within 14 days of the date of this Determination.

Filing Fee

[38] Foundation Advice Limited must also reimburse Mr Presling the filing fee of \$71.56 within 14 days of the date of this Determination.

Costs

[39] It is submitted for Mr Presling that he should be awarded costs. On the basis that he had incurred significant costs in the enforcement of the ROS, he is seeking an uplift in costs above the notional daily tariff rate in the Authority to \$5,500.00.

[40] The Authority uses a tariff-based system for awarding costs, based on the rate of \$4,500 for the first day of hearing, and \$3,500 for each subsequent day.

[41] I consider it appropriate to take the normal daily tariff in the Authority and to take a half day investigation meeting as the starting point. Taking the submissions into consideration and the number of attempts by Mr Presling to resolve the matter prior to the investigation which I find are proper to be taken into account, I consider that \$2,500.00 is the appropriate costs award in this case.

² *Mahieu v Gilbert & Associates Ltd* [2017] NZERA 79 at [45] – [51]

[42] Accordingly Foundation Advice Limited is ordered to pay Mr Presling the sum of \$2,500.00 towards his legal costs, pursuant to clause 15 of Schedule 2 of the Act, within 14 days of the date of this Determination.

**Eleanor Robinson
Member of the Employment Relations Authority**