

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2019] NZERA 72
3045932

BETWEEN SAMANTHA RUSSELL
Applicant

AND LIGHTFORCE ELECTRICAL
LIMITED
Respondent

Member of Authority: Jenni-Maree Trotman

Representatives: Mike Harrison, advocate for the Applicant
No submissions for the Respondent

Investigation Meeting: On the papers

Submissions and further 25 January, 7 February and 8 February 2019 from the
Information Received: Applicant

Date of Determination: 13 February 2019

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] On 22 November 2018 Samantha Russell applied to the Authority for a compliance order in relation to a record of settlement entered into with her former employer, Lightforce Electrical Limited (Lightforce), under s 149 of the Employment Relations Act 2000 (the Act). Ms Russell also applied for the imposition of a penalty on Lightforce and sought indemnity costs.

[2] No Statement in Reply was filed by Lightforce.

[3] Prior to the investigation meeting I issued a Minute in which I proposed that the investigation of Ms Russell's claim be heard on the papers. A proposed timetable

was set for the filing of an affidavit from Ms Russell with the parties being advised that if they wished to oppose the proposed procedure they must provide written notification to the Authority within 7 days of the date of the Minute. No objection to the procedure proposed by the Authority was received.

[4] The Minute also advised that, pursuant to Regulation 8(3) of the Employment Relations Authority Regulations 2000, Lightforce would require the leave of the Authority to reply or respond to the Ms Russell's application. Lightforce was advised that if an application for leave was filed this must explain the delay in filing the Statement in Reply on time and file a copy of the proposed Statement in Reply.

[5] No application for leave was received from Lightforce.

[6] As provided for in clause 12 of Schedule 2 of the Act I have proceeded to act as fully in the matter before me as if Lightforce had duly attended or been represented.

[7] As permitted by 174E of 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 but has not recorded all evidence and submissions received.

The issues

[8] The issues requiring investigation and determination are:

- a) Has there been a breach of the Record of Settlement dated 10 October 2018?
- b) If so,
 - i. Should a compliance order be made under s137 of the Act?
 - ii. Should a penalty be imposed on Lightforce under s149(4) of the Act?
- c) Should either party contribute to the costs of representation of the other party?

Relevant background facts

[9] Ms Russell and Lightforce signed a record of settlement on 10 October 2018 (the ROS). The ROS followed the raising of personal grievances by Ms Russell and the commencement of proceedings in the Authority against Lightforce.

[10] The ROS was executed on behalf of Lightforce by its Managing Director, Luke Nutting. It was certified by a mediator employed by the Ministry of Business, Innovation and Employment on 10 October 2018.

[11] The material terms of the ROS were these:

[2] Lightforce Electrical shall, without admission of liability, pay Samantha Russell the sum of \$4,900.00 in terms of the provisions of s 123(1)(c)(i) of the Employment Relations Act. This amount will be paid by way Direct Credit into the nominated bank account by way of the following payment plan:

i. \$1,633.33 to be paid on the 20th of October 2018

ii. \$1,633.33 to be paid on the 20th of November 2018

iii. \$1,633.33 to be paid on the 20th of December 2018

[3] Lightforce Electrical shall pay, upon receipt of an invoice from Employment Equity Limited, costs of \$3,600.00 including GST directly to Employment Equity Limited on or before the 20th of November 2018.

[5] Samantha shall provide Lightforce with the passwords to her desktop computer which are stated below:

[password]

[6] Lightforce Electrical shall arrange to provide Samantha with a copy of her "Personal" file on the work desktop computer, to be sent on a pen drive to [address]

The first breach - Non-payment of monies on 20 October 2018

[12] Lightforce failed to make payment of the sum of \$1,633.33 due on 20 October 2018.

[13] After contact between Ms Russell's representative and the Mediator, Lightforce attended to payment of this sum on 25 October 2018.

The second and third breaches - Non-payment of monies on 20 November 2018 and failure to return property

[14] On the date the next payment fell due, 20 November 2018, Ms Russell received an email from Mr Nutting that advised:

I would like to inform you that we are currently withholding the second 20th month payment of \$1,633.33 to Sam Russell as we are still waiting on Sam to supply the password to the office cellphone that she had use of whilst working for Lightforce. Once we receive this password we will process payment.

[15] Ms Russell's representative responded:

Thank you for the advice. Your withholding of the payment constitutes a breach of the settlement agreement. If payment is not made and the funds are not available before the end of the day today (20.11.2018) we will not hesitate to proceed with the matter to the Employment Relations Authority for compliance.

[16] This email was followed up with another email from Ms Russell's representative on 21 November 2018:

We have been advised by our client that you have withheld payment in breach of the attached settlement agreement. We have been instructed to commence proceedings to compel compliance.

In regard to your position, that you are purposefully in breach of the s149 settlement agreement, we would like to point out that our client has fully complied with the terms of the agreement. The terms are:

At point 5. Samantha shall provide Lightforce with the passwords to her desktop computer which are stated below:

[password]

Our client has complied fully with this provision of the settlement agreement.

We would like to point out that at point 6 the agreement it states; Lightforce Electrical Limited shall arrange to provide Samantha with a copy of her "Personal" file on the work desktop computer, to be sent on a pen drive to [address].

We note that Lightforce is currently in breach of this clause.

The fourth breach - Non-payment of legal fees on the agreed date

[17] On 10 October 2018 Ms Russell's representative sent an invoice to Lightforce in accordance with the terms of the ROS. However, this invoice was incorrect in that it incorrectly issued the invoice to "Lifeforce Electrical" instead of Lightforce.

[18] In or about December 2018 Lightforce notified Ms Russell's representative that the company name on the invoice was incorrect. A replacement invoice was sent to Lightforce on 13 December 2018.

The fifth breach - Non-payment of monies on 20 December 2018

[19] The third instalment was due for payment by Lightforce on 20 December 2018. This was not paid.

First issue: Breach of the Record of Settlement

[20] I am satisfied Lightforce breached the Record of Settlement when it failed to pay the amounts due on 20 October, 20 November and 20 December 2018. In addition, by failing to pay the legal fees upon receipt of the invoice, and by failing to provide a copy of Ms Russell's personal file to her.

Second Issue: Should a compliance order be made under s137 of the Act?

[21] On 11 January 2019 Lightforce attended to payment of the second and third instalments due under the ROS together with the legal fees invoice. To date, Lightforce has not provided Ms Russell with the pen drive containing her personal file. A compliance order is therefore necessary.

[22] I make an order pursuant to s 137(2) of the Act that Lightforce comply with Clause 6 of the ROS by providing Ms Russell with a copy of her "Personal" file from her work desktop computer. This is to be sent to her on a pen drive to the address named in the ROS within 7 days of the date of this determination.

Third Issue: Penalty

[23] Lightforce's breaches of the ROS renders it liable to the imposition of a penalty.¹ Penalties are at the discretion of the Authority and are generally imposed for the purpose of punishment as well as discouragement to others. The maximum penalty for a breach by a company is \$20,000.²

[24] In determining an applicable penalty the Authority must have regard to all relevant matters including those set out in s133A of the Act. In doing so it is helpful to follow the four step approach outlined by the Employment Court in *Jeanie May*

¹ S 149(4) of the Act

² S 135(2)(b) of the Act.

*Borsboom (Labour Inspector) v Preet Pvt Limited and Warrington Discount Tobacco Limited.*³

Step 1: Nature and number of breaches

[25] Lightforce breached the ROS on 5 occasions. However, I consider it appropriate to globalise the breaches. The starting point is \$20,000.

Step 2: Severity of the Breach

[26] Step 2 involves the consideration of the severity of the breach to establish a provisional starting point for the penalty. This will include an adjustment for aggravating and mitigating factors in relation to the breach.

[27] The significant aggravating feature of this case is that the breaches of the ROS by Lightforce were intentional. I do not accept that Lightforce was justified in withholding payments because Ms Russell had not provided it with her mobile password. Ms Russell's uncontested evidence was that she provided this to a representative of the Company approximately a month after her dismissal, being prior to the parties entering into the ROS. If Lightforce had an issue with the password provided by Ms Russell then it could have made the provision of the password a term of the ROS. It did not.

[28] Another aggravating factor is that Lightforce is still in breach of the ROS in that it has failed to provide Ms Russell with a copy of her "Personal" file from her work desktop computer.

[29] In terms of mitigation I accept that Lightforce has now attended to payment of all monies due under the ROS. I am also unaware of any previous involvement by Lightforce in proceedings for similar breaches.

[30] I assess the degree of severity at 50%.

Step 3: Ability to pay penalty

[31] I am aware of no inability of Lightforce to pay a penalty. I accordingly make no reduction under this step.

³ [2016 NZEmpC 143

Step 4: Proportionality of penalty

[32] Step 4 is to apply the proportionality principle. This is consideration of whether the potential penalty arrived at is proportionate to the breach and any harm occasioned by it. At this stage I must assess if the amount I have reached is just in all of the circumstances.

[33] Looking at recent Authority and Court imposed penalties I conclude the sum of \$2,000 is an appropriate penalty. This sum is proportionate to the breaches of the ROS and is sufficient to act as a deterrent.

[34] I consider it appropriate that part of this penalty be paid to Ms Russell as it is she that has suffered the impact of Lightforce's breach and has been obliged to take steps to enforce her rights. I apply the same ratio of payment as Judge Inglis in *Lumsden v Skycity Management Limited* to reflect this.⁴

[35] Lightforce is ordered to pay \$2,000 by way of penalty for its breaches of the ROS. I direct that 75% of that amount (\$1,500) is to be paid to Ms Russell. The remaining 25% (\$500) is to be paid to the Employment Relations Authority. The Employment Relations Authority will then pay this sum into a Crown Bank Account.

[36] Payment of the penalty is to be paid within 28 days of the date of this determination.

Issue Four: Costs

The Claim

[37] Ms Russell claims indemnity costs in the sum of \$3,500 plus GST and the Authority's filing fee on the filing of the Statement of Problem in the sum of \$71.56.

The Authority's approach to costs

[38] The Authority may order any party to a matter to pay to any other party such costs and expenses as the Authority thinks reasonable.⁵

[39] In *PBO Ltd v Da Cruz*, a full Court set out the principles that are appropriate for the Authority to apply when considering an application for costs.⁶ These costs

⁴ [2017] NZEmpC 30 at [69].

⁵ Employment Relations Act 2000, Schedule 2 clause 14.

were confirmed as remaining appropriate in *Fagotti v Acme & Co Limited*.⁷ The principles include:

- a) There is a discretion as to whether costs would be awarded and in what amount.
- b) The discretion is to be exercised in accordance with principle and not arbitrarily.
- c) The statutory jurisdiction to award costs is consistent with the equity and good conscience jurisdiction of the Authority.
- d) Equity and good conscience is to be considered on a case by case basis.
- e) Costs are not to be used as a punishment or as an expression of disapproval of the unsuccessful party's conduct although conduct which increases costs unnecessarily can be taken into account in inflating or reducing an award.
- f) It is open to the Authority to consider whether all or any of the parties' costs were unnecessary or unreasonable.
- g) Costs generally follow the event.
- h) Without prejudice offers can be taken into account.
- i) Awards will be modest.
- j) Frequently costs are judged against notional daily rates.
- k) The nature of the case can also influence costs and this has resulted in the Authority ordering that costs lie where they fall in certain circumstances.

[40] An assessment of costs will normally start with the notional daily tariff. The Authority's normal daily tariff is \$4,500.00 for the first day of an investigation meeting.⁸ The tariff is then adjusted upwards or downwards depending on the particular circumstances of the case.

⁶ *PBO Ltd (Formerly Rush Security Ltd) v Da Cruz* [2005] ERNZ 808 (EmpC) at [44].

⁷ *Fagotti v Acme & Co Ltd* [2015] ERNZ 919 at [114].

⁸ Practice Note 2, Costs in the Employment Relations Authority.

Analysis

[41] This matter was dealt with on the papers. Two affidavits were filed by Ms Russell. One of which was very brief and the other largely repeated matters contained in the Statement of Problem. Brief submissions from her representative were also filed. No telephone conference was held. I adopt a starting point of \$1,125 which is the daily tariff for one quarter day.

[42] I accept that Ms Russell has been put to the expense of seeking the enforcement of the terms of the ROS and that an award of costs is appropriate. However, I do not accept that indemnity costs or an uplift to the daily tariff is justified.

[43] Costs are not to be used as a punishment or as an expression of disapproval. A compliance order and a penalty have already been imposed in relation to the breaches of the ROS. Lightforce's conduct in the course of the compliance order application did not unnecessarily increase Ms Russell's costs.

[44] As was stated recently in *Booth v Big Kahuna Holdings Limited*:⁹

Parties are entitled to adopt a belts-and-braces approach to litigation, and may retain the services of legal counsel of their choosing. That is not, however, a choice that can automatically be visited on the unsuccessful party. The point is particular apposite in the Authority, which is statutorily designed to be an investigative, non-technical, low level, and readily accessible forum. That suggests two things. First, that the legal costs of preparing for and attending at an investigation meeting should be modest. Second, imposing a substantial costs burden on unsuccessful litigants almost inevitably gives rise to access to justice issues ...

Finding

[45] Lightforce is ordered to pay to Ms Russell the sum of \$1,125 towards her legal costs. In addition, it must reimburse her the sum of \$71.56 for the filing fee that she paid to the Authority when filing her Statement of Problem. These amounts must be paid within 14 days of the date of this determination.

Outcome

[46] The following orders are made:

⁹ [2015] NZEmpC.

- A. Lightforce Electrical Limited breached the Record of Settlement with Samantha Russell.
- B. Lightforce Electrical Limited must comply with the Record of Settlement dated 10 October 2018 by providing Ms Russell with a copy of her “personal” file from her work desktop computer. This is to be sent to her on a pen drive to the address named in the Record of Settlement within 7 days of the date of this determination.
- C. Lightforce Electrical Limited must pay \$2,000 by way of penalty for its breaches of the Record of Settlement. I direct that 75% of that amount (\$1,500) is to be paid to Samantha Russell. The remaining 25% (\$500) is to be paid to the Employment Relations Authority. The Employment Relations Authority will then pay this sum into a Crown Bank Account.
- D. Payment of the penalty is to be paid within 28 days of the date of this determination.
- E. Lightforce Electrical Limited must pay Samantha Russell the following sums within 14 days of the date of the determination:
 - a. A sum of \$1,125 by way of contribution towards her legal costs of bringing these proceedings; and
 - b. The Authority filing fee of \$71.56.

Jenni-Maree Trotman
Member of the Employment Relations Authority