

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2019] NZERA 362
3052252

BETWEEN ATLANTA STEWART
 Applicant

A N D BF7 TRADING LIMITED
 Respondent

Member of Authority: Peter van Keulen

Representatives: David Buckingham, advocate for the Applicant
 Roy Bishop for the Respondent

Investigation Meeting: 5 April 2019

Submissions Received: 5 April 2019 from the Applicant
 5 April 2019 from the Respondent

Date of Determination: 19 June 2019

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Atlanta Stewart was employed by BF7 Trading Limited. During the course of her employment, an employment relationship problem arose between the parties.

[2] In order to attempt to resolve that employment relationship problem, the parties attended mediation on 10 October 2018. The parties reached an agreement in full and final settlement, which was recorded in a record of settlement, which was signed off by a mediator (the Record of Settlement).

[3] The operative clause of the Record of Settlement is clause 2 and that states:

BF7 Trading Ltd shall, without admission of liability, pay Atlanta Stewart, the sum of \$12,500.00 in terms of the provisions of s 123 (1)(c)(i) of the Employment Relations Act 2000. This amount will be paid by way of 25

consecutive weekly instalments of \$500.00 per week commencing 17 October 2018. Each payment will be made by direct credit to [Ms Stewart's bank account].

[4] BF7 paid several of the initial weekly instalments, but then missed a couple and then stopped making any payments at all.

[5] At the date of my investigation into this claim, 5 April 2019, BF7 should have made 24 instalment payments to Ms Stewart, with one final payment due on 10 April 2019. In fact, BF7 has only paid \$5,500.00 in instalments leaving a balance of \$7,000.00.

[6] Ms Stewart seeks a compliance order obliging BF7 to comply with the record of settlement by paying the outstanding \$7,000.00 and she seeks a penalty for the breach of the Record of Settlement.

Progress of this matter

[7] BF7 did not participate in the conduct of Ms Stewart's claim by lodging a statement in reply or participating in the case management conference. It did however participate in the investigation meeting, notifying the Authority of its intention to do so at the last minute.

The issues

[8] I must determine the following issues:

- (a) Has BF7 breached the Record of Settlement by not making the payments; and
- (b) If there is a breach of the Record of Settlement, is a compliance order required and is a penalty appropriate?

Has BF7 breached the record of settlement?

[9] Clause 2 of the Record of Settlement is straightforward; it required BF7 to make periodic payments until the total settlement sum was paid. BF7 made some of those payments and then simply stopped making any further payments.

[10] Roy Bishop on behalf of BF7 accepted that BF7 had only paid \$5,500.00 to Ms Stewart and there was \$7,000.00 still owing in respect of the settlement sum it had agreed to pay.

[11] By not making all of the required payments BF7 has breached clause 2 of the Record of Settlement.

Is it appropriate to make a compliance order?

[12] As BF7 has breached the Record of Settlement, a compliance order is necessary. I will make an order for compliance pursuant to s 137(2) of the Act.

[13] As at the date of this determination all periodic payments should have been made so it is appropriate for compliance to be made in terms where the balance of the settlement sum is paid in full immediately – as the balance is due and owing.

Is it appropriate to impose a penalty against BF7 for the breach of the Record of Settlement?

[14] Section 149(4) of the Act provides that a person who breaches an agreed term of settlement in a record of settlement signed pursuant to s 149 of the Act, is liable to a penalty imposed by the Authority.

[15] Section 135(2)(a) of the Act provides that a company who is liable for a breach of a record of settlement is liable to a penalty not exceeding \$20,000.00.

[16] Section 133A of the Act lists the factors relevant to my assessment of the quantum of any penalty. In addition, in *Borsboom v Preet PVT Limited*¹ the Employment Court set out the considerations for awarding penalties, in the form of a four-step approach to fixing penalties where there have been multiple breaches of minimum employment standards. More recently, in *Allan Nicholson v Matthew Ford*² Chief Judge Inglis analysed s 133A and *Preet* and set out guidance on applying the principles to the imposition of penalties. In particular Her Honour stated:

[18] Drawing the threads together from the statute and *Preet*, the mandatory considerations which must be considered in assessing penalties are the following (there may be others which are relevant, and accordingly must be considered, depending on the circumstances of a particular case):

1. The object stated in s 3 of the Act (mandatory statutory consideration 1);

¹ [2016] NZEmpC 143

² [2018] NZEmpC 132

2. the nature and extent of the breach or involvement in the breach (mandatory statutory consideration 2);
3. whether the breach was intentional, inadvertent or negligent (mandatory statutory consideration 3);
4. the nature and extent of any loss or damage suffered by any person or gains made or losses avoided by the person because of the breach or involvement in the breach (mandatory statutory consideration 4);
5. whether the person in breach has paid an amount in compensation, reparation or restitution, or has taken other steps to avoid or mitigate any actual or potential adverse effects of the breach (mandatory statutory consideration 5);
6. the circumstances of the breach, or involvement in the breach, including the vulnerability of the employee (mandatory statutory consideration 6);
7. previous conduct (mandatory statutory consideration 7);
8. deterrence, both particular and general (*Preet* additional mandatory consideration 1);
9. culpability (*Preet* additional mandatory consideration 2);
10. consistency of penalty awards in similar cases (*Preet* additional mandatory consideration 3);
11. ability to pay (*Preet* additional mandatory consideration 4);
and
12. proportionality of outcome to breach (*Preet* additional mandatory consideration 5).

[17] I have applied this approach to my assessment of the penalty. In particular I have factored into my assessment the following:

- (a) The non-payment of the instalments was deliberate insofar as BF7 has chosen not to make payments applying its revenue elsewhere because of cashflow issues.
- (b) Ms Stewart has not received money she is entitled to and has experienced anxiety and concern over the payments. She has also had to pursue payment through the Authority.
- (c) I am aware that this is not the first time BF7 has defaulted on payments to its employees.
- (d) A review of other cases where a penalty has been imposed for one breach of minimum standards or breach of a record of settlement, indicates that penalties

range from \$250.00 to \$5,000.00. Those at the higher end of this scale tend to have aggravating features such as adverse impact on an employee.

[18] Based on all of the factors in *Nicholson*, particularly those that I have outlined, I intend to impose a penalty of \$2,000.00. Standing back and assessing this outcome against the breach I am satisfied that that is appropriate and proportionate.

Payment to Ms Stewart

[19] I will also order payment of all of this penalty to Ms Stewart given the consequences of non-payment on her.

Orders

[20] BF7 has breached the Record of Settlement by not paying the agreed settlement sum, through the required instalment payments, by 10 April 2019.

[21] BF7 must comply with the Record of Settlement. In particular, BF7 must make payment of the balance of the settlement sum owing, being \$7,000.00 immediately as the balance is overdue.

[22] BF7 must pay a penalty of \$2,000.00. I direct that all of that penalty is to be paid to Ms Stewart within 14 days.

Costs

[23] As Ms Stewart has been successful with her application for compliance and a penalty she is entitled to a contribution towards the costs she incurred, from BF7. My starting point is to apply the daily tariff and then consider whether this should be adjusted based on the principles in *PBO Ltd (formerly Rush Security Ltd) v. Da Cruz*³, and *Davide Fagotti v. Acme & Co Ltd*⁴.

[24] My investigation of this matter took one quarter of a day so the starting point is \$1,125.00 – this being 25% of \$4,500.00 which is the applicable daily tariff rate for a full day.

[25] There is no basis for an adjustment to the daily tariff so I determine that BF7 must pay \$1,125.00 as a contribution to Ms Stewart's costs in this matter. Ms Stewart is also entitled to

³ [2005] 1 ERNZ 808

⁴ [2015] NZEmpC 135

reimbursement of the filing fee being \$71.56. These two amounts must be paid within 14 days.

Peter van Keulen
Member of the Employment Relations Authority