

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2015] NZERA Wellington 103
5552926

BETWEEN DEAN TAYLOR
 Applicant

AND FIRST AID SPECIALISTS
 LIMITED
 Respondent

Member of Authority: Trish MacKinnon

Representatives: Quentin Haines, Counsel for Applicant
 Coral Stuart, for Respondent

Investigation Meeting: On the papers

Determination: 22 October 2015

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Dean Taylor and his former employer, First Aid Specialists Limited, entered into a record of settlement in June 2012. The settlement was made under the auspices of a mediator of the Department of Labour who, before he signed the settlement agreement, certified that he had explained to the parties the effect of s.149(3) of the Employment Relations Act 2000 (the Act) and was satisfied that the parties understood the effect of that subsection and had affirmed their request for him to sign the agreed terms of settlement.

[2] The effect of s. 149(3) of the Act is that agreed terms of settlement, once signed by a Department of Labour (now Ministry of Business, Innovation and Employment) mediator are final and binding, may not be cancelled under s. 7 of the Contractual Remedies Act 1979, and may only be brought before the Authority or Court for enforcement purposes.

[3] The terms of settlement entered into by the parties in this instance entailed the payment of \$5,256 by the respondent to Mr Taylor; the payment of holiday pay arrears of \$1,444 (gross); and a contribution of \$2,000 plus GST towards Mr Taylor's costs. All of the payments were to be made to Mr Taylor by way of automatic payments to his bank account at the rate of \$50 per week commencing Wednesday, 20 June 2012. Mr Taylor says a total of 65 payments were made pursuant to the record of settlement, 10 of which were later dishonoured by the respondent's bank. He says he has received only the sum of \$2,750 from the respondent.

[4] Mr Taylor seeks an order of enforcement of the record of settlement to the effect that all sums under the record of settlement are now due and payable. He further seeks the imposition of a penalty against the respondent, payable to him in full. Mr Taylor has sought a number of other remedies including a determination that the respondent has, in the circumstances, failed to act as a "*fair and reasonable*" employer could have acted; penalties for breach of the Act; and an order for costs.

[5] Coral Stuart is the sole director of First Aid Specialists Limited. She does not dispute that the respondent entered into a record of settlement on the terms described by Mr Taylor. However, she refers to financial difficulties, the fact that the company is no longer trading and is insolvent as reasons for failure by the respondent to honour the terms of the settlement agreement.

The Authority's investigation

[6] In the course of a telephone conversation between the parties and the Authority on 26 June 2015, it was agreed this matter would be determined on the papers following the filing of affidavits and further information from Mr Taylor and Ms Stuart.

Evidence of the parties

[7] In his affidavit, Mr Taylor referred to the difficulties that arose in his former employment relationship with First Aid Specialists Limited which led to the record of settlement being signed by the parties. He provided bank statements showing the payments he had received to date. He also provided evidence of the 10 payments made which were later dishonoured by the respondent's bank.

[8] Ms Stuart's affidavit evidence did not dispute many of the facts contained in Mr Taylor's affidavit, including the information relating to the number of payments he had received or the dishonouring of 10 of those payments. She noted that First Aid Specialists Limited had managed to pay all of the holiday pay and some other arrears in the payments that have been made since 20 June 2012.

[9] However, Ms Stuart spent much of her affidavit providing hearsay evidence about a meeting Mr Taylor attended with a third party and the negative impact this meeting had on her personally. Ms Stuart was not present at that meeting and her hearsay account of what occurred in the meeting is disputed by Mr Taylor.

[10] I place no reliance on that part of Ms Stuart's affidavit evidence partly on the basis that, as hearsay evidence, I cannot rely on it and partly on the grounds of its lack of relevance to the matter before me.

Discussion

[11] I am satisfied from the evidence supplied by Mr Taylor that First Aid Specialists Limited has failed to comply with the terms of the record of settlement it entered into with him on 12 June 2012. I have no information other than that supplied by Ms Stuart that the company is no longer trading and is insolvent.

[12] By my calculation, if the settlement agreement had been honoured and regular payments made at \$50 per week commencing on Wednesday, 20 June 2012 without any payments being dishonoured, payment in full would be effected by 24 October 2015. That being so, it is appropriate to order that the sums specified in the record of settlement be paid in full rather than by reverting to a payment-over-time arrangement.

[13] A penalty is imposed for the purpose of punishment of a wrongdoing which will consist of breaching the Act or another Act or an employment agreement¹. Not all breaches will result in the imposition of a penalty and, as was noted by the (then) Chief Judge in *Xu*, the first question should be how much harm the breach has occasioned and how important it is to bring home to the party in default that such behaviour is unacceptable or to deter others from it.

¹ *Xu v McIntosh* [2004] 2ERNZ 228 at464

[14] In this instance, Mr Taylor has been inconvenienced and put to the expense of obtaining legal representation in order to obtain monies which should have been paid to him on a regular basis over the past three years and four months. Ms Stuart as sole director of the respondent appears to show no appreciation of Mr Taylor's situation and no regret over the company's failure to honour the record of settlement. Her response, both in the statement in reply and in her affidavit put more emphasis on her own situation and how Mr Taylor's attempt to enforce the settlement agreement has made her feel stressed and anxious.

[15] I find it is appropriate to award a penalty against First Aid Specialists Limited for the purpose of reinforcing to the respondent that obligations entered into in a mediated record of settlement must be met and for the deterrent effect such an imposition may have on others.

Orders

[16] First Aid Specialists Limited is ordered to comply in full with the payment to Mr Taylor of those sums specified in the record of settlement entered into by the parties on 12 June 2012 that have not already been paid. Such payment is to be made by 6 November 2015.

[17] First Aid Specialists Limited is also ordered to pay a penalty pursuant to s.149(4) of the Act in the sum of \$500. That sum is to be paid in full to the Mr Taylor.

Costs

[18] The issue of costs is reserved.

Trish MacKinnon
Member of the Employment Relations Authority