

[3] Mai Media did not comply with clause 3.3 of the Record of Settlement and failed to pay Mr Taylor the agreed sum by 13 July 2007 (the 7th day after the signing of the Record of Settlement by the mediator). On 16 July 2007 Mr Taylor lodged this application in the Authority. The agreed sum was paid to Mr Taylor on 3 August 2007.

[4] Mr Taylor seeks a compliance order that Mai Media comply with the terms of the Record of Settlement, interest, the award of a penalty to be paid to him and costs.

Compliance order

[5] The terms of the Record of Settlement have now been complied with. No grounds exist upon which a compliance order can be made. The application is declined.

Interest

[6] Schedule 2, clause 11 of the Employment Relations Act 2000 provides:

11 Power to Award Interest

(1) Subject to subclause (2), in any matter involving the recovery of any money, the Authority may, if it thinks fit, order the inclusion, in the sum for which judgment is given, of interest, at such rate not exceeding the 90-day bill rate (as at the date of the order), plus 2%, as the Authority thinks fit, on the whole or part of the money for the whole or part of the period between the date when the cause of action arose and the date of payment in accordance with the determination of the Authority.

(2) Subclause (1) does not authorise the giving of interest upon interest.

[7] While, in the broad sense, this matter involves the recovery of money, no sum for judgment has been given. There is no basis upon which the Authority can order interest.

Penalty

[8] Section 149(4) of the Employment Relations Act 2000 provides:

A person who breaches an agreed term of settlement to which subsection (3) applies is liable to a penalty imposed by the Authority.

[9] An award of a penalty requires a finding of wilful or deliberate conduct proved to beyond a reasonable doubt.

[10] Graham Pryor, a director of Mai Media, said in evidence that the failure to pay Mr Taylor the agreed sum was due to expected funds not being available and that it was an oversight that this was not communicated to Mr Taylor. He said the agreed sum was not paid because a number of unexpected financial difficulties arose in the first few weeks of July.

[11] I am satisfied that the standard required to award a penalty has been reached. The respondent entered a Record of Settlement with a term that within seven days of signing by a mediator the agreed sum would be paid. That did not happen. The respondent knew before the date of payment it would not be able to make the payment as agreed; Mr Pryor's evidence was that the unexpected difficulties arose during the first few weeks of July, the period within which the payment term took effect. The respondent took no steps prior to or after the due payment date to communicate to Mr Taylor or his representative that the payment would not be made and the reason why.

[12] The availability or otherwise of funds is not relevant to whether the respondent's breach of an agreement voluntarily entered amounts to a wilful breach. What is relevant are the steps the respondent took to comply with the terms of the Record of Settlement. There is no evidence that the respondent took any steps to pay the agreed sum or to explain to Mr Taylor why the agreed sum could not be paid on the agreed date. Those failures amount to a wilful breach of the agreed terms.

[13] **Mai Media Limited is ordered to pay directly to Manu Taylor a penalty of \$500 pursuant to section 149(3) of the Employment Relations Act 2000.**

Costs

[14] Mr Taylor has enjoyed some success. The investigation meeting ran for about one hour during which the witnesses were questioned and closing submissions were

made, including those on costs. The issues were clearly defined and I accept those issues were important to the parties.

[15] Having considered counsels' submissions and guided by the principles applicable in a consideration of costs by the Authority¹ I find Mr Taylor is entitled to be reimbursed for the \$70 filing fee incurred in lodging this application along with \$1000 towards his legal costs and I so order.

Marija Urlich

Member of the Employment Relations Authority

¹ *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808