IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE

[2019] NZERA 431
3054192

	BETWEEN	MARILYN WOMERSLEY Applicant
	AND	RUSTIC COUNTRY LIMITED Respondent

Member of Authority:	Christine Hickey
Representatives:	Ashley Fechney and Anna Oberndorfer, advocates for the Applicant Ross Whiteside, for the Respondent
Investigation Meeting:	On the papers
Submissions Received:	3 and 24 May 2019 from the Applicant 19 May 2019 from the Respondent
Date of Determination:	19 July 2019

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] On 27 November 2018 the parties agreed to terms recorded in a Record of Settlement.[1] The applicant signed the Record of Settlement on 28 November 2018, and Mr Whiteside, for the respondent, signed it on 3 December 2018. The document was then sent to the mediator, who signed and certified it on 4 December 2018.

[2] Ms Womersley claims that the respondent has not complied with clause 3 of the Agreement, under which the respondent agreed to contribute $1,000 plus GST towards her legal costs. That amount was payable within 21 days of the respondent receiving an invoice for that amount.

[1] The Record of Settlement was signed off under s 149 of the Employment Relations Act 2000 (the Act).

[3] Ms Womersley claims:

(i) An order for compliance with the Record of Settlement;

(ii) A penalty for breach of the Record of Settlement;

(iii) Interest on the money owed under the Record of Settlement;

(iv) Reimbursement of the filing fee of $71.56;

(v) Legal costs of pursuing compliance with the Record of Settlement.

[4] On 17 April 2019 I held a case management teleconference with Ms Fechney and Mr Whiteside during which they asked me to determine the matter on the papers. I have received written submissions and relevant documents, mainly emails, from both parties.

[5] Mr Whiteside's submissions state:

> A counterclaim against the applicant will be actioned if the Authority finds in the Applicants favour, this will be for full costs …

Issues

[6] The issues I identified to the parties that I will resolve are:

(i) Whether the respondent breached the Record of Settlement;

(ii) If so, whether the Authority should make an order for compliance, taking into account the respondent's allegation against the applicant;

(iii) If so, whether the Authority should:

- award interest on the unpaid money;
- impose a penalty on the respondent for non-compliance; and
- make an order that Ms Womersley's costs for these proceedings be paid.

(iv) Whether the respondent can bring a counter-claim against Ms Womersley.

What happened?

[7] Ms Womersley worked for the respondent. Mr Whiteside is the operator of the Rustic Country 1878 Hotel. Her employment ended in May 2018. After that the parties entered into the Record of Settlement. They entered into negotiations and agreed on the terms in the Record of Settlement.

[8] On 29 November 2018 Mr Whiteside emailed Ms Fechney that he had received the Record of Settlement the previous day and:

> forwarded it to my Lawyer this morning, I expect his response and any comments from him by tomorrow at the latest. I will then process accordingly.

[9] On 3 December 2018 at 7.41 pm, Mr Whiteside sent Ms Fechney a covering email attaching a copy of the Record of Settlement that he had signed.

[10] Ms Fechney sent an invoice for $1000 plus GST on 5 December 2018. Under clause 3 it was due for payment by 26 December 2018.

[11] However, it was not paid. On 5 January 2019, Mr Whiteside wrote to Ms Fechney acknowledging that the account had not been paid by the due date:

> I …will keep you informed as to progress on payment. This settlement and the circumstances that created it are due to low trade and this has continued…
> I will keep you informed on our financial situation and if full payment is not possible in the near future then I will offer a payment plan to resolve. Thank You for your understanding in this matter.

[12] On 15 January 2018, Ms Fechney followed up by asking for the money to be deposited urgently and informing Mr Whiteside that if Ms Womersley had to take action to enforce the terms of settlement there would be increased costs for the respondent, including a penalty, interest on the sum owed and further legal costs.

[13] On 18 January 2019, Mr Whiteside wrote to Ms Fechney asking if she could clarify whether the mediator phoned Ms Womersley to explain:

> 1…the process of settlement, the binding nature of it and to adhere to any conditions agreed to by both parties in settling this case?
> 2: That your client was shown & agreed to the conditions requested prior to settlement in the email sent to you on Monday the 03rd December 2018 regarding "confidentiality" and related conditions and that if any of these were breached that the agreement would be void and the matter closed.
> I trust as your client has signed the settlement that she was informed, understood and agreed accordingly.

[14] Later that day Ms Fechney wrote noting that Ms Womersley was:

> aware of the confidentiality clause contained in the settlement document.
> Your email of 3 December 2018 did not alter the confidentiality clause contained in the settlement document. Both parties had agreed to, and signed, the settlement document prior to this email.

[15] The email Mr Whiteside refers to that he sent on 3 December, with the signed Record Settlement attached, included the following paragraph:

> Please remind your client to respect the "Confidentiality" clause agreed to by both parties. All matters arising from or associated with her cease (sic) of employment are to be respected. Any breach of this by either party towards themselves Personally, their Friends, Family, Customers or Staff including defamatory business Comments or Property will render this agreement void and this matter closed, I trust based on this that your client has disposed of the Hotel keys accordingly …

[16] On Friday, 25 January 2019 Mr Whiteside responded that the mediator told him that his emailed paragraph of 3 December 2018 was taken to be accepted by Ms Womersley.

[17] I understand Mr Whiteside's submissions to say the above paragraph asking Ms Fechney to remind Ms Womersley of her obligation of confidentiality forms part of the terms of settlement agreed between the parties.

[18] On 25 January 2019 Mr Whiteside also wrote to Ms Fechney that he had become aware that Ms Womersley had committed an act against the respondent's interests.[2] He wrote he had been informed that the act breached the terms of settlement and made the terms of the Record of Settlement void. However, he also recorded that he was told that the settlement terms regarding employment and finances were civil matters and his allegation was "not related" to the employment matters.

[19] Ms Fechney replied the same day informing Mr Whiteside that "the matter you have discussed….does not breach the terms of the settlement document."

Has the respondent breached clause 3 of the Record of Settlement?

[20] The terms of settlement can only be brought before the Authority or the Court for enforcement purposes, which is what Ms Womersley has done. The respondent has not paid Ms Womersley the agreed $1,000 plus GST towards her legal costs. Mr Whiteside does not deny that.

[2] I do not refer to the alleged act in this determination. See paragraphs [60] – [64] below for reasons that I have not referred to the alleged act.

[21] The document that Mr Whiteside signed includes the following:

> 1. The settlement is final and binding on and enforceable by us; and
> 2. Except for enforcement purposes neither of us may seek to bring those terms before the Authority or Court …; and
> 3. The terms of settlement cannot be cancelled under Section 36 to 40 of the Contract and Commercial Law Act 2017; and
> 4. That section 149(4) provides that a person who breaches an agreed term of settlement to which subsection (3) applies is liable to a penalty imposed by the Authority.

[22] The mediator has certified that prior to signing the Record of Settlement she explained to both parties "the effect of sections 148A, 149(1) & (3)" of the Act.

[23] Section 149 of the Act provides that once the Record of Settlement is signed by the mediator the terms included in that Record of Settlement are final and binding on the parties and cannot be cancelled under sections 36 to 40 of the Contract and Commercial Law Act 2017 (the CCL Act).

[24] Section 149 overrides the provisions of sections 36 to 40 of the CCL Act. That means that a party to a Record of Settlement signed under s 149 of the Act cannot cancel the contract even if they entered into it because of a misrepresentation or an indication that the other party does not intend to keep to their obligations.

[25] In other words, Mr Whiteside was notified in writing and verbally that the terms of the Record of Settlement were final and binding on the respondent. He was likewise informed that any breach of an agreed term would make the respondent liable to a penalty to be imposed by the Authority.

[26] Therefore, Mr Whiteside knew that the terms of the Record of Settlement could not be cancelled. Yet, Mr Whiteside submits that the action he alleges Ms Womersley undertook means the respondent should not be bound by clause 3.

[27] I agree with Mr Whiteside that Ms Womersley is bound by the confidentiality obligations set out at clause 5 of the Record of Settlement, as is the respondent. However, she could not be bound by the additional paragraph in Mr Whiteside's 3 December 2018 email because it was not a paragraph agreed by the parties as a "term of settlement" before

they signed the Record of Settlement. If it had been it would have been included in the Record of Settlement, which it is not.

[28] In any event, it is unclear how the act Mr Whiteside alleges Ms Womersley committed breaches the confidentiality or non-disparagement aspects of clause 5.

[29] I note that Mr Whiteside used the word "Property" in the 3 December email. However, in its context it relates to "defamatory Business Comments". Ms Womersley's obligations were to not make any disparaging comments about the respondent and not to tell other parties about the terms of settlement. Mr Whiteside's allegation and submissions do not disclose any alleged disparaging comments by Ms Womersley or any breach of the Record of Settlement.

[30] If there was such a breach the respondent could bring a claim to the Authority asking for a compliance order and a penalty against Ms Womersley. It has not done so.

[31] Ms Womersley has not breached the Record of Settlement. However, the respondent has. That means that the respondent is bound by clause 3 to pay Ms Womersley.

Should the Authority make an order that the respondent comply with clause 3?

[32] Clause 3 is final and binding on the respondent and it must pay the amount owed of $1,150.00.

[33] Mr Whiteside submits that the respondent had that amount ready to pay Ms Womersley when it discovered what it says was her breach of the Record of Settlement. He submits that if the Authority finds she has not breached her obligations it will pay her. However, he says that would need to be by time payment. That request arises out of the respondent's difficult financial circumstances that Mr Whiteside has sought to demonstrate by supplying a letter and copies of some of his and the business' bank statements. I had directed him to provide the relevant financial evidence in the form of an affidavit. However, he chose not to do so. Nevertheless, I have taken account of the bank statements that demonstrate an ongoing difficult financial situation and the fact that the respondent's business property is for sale.

[34] However, the respondent has had the use of the money Mr Whiteside says was ready to pay Ms Womersley for at least six months now. In addition, the application to the Authority was made on 19 February 2019, also almost six months ago, and the respondent has had that long to arrange to have the required amount ready to pay in the event that the Authority ordered it to do so.

[35] The first reason given for why it was not paid on time was that the respondent could not afford it. The respondent should not have agreed to pay an amount it could not afford to pay by its due date if it could not honour its obligation. Mr Whiteside offered to enter into a payment plan if ordered to pay Ms Womersley. However, he has not suggested one that the respondent could afford. In all the circumstances, I consider that Ms Womersley is entitled to the money in one lump sum, rather than by time payment. However, I am prepared to allow the respondent two weeks to find the money.

[36] I order that the respondent comply with clause 3 of the Record of Settlement by paying the invoice, for $1,150, in full by 4 pm, Friday, 2 August 2019.

Should the respondent pay interest on the overdue amount?

[37] Ms Womersley should have had the $1,150 the respondent undertook to pay her on 26 December 2018.

[38] The Authority has the power to award interest pursuant to clause 11 of the Second Schedule of the Act at the rate prescribed in Schedule 2 of the Interest on Money Claims Act 2016, which is currently 5% per annum. I consider this to be exactly the kind of situation in which interest should be paid. The respondent has given two very different reasons for not paying. Neither reason is one that frees it from its obligation to pay under clause 3.

[39] The respondent must pay interest on the amount owed from 26 December 2018 until the date of payment. To 18 July 2019 the amount of interest owed is $21.68.

Should the Authority impose a penalty?

[40] Under s 149(4) of the Act, a person who breaches an agreed term of settlement to which s 149(3) of the Act applies, could be liable to a penalty of up to $10,000 for an individual or up to $20,000 for a company or other corporation.

[41] The Authority's power to order a penalty is discretionary and it does not automatically follow that a where a breach of an agreed term has been found, a penalty must be awarded.

[42] The primary purpose of a penalty is to punish wrongdoing.[3] It is not intended to compensate Ms Womersley, as, for example, the payment of interest does. A further purpose of a penalty is to deter future breaches by the penalised party and by others who bind themselves by entering Records of Settlement signed under s 149 of the Act.

[43] I consider the respondent should pay a penalty for its failure to comply with its legal obligations and to send a message of deterrence to any parties who might consider breaching a s 149 agreement.

[44] In the recent Employment Court case of *Kazemi v Rightway Limited and others*[4] Judge Holden followed Chief Judge Inglis' lead in *Nicholson v Ford*, setting out a number of considerations that the Authority must take into account in assessing an appropriate penalty.

Nature and number of statutory breaches

[45] In this case there is only one breach for which the maximum penalty is $20,000, because the respondent is a company.

Severity of the breach – taking into account aggravating and mitigating factors

[46] The respondent did not necessarily set out to breach the terms of settlement. However, it apparently agreed to pay an amount it could not afford. The object of the Act includes promoting mediation as the primary problem-solving mechanism and reducing the need for judicial intervention. That means that parties must be encouraged to respect Records of Settlement. The fact that the respondent breached the terms and then argued that it should not be bound to pay has meant Ms Womersley has had to resort to judicial intervention by her application to the Authority.

[47] The breach was total, no money has been paid, and has been ongoing for 6 months. The first part of the breach, for lack of funds to pay the amount, was intentional because the respondent should not have agreed to pay if it could not afford to do so. However, I

[3] *Xu v McIntosh* [2004] 2 ERNZ 448
[4] [2019] NZEmpC 59

acknowledge that since about 25 January 2019 Mr Whiteside had some apparently conflicting advice leading him to understand the respondent was not bound to pay because of what he alleges was Mr Womersley's behaviour.

[48] Ms Womersley has not been able to have the comfort of her legal bill being paid by the respondent as it agreed. Instead, she has had to incur further legal costs in enforcing the Record of Settlement.

[49] The respondent has not taken any steps to mitigate the ongoing adverse effects of its breach.

[50] Ms Womersley was not a particularly vulnerable employee. She has a qualified advocate protecting her interests.

[51] Penalties awarded against companies for a single, but ongoing, failure to pay a settlement sum prior to compliance being sought vary between $250.00 and $10,000. The factual situations of those matters vary greatly. However, in the case in which a $10,000 penalty was imposed the respondent had three other cases in which it had committed similar breaches. There are no instances of the respondent having been brought before the Authority or the Court previously for any breach of a Record of Settlement.

[52] Standing back and considering all relevant matters, I assess an appropriate penalty would be $2,000.

Means of the respondent to pay the penalty

[53] The last aspect of the exercise of my discretion is to consider the means of the respondent to pay a penalty. Mr Whiteside's earlier position stated to Ms Fechney was that the business was under significant financial strain. However, he has not addressed this aspect at all in his submissions.

[54] As noted in paragraph [36] Mr Whiteside provided some financial information for the respondent and for himself. Because of the respondent's difficult financial circumstances, I reduce the penalty payable to $600.00.

Who should receive the penalty?

[55] Section 136 of the Act requires the Authority to order every penalty not be paid to the plaintiff but to the Authority, to be paid into a Crown Bank Account.

[56] However, the Authority has the discretion to order the whole or any part of any penalty to be paid to any person. Submissions for Ms Womersley ask for the whole or part of the penalty to be paid to her as the "victim" of the respondent's breach and having "suffered due to the stresses of ongoing litigation in resolving the matter."

[57] In the Employment Court case of *Nicholson v Ford*[5] Chief Judge Inglis wrote:

> [43] … One of the key purposes of the penalty provisions of the Act is to deter breaches and publicly denounce such actions. As was observed in *Stormont v Peddle Thorp Aitken Ltd*:
>
> > In determining issues relating to penalty apportionment, the nature of the issues involved and the extent they engage public, as opposed to private, interests will be relevant. While I agree … that the matters at issue in this case raise less acute concerns about public policy than, for example, breaches of mediator-certified settlement agreements, I do not accept the proposition that it follows that in the absence of a serious matter of public policy the whole of any penalty should be awarded to the affected individual.
> >
> > There is a broad public interest in deterring the sort of employment practices which have emerged in this case, and which are appropriately reflected in part-payment to the Crown. It is, however, appropriate that any apportionment take into account the fact that it is Ms Stormont (not, for example, a Labour Inspector on behalf of the affected employee) who has had to go to the effort of bringing the breach before the Court (while being conscious of the need to avoid duplication with costs).[6]

[58] In both the *Nicholson* and *Stormont* cases, Chief Judge Inglis awarded 75% of the penalties to the employees and 25% to the Crown.[7] By contrast, this is a case in which there is an important public policy consideration. There is a public interest in ensuring Records of Settlement are complied with. However, I also consider that Ms Womersley should receive some acknowledgment of the personal cost, such as time, effort and anxiety, as opposed to the monetary cost already ordered, to her of needing to achieve the compliance the respondent had agreed to.

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[5] [2018] NZEmpC 132
[6] Note 5, at [43] onwards. Footnotes omitted.
[7] Note 5, at [44] – [47].

[59] I consider that 70% of the penalty, being $420, should be paid to Ms Womersley with the Crown retaining 30% of the penalty.

Can the respondent bring a counter-claim in the Authority?

[60] Mr Whiteside made an allegation against Ms Womersley as a result of which he said the respondent should not be bound to comply with clause 3. That allegation is also the reason Mr Whiteside says the respondent will make a counterclaim if Ms Womersley succeeds in her claims.

[61] In this determination I have not detailed Mr Whiteside's allegation. First, Mr Whiteside's allegation falls squarely within the ambit of "disparaging comments" and any repetition of them in this document would mean that Mr Whiteside's disparaging comments would be made public.

[62] Secondly, Mr Whiteside was apparently informed by as early as 25 January 2019 that the employment issue and the purported act of concern to him were separate issues[8]. Certainly Ms Fechney clearly stated that the respondent had no grounds to withhold payment.

[63] Thirdly, Ms Womersley's employment ended several months before the parties entered into the Record of Settlement. Neither party had any continuing obligation of good faith towards each other under the employment relationship. Therefore, the act could not have breached any of Ms Womersley's obligations as an employee.

[64] Also important, although not falling within the ambit of my considerations, is a fourth point. Mr Whiteside has not provided any evidence that the act he complains of was carried out by Ms Womersley or even under her instructions. Mr Whiteside believes the event was of a criminal nature. In that case it was entirely a matter for the police.

[65] The respondent cannot bring a counterclaim against Ms Womersley in the Employment Relations Authority.

[8] Whilst apparently simultaneously receiving advice that Ms Womersley's "breach" made the terms of settlement void.

Costs

[66] Ms Womersley claims the cost to her of ensuring the respondent complied with its obligations. She asks me to order the respondent to pay her legal costs for making this claim. Her confirmed costs at the time of her application for costs were $1,180 plus GST; a total of $1,357.00 incurred after the Record of Settlement was entered into. Those costs have been incurred wholly because of the respondent's breach of the Record of Settlement.

[67] For the respondent, Mr Whiteside submits that Ms Womersley's actions that he considers a breach of the settlement mean that the respondent should not have to pay the amount owed. He says that at the time her action was discovered the respondent was poised to pay the $1,150.00 due under the Record of Settlement, but did not do so due to what he alleges was her unlawful behaviour. He says that it has been Ms Womersley's choice to incur further legal costs.

[68] Mr Whiteside also points out that the respondent has incurred costs for legal advice in these proceedings. I take it from his mention of that in his 7 June 2019 document that he implies that both parties should meet their own costs. However, the unsuccessful party, here the respondent, can usually expect to pay a reasonable contribution towards the successful party's costs. Ms Womersley is the successful party.

[69] Now that it has been established that the respondent was not legally entitled to withhold payment from Ms Womersley, it is clear that the respondent's submissions can carry no weight in my consideration of legal costs.

[70] The Authority usually awards costs based on a daily tariff amount of $4,500, inclusive of GST, for a full day of an investigation meeting. Costs have remained lower in this case because I have been able to deal with the matter without an investigation meeting.

[71] The work required of Ms Womersley's advocate included following the respondent up when the amount due was not paid in a series of emails between her and Mr Whiteside, making an application to the Authority, reporting to and taking instructions from Ms Womersley, preparing for and attending a case management teleconference, making written submissions in relation to the compliance order and penalty and then making written costs submissions. The amount claimed is a little under a third of the usual daily tariff. In all the circumstances it is a fair and reasonable amount to claim, especially when I bear in mind it

does not include any amount of legal costs Ms Womersley will be charged for her advocate preparing costs submissions.

[72] In addition, the respondent should reimburse Ms Womersley the $71.56 filing fee it cost her to lodge this application.

Orders

1. **Within 28 days of the date of this determination Rustic Country Limited must pay Marilyn Womersley:**
   - **(i) agreed legal costs of $1,150.00, including GST, to be paid in full by Friday, 2 August 2019 in compliance with clause 3 of the Record of Settlement. Failure by Rustic Country Limited to comply with this compliance order may result in the Employment Court exercising its discretion to impose one or more of the potential sanctions set out in s 140(6) of the Act, which include imprisonment, the imposition of a maximum fine of $40,000 and/or sequestering property; and**
   - **(ii) interest on $1,150.00 calculated from 26 December 2018 until the date of payment. The parties should use the following link to calculate the interest payable:** https://www.justice.govt.nz/fines/civil-debt-interest-calculator/; **and**
   - **(iii) costs of $1,357.00; and**
   - **(iv) $71.56 for the filing fee.**

2. **Within 28 days of the date of this determination Rustic Country Limited must pay the Employment Relations Authority $600.00 for payment into a Crown Bank Account. That is the penalty imposed. The Crown should then pay Ms Womersley $420.00 of the penalty.**

Christine Hickey
Member of the Employment Relations Authority