Appeal to Employment Court yields roughly double the remedies plus a penalty

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In a recent challenge to a determination of the Employment Relations Authority, the Employment Court ordered a new $6,000 penalty against an employer and roughly doubled the monetary compensation payable to a former employee who had been dismissed in what the Court described as a “mixed motive” redundancy: *Pyne* v *Invacare New Zealand Ltd* [2023] NZEmpC 179.

Factual background

The employee (Mr Pyne) was employed by Invacare New Zealand Ltd (the company) as a rentals business operations manager. He commenced employment in August 2019 on a fixed term basis.

In early December 2019, the company commissioned a workplace culture report due to a range of issues it had experienced in its Auckland office. Around this time, Mr Pyne made offensive comments to another employee, who subsequently complained to Mr Pyne’s manager.

On 6 January 2020, Mr Pyne had a meeting with his manager about his comments. Mr Pyne apologised to both to his manager and to the employee he had offended. The employee told Mr Pyne they accepted his apology.

Later, Mr Pyne also spoke to the company Human Resources Manager about his comments. The HR Manager confirmed that he had spoken to the offended employee as well. The HR Manager advised Mr Pyne that the employee had said that he (Mr Pyne) had apologised to them and that they considered the matter to be at end.

As a result, at that time in mid-January 2020, it appeared to Mr Pyne that the offensive comments issue had been resolved and that no disciplinary action would be taken against him.

In February 2020, Mr Pyne was offered permanent employment by the company, which he accepted.

Two weeks later, the workplace culture report was completed and provided to company management. The report referred to Mr Pyne’s offensive comment and inaccurately noted that no action had been taken about those comments. Mr Pyne had not been interviewed by the report writer. The report was never brought to Mr Pyne’s attention by the company even though it contained information which was critical about him.

In March 2020, the company announced a restructure proposal, which initially did not concern the rentals business Mr Pyne worked in.

In a series of internal emails between the company Vice President and the HR Manager, the company decided that Mr Pyne was “not the right person for the role” and that his new manager would inherit a “people problem”. The company contemplated actioning a performance management process, but after noting Mr Pyne might raise a legal claim, decided to a progress a restructure process for the rentals side of the business in which Mr Pyne was employed.

A meeting was held with Mr Pyne which addressed a proposal to disestablish Mr Pyne’s position. In the restructure proposal meeting, the Vice President raised the workplace culture issues, stating that if Mr Pyne stayed in the business following the restructure, then matters would need to be addressed at some stage in the future.

As part of exploring redeployment options, Mr Pyne requested to be considered for a vacant position in the structure, which 2 other candidates had also expressed interest in. The “interview” that Mr Pyne attended was found by the Court not to have been an interview in fact because only small talk was exchanged. The Court also noted the Vice President had attended the 2 other candidates’ interviews, but not Mr Pyne’s. Unsurprisingly, at the conclusion of restructure process, Mr Pyne was given notice that his employment would terminate on the grounds of redundancy.

Employment Relations Authority determination

The Employment Relations Authority found that Mr Pyne’s dismissal was primarily motivated by concerns about Mr Pyne’s conduct, rather than concerns about the company’s operational efficiency.

The Authority found the company had unjustifiability dismissed and unjustifiably disadvantaged Mr Pyne and breached its good faith obligations. Mr Pyne was awarded 3 months’ compensation for lost wages ($27,500). He was also awarded $10,000 compensation for humiliation, loss of dignity and injury to feelings, but this was reduced by 15% due to contribution linked to the offensive comments.

The Authority did not award a penalty for the company’s breaches of good faith, on the basis that the awarded compensation adequately addressed the company’s shortcomings and that “no further penalty” was necessary.

Employment Court judgment

Mr Pyne appealed the Authority decision to the Employment Court, claiming that the Authority had made both errors in calculating Mr Pyne’s lost wages and compensation for emotional harm, and in determining not to award a penalty.

Compensation for lost wages

The Employment Court considered Mr Pyne’s claim for compensation for lost wages. It had taken Mr Pyne around 20 months to obtain new employment, but he had received some income during that period. However, the exact amount of the income Mr Pyne had received was not clear. The Authority had declined to order more than 3 months lost wages because it considered Mr Pyne had not provided sufficient evidence of his attempts to mitigate his loss. On appeal, the Court concluded he had made attempts to mitigate his loss, especially given the Court heard evidence Mr Pyne had attended around 70 job interviews.

In assessing quantum, the Court noted that Mr Pyne’s actual loss was the upper limit but that there no automatic entitlement to actual loss. After having regard to the insufficient evidence given by Mr Pyne about income he did receive in the period after his dismissal, the Court concluded that compensation of 6 months’ lost wages was appropriate.

Compensation for emotional harm

The Court also considered what sum should be ordered to compensate Mr Pyne for humiliation, loss of dignity and injury to feelings experienced as a result of his grievance. The Court emphasised that although contemporaneous evidence of stress may support a claim for compensation, employees are not required to outwardly manifest emotional injury or advise their employer they are experiencing stress so to be eligible for compensation for that harm.

After considering how the company's unjustified actions had personally affected Mr Pyne, the Court determined that an award in the lower portion of band 2 was appropriate and awarded $18,000. The Court did not reduce that amount to account for contribution, pointing out that such a reduction would not be appropriate given the company had stated the restructure was not motivated by concerns about Mr Pyne's comments.

Penalty for breach of good faith

The Authority had found the company had breached its good faith duty but had not awarded a penalty for those breaches. The Court however held that imposition of a penalty was appropriate. It made 2 important observations about penalties.

Firstly, the Court highlighted that compensatory awards and penalties serve different purposes. Compensation seeks to redress harm caused to an employee by an employer's breach, whilst penalties are imposed to penalise or punish the defaulting party. This is exemplified by the fact that a penalty is paid by default to the Crown rather than the affected party. The Court stated that blurring the line between compensation and penalties "*risks obfuscation and a dilution of the penalty provisions*".

Secondly, the Court rejected the company's submission that previous Court decisions indicated that for a penalty to imposed against an employer, the conduct must meet the threshold of "*egregious bad faith*". The Court held that "*egregious bad faith*" was not the threshold, but rather threshold was exactly as stated in the s 4A of the Employment Relations Act 2000:

> *A party to an employment relationship who fails to comply with the duty of good faith in s 4(1) is liable to a penalty under this Act if —*
>
> *(a) the failure was deliberate, serious, and sustained; or*
>
> *(b) the failure was intended to —*
>
> *…*
>
> *(iii) undermine an employment relationship;*

The Court considered the company's breaches were deliberate, occurred over an extended period and were designed to undermine the employment relationship. It held it was appropriate to impose a $6,000 penalty to condemn the conduct as unacceptable.

Comments for Employers

This judgment emphasises that even though lost wages, hurt and humiliation compensation and penalties are all monetary amounts paid by the unsuccessful party, they are distinct orders which serve different purposes. Perhaps significantly, the Court's decision warns that a tendency to view compensatory awards as punishment for an employer could dilute the penalty provisions that Parliament deliberately strengthened in 2004.

The Court's decision unequivocally held that the threshold for a penalty for a breach of good faith is not "*egregious bad faith*" as had been referenced in some previous judgments, but rather is the legislative standard which includes breaches which are "*deliberate, serious and sustained*" or are intended to undermine the employment relationship.

Consequently, any employer who may look to bring an employment relationship to a close, for whatever reason, should take note of the Court's signal that a failure to act in good faith when ending the employment relationship could well warrant a penalty.

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