

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2016] NZERA Auckland 255
5628143

BETWEEN RAJBIR KAUR
 Applicant

A N D DRB2 T/A SUPER SAVER
 FOODMART LTD and HARDIP
 SINGH
 Respondents

Member of Authority: Anna Fitzgibbon

Representatives: May Moncur, Representative for the Applicant
 No appearance by or for Respondents

Investigation Meeting: 26 July 2016 at Auckland

Date of Determination: 26 July 2016

ORAL DETERMINATION OF THE AUTHORITY

Non-appearance of respondents

[1] DRB2 T/A Super Saver Foodmart Ltd and Hardip Singh (Super Saver and Mr Singh) failed to file a statement in reply to the statement of problem and also failed to attend the investigation meeting today.

[2] Regulation 8(3) of the Employment Relations Authority Regulations 2000 states that a party who fails to lodge a statement in reply, is entitled to respond to the application only with the leave of the Authority.

[3] Super Saver and Mr Singh have not made a request to the Authority for leave to respond to the statement of problem.

[4] Late on the 25 July 2016, the Authority received a brief email from Mr Singh saying he would not be attending the investigation meeting as he had been unwell for

the past few days. No details of his illness, nor a medical certificate were provided to the Authority. There was no request for the matter to be adjourned.

[5] Being satisfied that Super Saver and Mr Singh were properly served with the proceedings and notice of investigation meeting, I proceeded to investigate the employment relationship problem of the applicant, Mrs Rajbir Kaur, in the absence of Super Saver and Mr Singh.

The investigation meeting

[6] Mrs Kaur and her husband attended the investigation meeting. Mrs Kaur gave evidence which she affirmed to be true and correct.

[7] As allowed under s.174 of the Employment Relations Act 2000 (the Act), this determination does not set out all of the evidence; relevant facts and legal issues are set out along with the Authority's conclusions.

Employment relationship problem

[8] On 2 October 2015, a Record of Settlement (the settlement) was signed under s.149 of the Employment Relations Act 2000 (the Act). The applicant Mrs Kaur, and the respondents, Super Saver and Mr Singh were parties to the settlement. The settlement was signed by Mrs Kaur and by Mr Singh on behalf of the respondents.

[9] The settlement was signed and certified by a mediator employed by the Ministry of Business, Innovation and Employment (MBIE) on 27 October 2015.

Issue

[10] The issue brought to the Authority by Mrs Kaur relates to non-payment by Super Saver and Mr Singh of sums agreed to be paid by them under the settlement.

[11] Mrs Kaur seeks a compliance order requiring Super Saver and Mr Singh to comply with the settlement immediately. Mrs Kaur also seeks the imposition of a penalty of \$20,000 against Super Saver and a penalty of \$10,000 against Mr Singh for their breaches of the settlement agreement and a contribution towards costs.

Settlement Agreement

[12] The settlement states:

3. The Respondents shall, without admission of liability, pay the Applicant \$19,000 pursuant to section 123(1)(c)(i) of the Employment Relations Act 2000. This sum will be paid to the Applicant by way of direct credit and in accordance with [a] schedule.

[13] The schedule in the settlement required payments of \$3000 each by Super Saver and Mr Singh to Mrs Kaur on or before the 28th of November, December 2015, 28th January, February, March 2016 with a final payment of \$4000 on or before 28th April 2016.

[14] The settlement was certified under s.149 of the Act by the mediator. That certification confirmed that, before signing the agreement, the parties were advised and accepted they understood the effect of s.149(3) of the Act which states that the agreed terms of settlement:

1. Is final and binding on and enforceable; and
2. Could not be cancelled; and
3. Could not be brought before the Authority or the Court for review or appeal, except for the purposes of enforcing those terms.

[15] On 31 May 2016, an application for a compliance order was filed in the Authority by Mrs Kaur claiming that despite request, Super Saver and Mr Singh had failed to comply with the terms of settlement and pay her all the monies owing under the settlement. Super Saver and Mr Singh have not filed a statement in reply. Mrs Kaur says after payments totalling \$8,500 by Super Saver and Mr Singh, the sum of \$10,500 remains payable to her under the settlement.

[16] I am satisfied that Super Saver and Mr Singh have not complied with the terms of the settlement. Mrs Kaur says the non payment of monies due to her have caused her stress. Mrs Kaur and her husband have a young child and have suffered financially as a result of the non payment of monies due, and the cost of bringing this claim in the Authority.

Determination

[17] In a letter to the Authority dated 23 June 2016, Mr Singh admits non-payment of monies under the settlement and says this is due to his and Super Saver's financial situation. Mr Singh also says he has been suffering health problems which have impacted him and Super Saver's financial position. No details were provided.

[18] Mr Singh stated in the letter that he had requested his accountant to provide the Authority with Super Saver's latest financial accounts by 1 July 2016. A subsequent request was made to the Authority for an extension to provide the information by 20 July 2016.

[19] Super Saver's financial accounts have not been provided to the Authority. Rather, on 19 July 2016, the Authority received Super Saver's ASB bank statements for the period January 2016 to April 2016. A copy of a letter from the IRD has also been provided requesting payment to it by Super Saver of the sum of \$5,555.88. It is not clear when the payment is due and what it relates to, ie GST, provisional, terminal or some other tax payment.

[20] No other details have been provided concerning Super Saver's financial situation including its assets and liabilities or income. Further, there is no information at all concerning Mr Singh's financial situation. This is insufficient.

[21] I therefore make an order that Super Saver and Mr Singh are to pay Mrs Kaur within twenty one (21) days of the date of this determination, the sum of \$10,500, being the balance of monies owing under the settlement.

[22] This amount is to be paid by Super Saver and Mr Singh directly into Mrs Kaur's bank account, details of which have been provided.

[23] For the information of Super Saver and Mr Singh, failure to comply with an order such as this one made by the Authority under s.137 of the Act, may provide a basis for an application to be made by Mrs Kaur to the Employment Court. Where the Court is satisfied that any person has failed to comply with a compliance order under s.137, the Court may, under s.140 of the Act, order remedies, including an order that the person in default be sentenced to imprisonment for a term not exceeding three months and/or a fine not exceeding \$40,000.

Penalties

[24] Ms May Moncur on behalf of Mrs Kaur seeks a penalty of \$20,000 against Super Saver and a \$10,000 penalty against Mr Singh for the respective breaches of the settlement. This seems to me to be a double up. There has been a breach of the settlement agreement and as such one penalty may be payable.

[25] The Authority has the discretion pursuant to s.149(4) of the Act to impose a penalty.

[26] I am satisfied that in the circumstances a penalty should be awarded and that it should be imposed on Mr Singh, the sole director and shareholder of Super Saver. The settlement was reached in October 2015, Super Saver and Mr Singh have failed for almost 10 months to make the payments they agreed to make to Mrs Kaur. Intermittent payments only have been made. Mrs Kaur is still owed \$10,500 and has had to bring a claim in the Authority in order to recover this amount. This is a serious breach.

[27] Mr Singh is ordered to pay a penalty of \$2000 pursuant to s135(2)(a) of the Act. Under s136(2) of the Act, the total penalty is to be paid directly to Mrs Kaur. This payment is to be paid by Mr Singh within 21 days of the date of this determination.

Costs

[28] I order Super Saver and Mr Singh to pay costs of \$170 in respect of the investigation meeting today and to reimburse Mrs Kaur the Authority's \$71.56 filing fee.

Certificate of determination

[29] I direct that pursuant to Regulation 26 of the Employment Relations Authority Regulations 2000, Mrs Kaur be provided with a certificate of determination, sealed with the seal of the Authority, recording respectively that Super Saver and Mr Singh are ordered within 21 days of this determination to pay Mrs Kaur the sum of \$10,500 the sum of \$170 in legal costs and reimbursement of the Authority's filing fee of \$71.56.

[30] Mr Singh is to pay a penalty of \$2000 directly to Mrs Kaur within 21 days of the date of this determination.

Anna Fitzgibbon
Member of the Employment Relations Authority