

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI  
TĀMAKI MAKĀURAU ROHE**

[2019] NZERA 559  
3071372

BETWEEN                      NIGEL DUNN  
                                         Applicant  
  
AND                                METAL MEN (2018)  
                                         ENGINEERING LIMITED  
                                         Respondent

Member of Authority:        Robin Arthur  
  
Representatives:                Ritu Pandey, advocate for the Applicant  
                                         None notified by the Respondent  
  
Investigation Meeting:        On the papers  
  
Determination:                 30 September 2019

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**DETERMINATION OF THE AUTHORITY**

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- A. By order under s 137(2) of the Employment Relations Act 2000 Metal Men Engineering (2018) Limited must pay Nigel Dunn all sums due under its settlement agreement with him by no later than 14 October 2019.**
- B. Metal Men Engineering (2018) Limited must also reimburse Mr Dunn \$71.56 for the fee paid to lodge his application in the Authority.**
- C. Leave is reserved for Mr Dunn to revert to the Authority to seek a penalty for a breach of a certified settlement agreement if the amounts due are not paid in full by 14 October 2019.**

## **Employment Relationship Problem**

[1] Metal Men Engineering (2018) Limited (MMEL) and Nigel Dunn settled an employment relationship problem on terms set out in an agreement certified on 18 July 2019 by a Ministry of Business employment mediator. The certification was made under the terms of s 149 of the Employment Relations Act 2000 (the Act).

[2] On 21 August 2019 Mr Dunn applied to the Authority for a compliance order because he said MMEL had paid only one of several instalments of money due under their agreement. He also sought an order for damages.

## **Identity of the respondent**

[3] The statement of problem and the record of settlement identify the registered company that employed Mr Dunn as Metal Men Engineering Limited. However a copy of Mr Dunn's employment agreement, attached to his application to the Authority, identified his employer as Metal Men Engineering (2018) Limited. Michael Buckleigh is registered as a director and shareholder of the 2018 company. According to courier records a copy of Mr Dunn's statement of problem, addressed to Mr Buckleigh, was delivered to the business premises and signed for there by him on 28 August 2019.

[4] There is no apparent connection of this matter with the registered company named Metal Men Engineering Limited, that is without a year being included in its name. That company (which has the company number 4064679) has a different director, shareholder, registered office and address for service.

[5] It appears the correct legal entity that should be referred to as the respondent in this matter is the registered company Metal Men Engineering (2018) Limited (which has the company number 6908833). This is reflected in the intituling of this determination and orders made in it. The Record of Settlement and the agreed terms are to be taken as referring to that registered company.

## **The Authority's investigation**

[6] Courier records show Mr Dunn's statement of problem was delivered to the business premises, as already noted, and to the offices of a local accounting business that the Companies Office records show is the registered office and the address for service of Metal Men Engineering (2018) Limited. The respondent has not lodged a statement in reply or otherwise sought to engage in any way with the Authority's

consideration of Mr Dunn's application. In those circumstances, this uncontested application has been determined on the papers.<sup>1</sup>

### **Failure to comply with the terms of a certified agreement**

[7] Section 149 of the Act allows parties who have resolved an employment relationship problem to have the agreed terms of their settlement certified by a Ministry mediator. The agreement is certified after the mediator checks that the parties understand its terms are final, binding, enforceable and may not be cancelled. This finality is confirmed by specific provisions in s 149 that, except for enforcement purposes, no party may seek to have those terms brought before the Authority or the court for any action.

[8] There was no challenge to Mr Dunn's claim that Metal Men Engineering (2018) had paid only one instalment of four that had fallen due by the time of his application to the Authority on 21 August. His representative has since advised the Authority that a further and final instalment due on 30 August 2019 was also not paid. The company has however, according to Mr Dunn's representative, paid two instalments that it agreed to pay for Mr Dunn's costs of representation.

[9] The total amount remaining due to Mr Dunn is \$2,572.07. It comprises agreed payments for wages and holiday pay and for compensation under s 123(1)(c)(i) of the Act.

[10] Mr Dunn's representative sought two remedies for the failures to pay the due amounts – a compliance order and an order for damages. An order for damages is not available for a breach of a term of a certified settlement agreement.<sup>2</sup> The two remedies available in the Authority to address such breaches are a compliance order and a penalty.<sup>3</sup> The Authority has jurisdiction to impose a penalty of up to \$10,000 on an individual and up to \$20,000 on a company.

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<sup>1</sup> Employment Relations Act 2000, s 174D

<sup>2</sup> Section 151, *Brookers Employment Law* (online looseleaf ed, Thompson Reuters) ER 149.06 and *South Tranz Ltd v Strait Freight Ltd* [2007] ERNZ 704 at [38].

<sup>3</sup> Sections 151, 149(4) and 137(1)(a)(iii).

### **Compliance order**

[11] On the uncontested facts Mr Dunn was entitled to a compliance order. By order made under s 137(2) of the Act Metal Men Engineering (2018) Limited must, by no later than 14 October 2019, pay Mr Dunn the total amount of \$2,572.07 that remains due to him under the terms of the certified settlement agreement.

[12] If Metal Men Engineering (2018) Limited does not make the required payment by the due date Mr Dunn has the options of seeking further orders in the Employment Court, which may include sequestration of property or fines up to \$40,000, or to lodge this Authority determination and the settlement agreement in the District Court and seek its enforcement by through the civil debt procedures.<sup>4</sup>

### **Leave to apply for a penalty for breach of a certified agreement**

[13] In the event that Metal Men Engineering (2018) Limited does not pay the amounts due by the date set in the compliance order Mr Dunn also has leave to revert to the Authority to pursue a penalty for breaches of the terms of the settlement agreement. The Authority has taken a stern approach in previous cases of a party breaching certified settlement agreements, typically imposing penalties ranging from \$1,000 to \$6,000. Such penalties are considered necessary to emphasise the need for parties to honour agreements made and to uphold the finality and certainty that this system of certified agreements is intended to provide workers and employers alike.

[14] If a penalty is sought Metal Men Engineering (2018) Limited will be given a further opportunity to respond and participate before a determination is made.

### **Reimbursement of fee**

[15] Metal Men Engineering (2018) Limited must also reimburse Mr Dunn for the fee of \$71.56 he paid to lodge his application in the Authority. This amount is also to be paid by no later than 14 October 2019.

Robin Arthur  
Member of the Employment Relations Authority

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<sup>4</sup> Employment Relations Act 2000, s 138(6), s 140(6), s 151(2)(b)(ii) and s 141.