

[4] The Authority considers that if the respondent still has any of the applicant's personal effects and/or belongings, including but not limited to his books then these should be returned to the application within the next 7 days. If the respondent no longer has these items it must explain to the applicant what was done with them, when, by whom and why.

Issues to be determined

[5] The issues to be determined are:

- (a) Did the respondent breach the record of settlement?
- (b) If so, have these breaches been remedied?
- (c) If not, should a compliance order be issued?
- (d) Should a penalty be imposed for breaches of the certified settlement agreement?
- (e) If so, who should the penalty be paid to?
- (f) What, if any, costs should be awarded?

Material terms in the certified settlement

[6] Clause 2 of the certified settlement stated that Aotearoa Career and Management Limited (the respondent) would pay Rohit Arora (the applicant) a specified amount under s 123(1)(c)(i) of the Act in order to resolve his claims against it.

[7] The agreed amount was to be paid in five equal monthly instalments, with the first payment to be made on or before 20 September 2018 and the remaining four payments to be made on or before 20 October 2018, 20 November 2018, 20 December 2018 and 20 January 2019 .

[8] Clause 2 of the certified settlement further stated that if any of the payments were not paid in full by the due date then the entire amount that the respondent had agreed to pay to the applicant became due and was to be paid to the applicant immediately.

[9] Clause 3 of the certified settlement provided that the respondent was to pay the monthly instalments by way of direct credit into the applicant's nominated bank account.

[10] Clause 4 of the certified settlement stated that the respondent would provide the applicant with a certificate of service within seven days of the date of the certified settlement (ie by 27 September 2018).

Breaches of the certified settlement

[11] The certificate of service the respondent gave the applicant on 20 September 2018 breached clause 4 of the certified settlement. It was defective because it contained inappropriate information regarding the settlement of his legal claims against the respondent.

[12] The applicant raised his concerns with the respondent on a number of occasions, but the issue has still not been resolved. The applicant said that the inappropriate information the certificate of service contains meant he cannot provide it to a prospective new employer.

[13] The respondent was wrong to refuse to correct the certificate of service, by removing adverse and inappropriate information about the applicant from it, after he pointed out the problem with what had been provided.

[14] The respondent has also breached clause 2 of the certified settlement by not paying the specified amounts on the due dates.

[15] Although the respondent made the first payment on 20 September 2018 on time, its second and third payments were late and the fourth and fifth payments have not been made at all.

[16] The second payment was paid three days late, the third payment was paid 14 days late. The applicant has not been paid anything since the third instalment was paid late on 04 December 2018.

[17] The respondent's failure to pay the applicant the full amount he is due is therefore a continuing breach of the certified settlement.

Should a compliance order be issued?

[18] It is clear that breaches have occurred and that despite the applicant's attempts to get the respondent to remedy its breaches it has failed to do so.

[19] The issue is therefore whether or not the Authority should exercise its discretion in favour of ordering the respondent to comply with its obligations under the certified settlement.

[20] Mr Amit Saha is the sole director and shareholder of the respondent. He filed an affidavit dated 25 March 2019 setting out the respondent's financial circumstances. Ms Goredhi advised the Authority that Mr Saha is currently overseas which is why she appeared at the investigation meeting instead of him.

[21] Ms Goredhi did not dispute any of the evidence the applicant gave the Authority.

[22] The respondent's position was that at the end of November 2018 its financial position changed because it had no new enrolments from that date, which led to a reduction of the respondent's weekly and monthly income. It says that from December 2018 it could only afford to pay the applicant \$500 per month.

[23] However the respondent has not paid anything since the third payment was paid late on 4 December 2018. It said that it didn't pay anything at all because the applicant did not agree to take reduced instalments because he wanted the respondent to honour the agreed terms set out in the certified settlement.

[24] Mr Saha's affidavit set out the respondent's income and expenditure from the date on which it signed the certified settlement. This shows that while its expenditure was less than its income in September 2018 that has not been the case since then.

[25] The respondent's bank statements show that tens of thousands of dollars is being received and paid out by the respondent every month.

[26] Ms Goredhi said that these outgoings were to cover salaries/wages and printer hire and telephone expenses. She told the Authority that every week Mr Saha, who runs other businesses and is also in partnership with other businesses, takes money from the other businesses he is associated with and pays it in to the respondent's bank account to cover its outgoings.

[27] Ms Goredhi's evidence established that the respondent is able to obtain funds for expenses it wants to pay. It has clearly prioritised other payments over its obligations to the applicant. That should not have occurred.

[28] Ms Goredhi's evidence about the failure to correct the certificate of service implied there was some lingering animosity from the respondent towards the applicant.

[29] The Authority is concerned that animosity was the basis for the respondent not meeting its legal obligations to the applicant. That view is supported by the respondent's failure to pay the applicant the \$500 per month it said it could afford to pay him. There was no good reason for that.

Did the respondent breach the record of settlement?

[30] There is no dispute that the respondent has breached the record of settlement.

[31] The respondent failed to provide the certificate of service.

[32] The respondent failed to pay the second and third instalments on the due dates.

[33] The failure by the respondent to pay the monthly instalments to the applicant on the due dates meant that the full amount became due and owing as at 21 October 2018, once the due date of 20 October for the second instalment was missed.

[34] That full amount has still not been paid, in breach of the certified settlement.

Have the breaches been remedied?

[35] The respondent's breaches have not been remedied.

[36] The applicant has still not been paid the fourth or fifth instalments, the full amount outstanding has not been paid and he has not received an appropriate certificate of service.

Should a compliance order be issued?

[37] The issuing of a compliance order is discretionary, with the discretion to be exercised on a principled basis.

[38] There have been multiple breaches of the certified agreement.

[39] It is concerning that the respondent failed to continue paying the applicant the lesser amount of \$500 per month which it said it was able to pay since missing the fourth instalment. Had it done so the outstanding amount would have been reduced by \$2,500 by 20 April 2019.

[40] This omission together with the failure to correct the certificate of service suggests that the respondent has not taken its legal obligations under the certified settlement seriously.

[41] The applicant remains out of pocket to date when the full amount should have been paid to him by 20 January 2019 at the latest. Nothing has been done by the respondent to address the applicant's multiple attempts to get the respondent to meet its commitments under the certified settlement.

[42] The Authority was satisfied that the respondent was unlikely to meet its commitments under the certified settlement unless a compliance order was issued. It is therefore necessary and appropriate for the Authority to exercise its discretion in favour of the applicant.

Compliance order issued

[43] The Authority orders the respondent, within 28 days of the date of this determination, to comply with its obligations under the certified settlement by:

- (a) Paying the applicant the full outstanding amount of \$4,000; and
- (b) Providing the applicant with a certificate of service that does not include the second paragraph in the certificate of service it gave him dated 20 September 2018.

Should a penalty be imposed?

[44] Section 149(4) of the Act provides that the Authority may impose a penalty on a person who breaches an agreed term of a certified settlement.

[45] The Authority considers that the imposition of a penalty is necessary and appropriate to punish the respondent for deliberately breaching its obligations under the certified settlement and for failing to remedy these breaches when the applicant asked it to.

[46] Penalties are imposed to punish the respondent and to signal disapproval to the respondent and others of this type of conduct.

[47] Section 133A of the Employment Relations Act 2000 Act sets out the matters that the Authority must have regard to in determining the amount of any penalty which is to be imposed.

[48] In setting the level of penalty imposed on the respondent in this matter, the Authority has had regard to the s 3 objects of the Act which include promoting mediation as a primary problem solving mechanism, reducing the need for judicial intervention (which a certified settlement does), and by acknowledging and addressing the inherent inequality of power in employment relationships.

[49] The applicant has given evidence to the Authority about the significant financial hardship he and his family have suffered as a result of the moneys he is owed being withheld from him by the respondent.

[50] It is clear from the respondent's expenditure that it has been paying other financial obligations and has simply not prioritised its commitments to the applicant. It is also clear that it could afford to pay \$500 per month based on its own evidence but deliberately choose not to do so.

[51] The applicant has been deprived of the use of his money and has had to go to the time, trouble and stress of seeking a compliance order and penalty to recover what he is owed.

[52] The nature and extent of the breaches by the respondent include failure to pay three instalments on time, failure to pay the full amount outstanding after the second instalment was paid late, and failure to provide a certificate of service which did not contain adverse and inappropriate information.

[53] All of these breaches have extended over many months.

[54] The Authority finds that the respondent's breaches were intentional in that the respondent was aware of its legal obligations and commitments under the certified settlement to the applicant but failed to adhere to them. The respondent has ignored all of the applicant's attempts to hold it to the obligations it agreed to in the certified settlement.

[55] The respondent's breaches have had a seriously adverse effect on the applicant. He has experienced financial and emotional stress and he owes money which he needs to return to other people. The applicant has experienced significant pressure because he is the only income earner in his family. He was relying on the money that the respondent had agreed to pay to support his family.

[56] The respondent has not taken steps to compensate the applicant for the harm he has suffered or to mitigate the actual adverse effects of its breaches.

[57] The Authority is particularly concerned that the respondent has failed to address the valid concerns that the applicant raised regarding the certificate of service which was provided. There is no reasonable excuse for that issue not having been resolved immediately. Over seven months later that obligation has still not been complied with.

[58] There is no evidence that the respondent has previously been before the Authority for similar or the same breaches. It should therefore be treated as a first time civil offender for the purposes of assessing penalties.

[59] The potential maximum penalty is \$20,000 per breach for a company. There are six breaches that the Authority has identified (two instalments paid late, two instalments not paid at all, the full amount outstanding not being paid after the October instalment was late and the inappropriate certificate of service was not amended).

[60] The respondent's total potential maximum penalty liability is therefore \$120,000 (6 x \$20,000).

[61] The respondent is ordered, within 28 days of the date of this determination, to pay the applicant a penalty of \$5,000 in total for the six breaches that the Authority has found were proven on the balance of probabilities.

[62] That works out at \$800 per breach which is just over 4% of the total maximum penalty. The penalty imposed took into account the respondent's ability to pay submissions and is also in line with other cases, so meets consistency criteria.

Who should the penalty be paid to?

[63] The applicant has been harmed by the respondent's breaches in a way that he cannot be compensated for. It is therefore appropriate for some of the penalty that has been imposed to be paid to the applicant to reflect that.

[64] Accordingly, the respondent is ordered to pay \$2,000 of the penalty to the Crown and \$3,000 of the penalty recovered to the applicant.

What, if any, costs should be awarded?

[65] The applicant represented himself so there is no issue as to legal costs. However, as a successful party the applicant is entitled to be reimbursed \$71.56 for his filing fee.

[66] The respondent is therefore ordered to pay the applicant \$71.56 within 28 days of the date of this determination.

Orders

[67] Within 28 days of the date of this determination the respondent is ordered to:

- (a) Comply with the certified settlement by:
 - (i) Paying the applicant \$4,000 being the full amount outstanding due; and
 - (ii) Providing the applicant with a written certificate of service that does not contain the second paragraph which is in the certificate of service dated 20 September 2018;
- (b) Pay the applicant \$71.56 to reimburse him for his filing fee;
- (c) Pay \$5,000 penalty of which \$2,000 is to be paid to the Crown and the remaining \$3,000 of the penalty imposed is to be paid to the applicant.

Rachel Larmer
Member of the Employment Relations Authority