

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2020] NZERA 21
3084853

BETWEEN	HARWINDER SINGH Applicant
AND	MEGA CIVIL LIMITED First Respondent
AND	SUDHIR SAKSENA Second Respondent

Member of Authority: Robin Arthur

Representatives: Sunny Sehgal for the applicant
Sudhir Saksena for the respondents

Investigation Meeting: By telephone conference on 20 January 2020

Determination: 21 January 2020

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] On 13 September 2019 the parties signed an agreement in settlement of an employment relationship problem. A Ministry of Business employment mediator certified the agreement under the requirements of s 149 of the Employment Relations Act 2000 (the Act). In the process of certifying the agreement the mediator had the parties confirm that they understood the terms of settlement were final, binding, enforceable and could not be brought before the Authority except for enforcement purposes.

[2] In a statement of problem lodged on 17 December 2019 Mr Singh said Mega Civil Limited (MCL) and Sudhir Saksena had not complied with a term of the agreement to pay him \$14,000 by 11 October 2019. Instead MCL and Mr Saksena had paid only \$10,000 in three separate instalments.

[3] Mr Singh sought orders requiring MCL and Mr Saksena to pay him the remaining \$4,000, a penalty for breach of the settlement agreement and his costs of representation in making this application.

[4] In a statement in reply lodged on 16 January 2020 Mr Saksena, who is the director of MCL, said a further payment of \$2,000 was made to Mr Singh on 15 January 2020 so the balance remaining due to him was \$2,000. Mr Saksena said he had not been able to raise a loan to clear the total amount due to Mr Singh. Mr Saksena wrote that he “just need one more month till end of February” to pay the balance.

The Authority’s investigation

[5] Because there was no dispute about the relevant facts in this matter, the Authority’s investigation was conducted by telephone conference. Both Mr Singh’s representative, Mr Sehgal, and Mr Saksena, on behalf of MCL and in his personal capacity, had the opportunity to comment on the issues for resolution. Those issues, notified to them in advance of the call, were:

- (i) What order should be made regarding the outstanding balance due to Mr Singh?
- (ii) Should a penalty be imposed on Mega Civil Limited and Mr Saksena for not paying the full amount of \$14,000 due by 11 October 2019 and, if so, how much should that penalty be?
- (iii) Should an order be made requiring MCL and Mr Saksena to pay Mr Singh’s costs of representation and to reimburse him for the fee of \$71.56 paid to lodge this matter in the Authority?

[6] As permitted by s 174E of the Act this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received.

Compliance order

[7] MCL and Mr Saksena were in undisputed breach of the terms of the settlement. A compliance order was necessary. Accordingly, under s 137 of the Act, MCL and Mr Saksena are ordered to pay the sum of \$2,000 to Mr Singh within seven days of the date of issue of this determination.

Penalty for breach of a term of a certified settlement agreement

[8] Under s 149(4) of the Act a person who breaches an agreed term of settlement is liable to a penalty imposed by the Authority.

[9] There was no dispute in this case that a breach had occurred by the failure of MCL and Mr Saksena to pay the full agreed amount by the agreed date. The breach was repeated through three further part payments that did not reach full amount due. MCL and Mr Saksena were therefore liable to a penalty. Because MCL and Mr Saksena were both parties to the settlement agreement, their liability to a penalty was joint and several – that is either party is liable to pay the full amount of any penalty if the other party cannot or will not pay it.

[10] Treating the breach as a single breach, the liability of MCL was for a penalty of up to \$20,000 and Mr Saksena was liable as an individual to a penalty of up to \$10,000. In this case, given the joint and several liability already noted, a single penalty was appropriate. Factors set by s 133A of the Act, applied through a methodology developed by the Employment Court, guide determination of the appropriate level of penalty in the circumstances of each case.¹

[11] In this case a penalty was necessary as a matter of public policy to uphold the integrity of the full, final, binding and enforceable agreements allowed for under s 149 of the Act. The term to pay the full amount by a set date was not merely an opening gambit on which subsequent payments by instalment could later be made or negotiated. To allow, without sanction, such an approach to agreed payments would be inconsistent with the object of the Act to promote mediation as a primary problem solving mechanism, which includes the s 149 provision for final and enforceable certified agreements, and to address the inherent inequality of power in employment relationships. In this case Mr Singh was a migrant worker who has since returned to India and, according to Mr Sehgal's submissions, had to borrow money from family and friends when the agreed settlement amount was not paid on time. A penalty was appropriate given the relative vulnerability of Mr Singh's position. Although MCL and Mr Saksena had arranged part payments of the agreed amount, this was not sufficient mitigation of the effects of the breach to warrant releasing the company and him from any obligation to pay a penalty. Instead, applying the various factors

¹ *Boorsboom v Preet PVT Limited* [2016] NZEmpC 143 at [138]-[151], *Nicholson v Ford* [2018] NZEmpC 132 at [18] and *A Labour Inspector v Daleson Investment Limited* [2019] NZEmpC 12 at [19].

identified in s 133A of the Act, a suitable adjustment to the provisional level of the penalty was to \$5,000. Two further factors required assessment, in this case, before setting the final level.

[12] Firstly, Mr Saksena had referred to difficulties in raising funds to pay the initial amount he and MCL had agreed to pay Mr Singh. He said the sale of a van did not result in sufficient proceeds because he said the van was damaged in an accident and the insurer had paid all the funds he expected to receive directly to a finance company that had a security interest over the vehicle. Mr Saksena did, however, accept he had other means to explore raising necessary funds. These included a house he owns and he accepted he could look at getting the mortgage on it extended to raise funds. No reduction of the provisional level of penalty was established as necessary on the ground of financial capacity.²

[13] Secondly, the proportionality of the provisional level of a penalty is cross-checked in relation to the amounts in issue and the gravity of the conduct subject to the penalty. Considering the range of penalties in other cases, an adjustment of the penalty to \$3,000 was appropriate for the breach in this case.³ This amount is sufficient both to punish MCL and Mr Saksena for the breach and to act as a deterrent generally to parties that breach an agreed term of settlement.

[14] The penalty must be paid by MCL and Mr Saksena to the Authority within 28 days of the date of issue of this determination.

[15] Mr Singh sought an order that a portion of any penalty imposed, once recovered, be paid to him.⁴ This was appropriate in this case, given the absence of an alternative remedy for consequences to him resulting from the original failure to pay the agreed settlement amount in full. By order under s 136(2) of the Act one half of the penalty is to be paid to Mr Singh once the full amount of the penalty has been recovered by the Authority. The other half is to be transferred to the Crown account.

Costs and reimbursement of fee

² *Daleson Investment Limited*, above n 1, at [45]-[46].

³ See, for example, *A Labour Inspector v Vishnu Hospitality Limited* [2018] NZERA Auckland 383 (\$2,000); *High v Mighty Rocket Properties Limited* [2018] NZERA Wellington 111 (\$6,000); *Mangos v Metrofloor Contracting Ltd* [2018] NZERA Christchurch 46 (penalty \$1,500); *Masjedi v Phoenix Publishing Ltd* [2018] NZERA Auckland 161 (\$10,000) and *Elliot v All Coat Painters Limited* [2019] NZERA 165 (\$3,000).

⁴ Employment Relations Act 2000, s 136(2).

[16] Given his success in bringing this application Mr Singh was entitled to an order for a contribution to his costs of representation and for reimbursement of the fee of \$71.56 paid to lodge his application in the Authority. Mr Sehgal sought an order for the sum of \$2,000 plus GST as this was the amount he said he would charge Mr Singh for his services.

[17] The Authority's usual daily tariff for costs, as a contribution towards costs of representation reasonably incurred in preparing for and then attending an investigation meeting, is \$4,500. For this case, which required an investigation meeting by telephone conference lasting less than an hour, the appropriate award of costs was \$1,000. This also allowed for some of the time Mr Sehgal had spent on numerous calls and texts to Mr Saksena in attempts to resolve this matter earlier.

[18] Mr Saksena and MCL are also jointly liable for reimbursing Mr Singh for the Authority fee of \$71.56.

Summary of orders

[19] By no later than seven days from the date of issue of this determination MCL and Mr Saksena must pay Mr Singh \$2,000 as the balance due under their settlement agreement.

[20] By no later than 28 days from the date of issue of this determination MCL and Mr Saksena must also pay Mr Singh \$1,000 as a contribution to his costs of representation and \$71.56 in reimbursement of the fee paid to lodge his application in the Authority.

[21] By no later than 28 days from the date of issue of this determination MCL and Mr Saksena must pay to the Authority \$3,000 as a penalty under s 137 and s 149(4) of the Act for breach of an agreed term of settlement. On recovery of that penalty the Authority must pay \$1,500 to Mr Singh and \$1,500 to the Crown Account.

Robin Arthur
Member of the Employment Relations Authority