

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2020] NZERA 60
3084872

BETWEEN BENNY LAM SAM
Applicant

AND SHAKE SHED & CO
NZ LIMITED
Respondent

Member of Authority: Robin Arthur

Representatives: Applicant in person
None advised by the Respondent

Investigation: On the papers

Determination: 11 February 2020

DETERMINATION OF THE AUTHORITY

- A. Within 14 days of the date of this determination Shake Shed & Co NZ Limited must pay Benny Lam Sam the agreed sum of \$640.86 and reimburse him \$71.56 for the fee paid to lodge his application in the Authority.**
- B. Mr Lam Sam has leave to apply for further orders, including a penalty, in the event that SSCNZL has not paid the required sum within the required 14 days.**

Employment Relationship Problem

[1] Benny Lam Sam applied to the Authority for an order requiring Shake Shed & Co New Zealand Limited (SSCNZL) to comply with the terms of a settlement agreement with him.

[2] On 26 November 2019 Mr Lam Sam and a representative of SSCNZL signed a record of settlement. A mediator of the Ministry of Business Employment Mediation Services (EMS) then certified their agreement under s 149 of the Employment Relations Act (the Act). The certification process, which both parties are recorded as confirming they understood before the mediator signed their agreement, made their agreed terms final, binding and enforceable. A person (which includes a company) who breaches a term of a certified settlement agreement is liable under s 149(3) of the Act to a penalty imposed by the Authority.

[3] Mr Lam Sam's application to the Authority reported that SSCNZL had not paid him the sum of \$640.86 that was due under the agreed terms to be paid to him by no later than 3 December 2019. A copy of his statement of problem was delivered to SSCNZL's address for services, as listed in the Companies Office Register, but the company did not lodge a statement in reply. Authority courier records show the delivery was signed for by Chang Xi who, according to Mr Lam Sam's statement of problem, was the person who signed the settlement agreement on behalf of SSCNZL. According to information from EMS Mr Xi had attended the mediation by telephone. He did not respond to telephone messages left for him by an Authority Officer on the same telephone number in late January and early February 2020.

The Authority's investigation

[4] SSCNZL appears to have had an adequate opportunity to participate in this matter but has not done so. In the absence of any response or engagement by SSCNZL this was a matter that could be determined on the papers.¹

Order for compliance and reimbursement of Authority fee

[5] There was no question Mr Lam Sam was entitled to be paid the certain agreed amount within the agreed timeframe. On his unchallenged assertion that it was not paid, it was necessary to issue an order for compliance.

[6] Under s 137(1)(iii) and s 151 of the Act SSCNZL is ordered to pay Mr Lam Sam the sum of \$640.86 within 14 days of the date of this determination. It must also reimburse him the further sum of \$71.56 for the fee paid to the Authority to lodge his application.

¹ Employment Relations Act 2000, s 161(1)(f) and s 173(2) and s174D.

Leave reserved to apply for a penalty

[7] Mr Lam Sam did not apply for a penalty for SSCNZL's breach of the agreed term of settlement. However SSCNZL is liable for a penalty for its breach. The Authority has jurisdiction to award a penalty against a company of up to \$20,000. Considering similar cases of breaches of certified settlement agreements, a penalty in this matter would likely fall in the range of \$2,000 to \$3,000.²

[8] In the event that SSCNZL has not paid the agreed sum of \$640.86 within the 14 days ordered in this determination, Mr Lam Sam has leave to make a further application to the Authority for the imposition of a penalty on the company (in addition to the agreed sum it must pay him).

[9] Failure to pay an agreed sum in a certified agreement is a serious breach of the Act. If a penalty was sought, the Authority would first give the company a further opportunity to respond and consider any factors relevant to whether to impose one and, if so, at what level. However, if that situation arose, the company could expect the penalty would be in the range indicated.

Service

[10] A copy of this determination is to be sent to SSCNZL at its registered office, its address for service and by email to an address used by Mr Xi.

Robin Arthur
Member of the Employment Relations Authority

² 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); and *Elliot v All Coat Painters Limited* [2019] NZERA 165 (\$3,000) and *Singh v Mega Civil Limited* [2020] NZERA 21 (\$3,000).