

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2020] NZERA 66
3071614

BETWEEN AMMAR AHMAD
 Applicant

AND REEM GROUP LIMITED
 First Respondent

AND MAHMOUD AL HARDAN
 Second Respondent

Member of Authority: Nicola Craig

Representatives: Tanya Hay, Counsel for the Applicant
 Bharat Bhanabhai for the Respondent

Investigation Meeting: On the papers

Submissions [and further 22 November 2019 and 22 January 2020 from the
Information] Received: Applicant
 22 November 2019 and 13 February 2020 from the
 Respondents

Date of Determination: 17 February 2020

DETERMINATION OF THE AUTHORITY

- A. Reem Group Limited breached a settlement agreement with Ammar Ahmad and is ordered to pay a penalty of \$1,500.00 within 28 days of the date of this determination. That sum is to be paid into the account of the Employment Relations Authority, with \$750.00 to be forwarded to Mr Ahmad and \$750.00 to the Crown account.**

B. Reem Group Limited is ordered costs of \$800.00 to Community Law Waikato and \$71.56 to Mr Ahmad for the Authority's filing fee, within 28 days of the date of this determination.

What is the Employment Relationship Problem?

[1] Anwar Ahmad entered into a settlement agreement (the agreement) with his former employer Reem Group Limited (Reem or the company). The agreement was signed by a mediator from the Ministry of Business, Innovation and Employment on 27 June 2019.

[2] The agreement provided for the payment by Reem of two payments, each of \$10,500 less applicable tax. The first payment was to be made within seven days and the second within 28 days.

[3] There was a delay in the payment of both instalments. Over time two payments of different amounts were paid, with a third payment later following. There was confusion about whether the total amount owing had been paid as the payments did not reflect the pattern in the agreement.

[4] Mr Ahmad's statement of problem initially sought a compliance order, as well as a penalty. His representative sought a breakdown of payments. Mr Ahmad logged into the IRD website and identified the gross and net figures, thus confirming full payment had been made. A compliance order is therefore no longer pursued.

How did the Authority investigate?

[5] Mr Ahmad wishes to pursue a penalty against Reem. The company opposes the imposition of a penalty. At a case management conference the parties agreed that the issue could be decided on the papers. Affidavits from Mr Ahmad and Reem director Mahmoud Al Hardan were received, followed by submissions on behalf of the parties. Further information about the costs issue was later sought by the Authority and received.

[6] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has not recorded everything received from the parties but has stated findings and conclusions and specified orders made as a result.

When were payments made?

[7] There was some variance between evidence and submissions regarding when payments were made. Unfortunately no primary documentary evidence, such as bank statements, was filed.

[8] Mr Ahmad's affidavit sets out the dates he received payments. It referred to the first instalment on 24 July 2019, part of the second instalment on 9 September and another portion on 18 September. However, this was not entirely consistent with submissions made by both parties and in one case, with another part of his evidence. It was submitted, for example, that the total payment was not made until after the statement of problem was filed and a part of Mr Ahmad's affidavit supported this but the date specified in the affidavit for the final payment did not.

[9] In any event both parties now accept that the total sum owing under the agreement has been paid.

Was there a breach of the settlement agreement?

[10] The agreement required payments within seven and 28 days. Although not explicit, I take the references to "days" to be to a number of days after the agreement was signed. On the best evidence Reem paid the first instalment a day under three weeks after it was due. The second instalment was paid in two parts, making the total payment received, by my calculation, eight weeks late. There was a breach of the settlement agreement.

Should interest be awarded?

[11] Interest for late payment was sought on Mr Ahmad's behalf. There was support from the respondents for the awarding of interest to penalise Reem rather than the imposition of any other penalty. The matter of interest is not straight forward in this case.

[12] There is a complication, which was not addressed in submissions, namely that the money has already been paid. The Authority's power to award interest is set out in clause 11 of Schedule 2 of the Act. This permits the Authority in "any matter involving the recovery of money" to order "the inclusion, in the sum for which judgment is given, of interest". This does not fit particularly comfortably with a situation where no other money is ordered and where it

may be that even at the time of the receipt by the Authority of the claim, all the money had been paid.

[13] In any event, for another reason I have concluded that the awarding of interest is not the most appropriate way to deal with this matter. Taking into account the state of the evidence and the part payments, it would be somewhat complex to calculate interest here, especially considering the likely small amounts of interest involved. Rather the prospect of awarding a penalty under s 149(4) of the Act, with part going to Mr Ahmad, could address the fact that he was deprived of money owing.

Should a penalty be imposed on Reem?

[14] A penalty may be imposed for a breach of a settlement agreement.¹ It is not mandatory. I have carefully considered whether this is an appropriate case in which to award a penalty.

[15] Efforts were made on numerous occasions by Mr Ahmad's representative to pursue payment, in some cases without response. Mr Ahmad says that he was unable to make payments which were due because Reem had not paid him as it had agreed to do.

[16] Reem committed to make payments to the company's former employee. Mr Al Hardan's evidence is that the company is not trading, had no cash flow and relied on another of his companies to make the payments as its cash flow allowed. However, I note that these matters must have been evident at the time of signing the agreement.

[17] Mr Al Hardan also says that he had to travel overseas to attend to personal and business matters. He does not say when this travel occurred or provide any documentary evidence of the trip. Also with internet banking, payment may well have been possible even with Mr Al Hardan overseas.

[18] I consider that a penalty is appropriate, although I will consider Reem's circumstances when assessing the amount.

¹ S 149(4) of the Act.

What level of penalty is appropriate?

[19] In considering the amount of penalty I have regard to s 133A of the Act as well as the Employment Court's approach in recent cases *Nicholson v Ford*² and *A Labour Inspector v Daleson Investment Ltd*³. I have only a modest amount of evidence on which to base my assessment.

[20] The maximum penalty against a company is \$20,000. Although there were two payments which were late, for this purpose I regard it as one breach. The starting point is therefore \$20,000.

[21] The resolution through mediation of employment relationship problems is a crucial part of the Act. It is critical that when parties reach agreements which are signed by a mediator they can be confident that the terms of their agreement will be complied with. However, I take into account that Reem did eventually pay the total amount owing. The longest delay was eight weeks. Mr Ahmad's evidence is that his delay in making his own payments due to Reem's delay, caused him further financial cost and stress. No further details are provided. Mr Ahmad is however, the only income-earner in his family and he has three young children.

[22] The breach is made more serious by the fact that the agreement indicates the sums to be outstanding salary and accrued holiday pay. Those amounts should have been paid during Mr Ahmad's employment and in his last pay.

[23] The breach was intentional in the sense that the obligation to pay was clearly known to Reem when the settlement agreement was signed in late June 2019.

[24] No financial evidence was filed regarding Reem or its associated company which Mr Al Hardan says was going to provide the funds.

[25] There is some need for deterrence regarding Reem as Mr Al Hardan's evidence downplays the breach by referring to the payments being as only a "little late". There is also a need for deterrence of other employers, who should not regard themselves as free to delay payments from times agreed at mediation.

² *Nicholson v Ford* d [2018] NZEmpC 132.

³ *A Labour Inspector v Daleson Investment Ltd* [2019] NZEmpC 12.

[26] I have considered these matters as well as other cases concerning breaches of settlement agreements and conclude that a penalty of \$1,500.00 is appropriate. I order Reem Group Limited, within 28 days of the date of this determination, to pay a penalty of \$1,500.00. That sum is to be paid into the account of the Employment Relations Authority, with \$750.00 to be forwarded to Mr Ahmad and \$750.00 to the Crown account.

What about Mr Al Hardan?

[27] Mr Al Hardan is identified in a clause of the agreement as personally guaranteeing the payments. However, he is not named as a party, is only referred to in the signature provision as signing as director and has not signed additionally in his personal capacity.

[28] There was no objection to his being named as a respondent, although it was not clear in the statement of problem whether orders were being sought against him personally. Similarly the submissions on behalf of Mr Ahmad did not identify that a separate penalty was sought against Mr Al Hardan. In all of these circumstances I do not consider that a penalty should be imposed on Mr Al Hardan.

Costs

[29] Mr Ahmad was represented by Waikato Community Law. He was not charged fees due to his financial circumstances. However, Waikato Community Law are not receiving any funding from the Ministry of Justice for the work completed and thus a contribution to costs is sought. A contribution of \$1190 is sought, broken down into four categories of work.

[30] On Reem's behalf it is submitted that no costs should be awarded or if they are, a minimal level only.

[31] The Authority's power to award costs is discretionary. I am satisfied that it is appropriate in this case for an award to be made to a community law service.⁴ The company's failure to make payments in the manner stipulated in the agreement has necessitated Mr Ahmad's representative to undertake some work. The claim for a penalty against the company was successful. I order Reem Group Limited to pay the sum of \$800.00 to the Waikato

⁴ *Chevelle Motors Ltd v Cranswick* [2017] NZEmpC 112.

Community Law Centre within 28 days of the date of this determination as a contribution to costs.

[32] I also order Reem Group Limited to pay Mr Ahmad the sum of \$71.56 for the Authority's filing fee for this application within 28 days of the date of this determination.

Nicola Craig
Member of the Employment Relations Authority