

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2021] NZERA 153
3117172 & 3119233

BETWEEN	JEDA HARRISON Applicant in 3117172
AND	TE WAIATA MASON Applicant in 3119233
AND	MACHU PICHU LIMITED Respondent

Member of Authority:	Robin Arthur
Representatives:	Carleton Mateer for the Applicant Julie Smith and Jeff Howarth for the Respondent
Investigation:	On the papers and by telephone conference on 9 April 2021
Determination:	16 April 2021

DETERMINATION OF THE AUTHORITY

[1] Jeda Harrison and Te Waiata Mason each sought an order requiring Machu Pichu Limited (MPL) to comply with the terms of a settlement agreement each of them had signed on 10 February 2021. Both also asked for a penalty to be imposed on MPL for not paying agreed amounts by agreed dates.

[2] The settlement terms were agreed in mediation about personal grievances Ms Harrison and Ms Mason raised against their former employer MPL in 2020. At the request of the parties a Ministry of Business employment mediator certified those agreed terms of settlement under s 149 of the Employment Relations Act 2000. Certification established the parties had confirmed to the mediator that they understood the settlement was final, binding, enforceable and, except for enforcement purposes, could not be brought before the Authority or Employment Court for review.

[3] Despite the finality confirmed by certification MPL did not complete terms requiring it to pay the full amount of certain sums to Ms Harrison, Ms Mason and their representative within the agreed date of seven days after the mediator signed their agreements – that was on 16 February for Ms Mason and 17 February for Ms Harrison.

[4] Instead MPL's director Jeff Howarth made only part payments of the separate amounts over the following weeks. During March and April these comprised weekly payments of \$50 to Ms Mason and Ms Harrison. They had not agreed to vary the settlement agreement to allow for instalments in small amounts over a longer period. The drip feed approach MPL instigated at its own volition, if continued at that rate, would take at least two years to pay the full amount rather than the seven days promised in their agreement.

[5] In a telephone conference with the representatives on 9 April 2021 I discussed this situation, the requirements of s 149 and MPL's risk of substantial penalties for breaching a certified settlement agreement. The parties agreed with a proposal to adjourn the matter for MPL to investigate means for paying the balance due on the basis that, if they did so by 16 April 2021 no compliance order would be necessary and any penalties would, probably, then be set at a significantly lower amount.

[6] By email today Mr Howarth advised the amount due had been settled in full. Mr Mateer confirmed amounts due to Ms Mason, Ms Harrison and him had been received.

[7] As a result no compliance order was needed. However, as discussed with the representatives on 9 April 2021, this was a situation where the Authority still had to determine MPL's liability to a penalty.

[8] Settlement agreements made and certified under s 149 of the Act are the main formal instrument of dispute resolution for employment relationship problems in New Zealand. Typically more than 10,000 such agreements are certified a year. Their strength and value to all parties lies in the statutory declaration of their finality and enforceability. Once agreed all parties know that, when the requirements of the terms are met, they are free to get on with their lives and business without the worry of ongoing litigation and dispute on whatever issues were agreed in their settlement.

[9] Parliament reinforced the finality and certainty of those agreements by providing for a penalty when a term is breached. This solemn sanction upholds the integrity of each individual agreement and deters parties, whether they be the employer or the worker, from breaking their promise. It is an instance of the law saying promises are made to be kept and, for public policy reasons, there is a price for breaking such promises.

[10] Accordingly, it was appropriate to impose penalties on MPL for the breaches which occurred in the eight week period between the February due dates for full payment and today's payment of settlement in full.

[11] Given the nature of the breach and its ongoing nature the representatives were given an oral preliminary indication that penalties, if payment was not made and a compliance order was also still required, would be imposed in the range of \$2,500 to \$5,000 per breach. On that indication the penalties for both breaches would likely total between \$5,000 and \$10,000.

Order for penalty of \$1,000 for two breaches of s 149 of the Act

[12] A penalty still has to be imposed because of the nature of the breach, that is breaching the finality of an s 149 certified agreement, the loss to the workers of the money they reasonably expected by a certain time, and part rather than full payment had been an intentional rather than inadvertent breach.¹

[13] However, as MPL has made the most of the adjournment granted to arrange compliance, a significant discount on the penalty was appropriate due to the steps taken to mitigate the breach and cease its ongoing nature. Accordingly, MPL is ordered to pay a penalty of \$500 for its breach of each of the two agreements, that is a total of \$1,000.² This amount must be paid to the Authority within 28 days. On recovery, the amount paid in penalties is to be transferred to the Crown Account.³

Order for costs and expenses

[14] In addition to the penalty of \$1,000 to be paid to the Authority, MPL must also contribute to costs of representation and expenses Ms Harrison and Ms Mason

¹ Employment Relations Act 2000, s 133A.

² Employment Relations Act 2000, s 149(4) and s 135.

³ Employment Relations Act 2000, s 136.

incurred in lodging their application about the breaches of the agreements with them. MPL must pay the same of \$1,000 (GST inclusive) to Mr Mateer for representation services and reimburse Ms Harrison and Ms Mason \$71.56 for the fee incurred in bringing their applications. Those costs and expenses must be paid to Mr Matter, Ms Harrison and Ms Mason within 28 days of the date of this determination.

Robin Arthur
Member of the Employment Relations Authority