IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE

[2022] NZERA 158
3157081

	BETWEEN	SHANE RAUHIHI Applicant
	AND	SIMPLY DRYWALL LIMITED First Respondent
		TIMOTHY EVETT Second Respondent
Member of Authority:		David G Beck
Representatives:		Paul Mathews, advocate for the Applicant No appearance from the Respondents
Investigation Meeting:		13 April 2022 by video conference
Submissions Received:		None from the Applicant None from the Respondent
Date of Determination:		22 April 2022

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Shane Rauhihi has applied to the Authority for an order pursuant to section 137(1)(a)(ii) Employment Relations Act 2000 (the Act) requiring the first respondent to

comply with the terms of a settlement agreement made with him. The settlement agreement in dispute was between the parties Mr Rauhihi and Simply Drywall Limited and was signed by Mr Rauhihi and Timothy Evett (sole director of Simply Drywall Limited) and an MBIE mediator pursuant to s 149 of the Act, on 15 September 2021. The agreement provided Mr Rauhihi be paid by direct credit within seven days:

a) A compensatory payment under s 123(1)(c)(i) of the Act in the sum of $2,700 without deduction; and:

b) Upon receipt of a GST invoice from Mathews Walker limited, payment of costs in the amount of $1,300 + GST toward legal costs.

[2] Mr Rauhihi asserts that to date despite follow up requests by Mr Mathews the above amounts have not been paid. As remedies Mr Rauhihi seeks:

- A compliance order against Simply Drywall Limited.
- A penalty against Simply Drywall Limited for breach of the s 149 settlement agreement in the amount of $6000 with half being paid to Mr Rauhihi.
- Costs including reimbursement of the filing fee.
- An order under s 137(2) of the Act that the second respondent, Timothy Evett does everything in his power to ensure that his company complies with the orders sought.

The Authority Investigation

Mr Evett failed to participate in any of the proceedings. This includes not filing any statement in reply or attending a case management call, filing submissions or attending the investigation meeting.

[3] I am satisfied that Mr Evett has been given ample opportunity to respond to Mr Rauhihi's claims and he has been specifically apprised of the potential penalty sought but has advanced no explanation for the continued breach of the settlement agreement.

[4] Mr Mathews detailed unsuccessful attempts to resolve outstanding payments that included email correspondence and provision of an invoice for legal costs. Mr Rauhihi also provided a statement of evidence setting out the impact upon him of non-compliance.

[5] Mr Evett apart from an initial suggestion in late September 2021 that he was on ACC and impliedly struggling financially, has given no explanation to date for failing to meet the agreed payments and the contribution to Mr Rauhihi's legal costs.

[6] I find the settlement agreement terms were breached.

Order for Compliance

[7] The terms of settlement are clear and the payments due have not been made in full. I accordingly under s 137(iii) of the Act, order Simply Drywall Limited to make the payments overdue within fourteen days of this determination being issued. In addition, pursuant to s 137(2) of the Act I order that Tim Evett take steps to ensure the payments due are met by his company.

Imposition of a penalty and whether it should be awarded to Mr Rauhihi?

[8] Failure to fulfil without adequate explanation, the terms of a s 149 settlement agreement is a serious breach of the Act. The Authority under s 133 of the Act has the jurisdiction to award a penalty against a defaulting party. In the situation of a company, the maximum penalty is $20,000 for each breach and I must consider matters set out in s 133A of the Act in determining what amount I can impose including whether the penalty should be paid to the Crown or apportioned.

[9] Generally, the approach I must take has to be consistent with the full Employment Court decision of *Borsboom v Preet PVT Limited.* [1] *Preet* identified a four-step framework to fixing penalties:

> Step 1: Identify the nature and number of statutory breaches. Identify each one separately. Identify the maximum penalty available for each penalisable breach.

[1] *Borsboom v Preet PVT Limited* [2016] NZEmpC 43.

> Consider whether global penalties should apply, whether at all or at some stages of this stepped approach.
>
> Step 2: Assess the severity of the breach in each case to establish a provisional penalty starting point. Consider both aggravating and mitigating features.
>
> Step 3: Consider the means and ability of the person in breach to pay the provisional penalty arrived at in Step 2.
>
> Step 4: Apply the proportionality or totality test to ensure that the amount of each final penalty is just in all the circumstances. [2]

The nature and extent of the breaches

[10] The breach is regarding the non-payment of an agreed and modest compensatory amount to end an employment relationship. As the agreement is full and final, Mr Rauhihi forwent an opportunity to pursue a personal grievance, which is of value to Simply Drywall Limited in the sense of finality and no ongoing litigation expenses. In simple terms, this was a compromise of rights in return for consideration that has not been met in full.

Were the breaches intentional, inadvertent, or negligent?

[11] Given that Mr Evett who is a signatory to the settlement agreement has chosen to provide no explanation on behalf of Simply Drywall Limited, I can only infer that this is an intentional breach.

What steps have been taken in mitigation?

[12] Whilst Mr Evett has remained uncommunicative since late last year, I acknowledge that the amounts due fell within a very difficult period for businesses but no further steps have been taken to resolve matters and the timeframe is now extended beyond reasonable.

Severity of breaches

[13] On top of statutory considerations (the aims of the Act), I am obliged following *Preet,* to examine the extent of Simply Drywall's culpability and take the public interest factor of using the penalty regime as a legitimate deterrent to others into account.

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[2] At [151].

[14] Whilst the breach here may appear to involve a relatively small amount of money, I must consider that Mr Rauhihi has indicated the loss of his job and costs associated with achieving what he thought was a fair compromise, have caused him financial stress.

Means and ability of the respondent to pay?

[15] I was provided with no information to accurately assess ability to pay and the onus to provide supporting information is on the respondent party, Simply Drywall Limited.

Proportionality

[16] This step requires me to stand back and consider consistency with other comparable situations where the Authority has imposed penalties and to assess whether the final figure I determine is in proportion to the extent and severity of the breach and the context of such.

[17] In 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. [3] The respondents' non–participation has given me nothing further to consider and I consider that the totality of the ongoing breach warrants a modest deterrent penalty that I fix at $1,000 of which the full amount is to be made available to Mr Rauhihi.

Conclusion on penalty

[18] Within 28 days of the date of this determination being issued Simply Drywall Limited must pay a penalty in the sum of $1,000 to Shane Rauhihi.

Compliance order and s 137(2) direction

[19] Pursuant to s 137(iii) of the Employment Relations Act 2000, I order Simply Drywall Limited to pay to Shane Rauhihi the sums of $2,700 without deduction and to pay $1,300 plus GST legal costs to Matthews Walker Limited.

[20] Further, pursuant to s 137(2) of the Act I direct that Timothy Evett as an agent for Simply Drywall Limited and the only person Mr Rauhihi had knowledge of owning and

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

running the company he formerly worked for, takes steps to ensure that the outstanding sums owed, costs and penalty amount identified above are paid by Simply Drywall Limited by no later than 5pm, Friday 5 May 2022.

Costs

[21] Costs are at the discretion of the Authority and here Shane Rauhihi was successful in his actions for a compliance order and a penalty and has sought $575 in costs. In the circumstances by exercising the discretion I have under Section 15 Schedule 2 of the Act I award Mr Ruhihi costs in the amount of $400 and his Authority application fee of $71.56. Both amounts are to be paid by Simply Drywall Limited to Shane Rauhihi.

David G Beck
Member of the Employment Relations Authority