

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI  
ŌTAUTAHI ROHE**

[2023] NZERA 199  
3196099

BETWEEN	LUANA ALVES VALIM BRITO COSTA Applicant
AND	GOLDEN FLEECE 2018 LIMITED First Respondent
AND	RODNEY BOWLER Second Responder
AND	ROWENA BURGESS Third Respondent
AND	SAMUEL CHIN Fourth Respondent

Member of Authority:	Helen Doyle
Representatives:	Kristopher Main, advocate for the Applicant No appearance for the Respondents
Investigation Meeting:	18 April 2023 by audio visual conference
Submissions Received:	On the day
Date of Determination:	20 April 2023

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] Luana Alves Valim Brito Costa seeks compliance with terms of settlement contained in a record of settlement under s 149 of the Employment Relations Act 2000 (the Act) that she be paid a compensatory sum.

[2] Additionally, penalties are sought under s 149(4) of the Act for breaches of the terms of settlement. Interest was claimed in final submissions on the amount outstanding but not in the statement of problem. Costs are also sought.

[3] Golden Fleece 2018 Limited (Golden Fleece) is a duly incorporated company that at the material time carried on the business of a hotel in Waikouaiti north of Dunedin. It is understood that Golden Fleece is no longer operating the business. Rodney Bowler, Rowena Burgess and Samuel Chin are directors of Golden Fleece.

[4] A mediator employed or engaged by the chief executive of the Ministry of Business Innovation and Employment (MBIE) signed the agreed terms of settlement on 14 August 2021. In so signing the mediator certified that she was satisfied that the parties understood the effect of ss 148A, 149(1) and 149(3) of the Act and affirmed their request that she sign the agreed terms of settlement.

[5] The relevant part of clause 2 of the settlement agreement provided as follows:

The Employer shall, without admission of liability, pay the Employee, within 14 days of the date of this agreement, the sum of \$4,250 in terms of the provisions of s 123(1)(c)(i) of the Employment Relations Act 2000. This amount will be paid by way of Direct Credit....

[6] Ms Costa's bank account details are recorded in the agreed terms of settlement.

[7] The compensatory sum was to be paid by 28 August 2021 which was 14 days after the mediator signed the agreed terms of settlement.

[8] No payment was made on or before 28 August 2021.

[9] On 1 December 2021 payment was made of \$2,833.32 towards the sum of \$4,250 on the basis it extinguished any liability of Mr Bowler and Ms Burgess. In an email dated 30 November 2021 Mr Bowler advised Mr Main that he would need to contact Mr Chin for the remaining amount.

[10] Mr Main in correspondence to Mr Bowler advised that Golden Fleece and its three directors were jointly and severally liable to pay the compensatory amount in clause 2 of which \$1,416.68 remained owing.

[11] Mr Bowler and Ms Burgess lodged a statement in reply. It provided that they had paid their share of the agreed amount and that the balance of \$1,416.68 would have to be paid by Mr Chin. It also set out that Golden Fleece had been sold and “debts tidied up.”

[12] There was no statement in reply lodged on behalf of Golden Fleece or Mr Chin.

### **Investigation process**

[13] I am satisfied that Golden Fleece was served at its registered office with the notice of investigation meeting. I am further satisfied that the notice of investigation meeting was delivered by courier to the rural address of Mr Bowler and Ms Burgess. The notice of investigation meeting was served on Mr Chin by courier at his current address which is a hotel in Dunedin. Proof of delivery from New Zealand Post confirms it was delivered to the hotel and it was signed for at the hotel.

[14] The notice of investigation meeting provided that the Authority would hold an investigation meeting via Microsoft Teams on Tuesday 18 April 2023 at 9.30 am. The Microsoft Teams meeting details were provided in the investigation meeting notice as the Authority did not have email addresses of Mr Bowler, Ms Burgess and Mr Chin to send those Teams details to. Mr Bowler, Ms Burgess and Mr Chin could have joined the meeting or called in by audio only.

[15] There was no attendance by Golden Fleece, Mr Bowler, Ms Burgess and Mr Chin at the Teams meeting and no good reason advanced as to why they did not attend.

[16] The Authority proceeded to hear evidence from Ms Costa. The Authority also heard closing submissions.

### **The issues**

[17] The Authority needs to determine the following issues in this matter:

- (a) Who were the parties to the record of settlement?
- (b) Has there been a breach of the record of settlement?
- (c) Is Golden Fleece and its three directors jointly and severally liable for payment of the compensatory amount in clause 2 of the record of settlement?
- (d) Should there be an order for compliance?

- (e) Should interest be awarded?
- (f) Is this a matter where there should be an award of a penalty?
- (g) Should penalties where there is more than one person or entity be considered separately?
- (h) If penalties are awarded what should the quantum be?
- (i) If a penalty is awarded, who should it be payable to?
- (j) Should there be an award of costs and if so in what amount?

**Who were the parties to the record of settlement?**

[18] Ms Costa was the employee party to the record of settlement.

[19] The employer/principal party was set out in the record of settlement as:

Golden Fleece 2018 Limited,

Rodney Bowler,

Rowena Burgess,

Samuel Chin.

[20] Mr Bowler signed on behalf of the employer. As a director he had, if not actual authority, implied or ostensible authority to sign on behalf of all directors and Golden Fleece. His communications after the settlement agreement with Mr Main were consistent with the employer party to the record of settlement being Golden Fleece and its three directors.

[21] The employer party to the record of settlement is Golden Fleece, Rodney Bowler, Rowena Burgess and Samuel Chin.

**Has there been a breach of the record of settlement?**

[22] Ms Costa confirmed in her evidence that she received payment of on 1 December 2021 of the sum of \$2,833.32 from Mr Bowler and Ms Burgess. Ms Costa confirmed that there is still a balance due and owing of \$1,416.68 that remained unpaid as at the date of the investigation meeting.

[23] There was a breach of clause 2 of the record of settlement. The partial payment of \$2,833.32 was paid outside of the timeframe agreed to do so in clause 2. The sum of \$1,416.68 remains unpaid.

**Are the parties to the record of settlement jointly and severally liable for payment of the compensatory amount in clause 2 of the record of settlement?**

[24] The record of settlement read as a whole does not support separation of liability between the company and/or between its directors for payment of the compensatory sum.

[25] Clause 2 provides it is the employer who is to pay the compensatory sum. The employer is described as Golden Fleece and its three directors.<sup>1</sup>

[26] Clause 5 describes the record of settlement as being a full and final settlement between the parties arising out of their employment relationship. The employer party is described as Golden Fleece and its three directors.<sup>2</sup>

[27] Golden Fleece, Mr Bowler, Ms Burgess and Mr Chin are jointly and severally liable for payment of the compensatory sum in clause 2 of the record of settlement.

**Should there be an order for compliance?**

[28] Section 137(1)(a)(iii) of the Act applies where any person has not observed or complied with any terms of settlement that s 151 provides may be enforced by compliance order.

[29] It is appropriate to order that Golden Fleece, Mr Bowler, Ms Burgess and Mr Chin are to comply with clause 2 of the record of settlement and pay the balance owing of \$1,416.68 within 28 days of the date of this determination.

**Should interest be awarded?**

[30] This was a late claim. Interest was not claimed in the statement of problem. Golden Fleece and its directors had no advance notice of this claim. There was no appearance by or on behalf of the respondents.

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<sup>1</sup> Set out in [19] hereof.

<sup>2</sup> Above n [1].

[31] I am not prepared to award interest in those circumstances.

**Is this a matter where there should be an award of a penalty?**

[32] Section 149(4) of the Act allows the Authority to impose a penalty on a person who breaches a settlement agreement under the Act.

[33] In considering whether there should be a penalty I have weighed the public interest in deterring parties from not complying with s 149 terms of settlement.

[34] This is a matter where there should be consideration of penalties to signal Authority disapproval of breaches of s 149 records of settlement and to disincentivise others who may be inclined to breach records of settlement.

**Should penalties where there is more than one person or entity be considered separately?**

[35] The breach of the record of settlement involves more than one person. A penalty against Golden Fleece was not sought because of its financial position as known at the time of the investigation meeting. The degree of culpability for each person in relation to the breach needs to be assessed separately. As individuals Mr Bowler, Ms Burgess and Mr Chin are each potentially liable for a penalty not exceeding \$10,000.

*If penalties are awarded what should the quantum be?*

[36] Mr Main in final submissions sought \$500 as a penalty from each of the three directors.

[37] In assessing an appropriate level of penalty, I have considered the factors in s 133A of the Act. I have also had regard to the four-step process in *Labour Inspector v Prett PVT Ltd*.<sup>3</sup>

*Rodney Bowler*

[38] There was one breach of the record of settlement by the failure to pay the compensatory amount set out in clause 2.

[39] I conclude that the breach was intentional. I weigh that Mr Bowler made a partial payment on a genuine but mistaken basis that such payment extinguished his liability. There was an attempt in that way to mitigate any breach although the payment was made about three months after it should have been paid. Mr Main advised Mr Bowler the approach was incorrect

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<sup>3</sup> *Labour Inspector v Prett PVT Ltd* [2016] ERNZ 514 at [138] – [151].

because of the joint and several liability. Mr Bowler remained firmly of the view that he had done all that was required.

[40] I am not satisfied that there has been previous relevant conduct of this nature by Mr Bowler.

[41] Ms Costa's evidence supported that the breach did have an impact on her. She said that she had struggled for money and payment would have assisted. The issue in her mind became as she put it more "emotional and moral." She thought that she would be paid in accordance with the record of settlement and then be able to move on after a difficult situation. Instead some twenty-one months after the record of settlement was signed, she is still waiting for full payment.

[42] I conclude after considering other cases in which penalties have been ordered that an appropriate and proportionate penalty is \$200.

*Rowena Burgess*

[43] There was one breach of the record of settlement by the failure to pay the compensatory sum in clause 2 of the record of settlement.

[44] The same circumstances apply to Ms Burgess as to Mr Bowler. There was no evidence of previous relevant conduct by Ms Burgess.

[45] An appropriate and proportionate penalty is \$200.

*Samuel Chin*

[46] There was one breach of the record of settlement by failure to pay the compensatory sum in clause 2 of the record of settlement.

[47] Mr Chin has taken no steps to mitigate any breach.

[48] There was no evidence of any previous relevant conduct on his part.

[49] I conclude in those circumstances in accordance with similar cases that a penalty of \$400 is appropriate.

**If a penalty is awarded, who should it be payable to?**

[50] I consider that it is appropriate to award some of the penalties to Ms Costa under s136(2) of the Act. Ms Costa was significantly impacted by the breach and for reasons set out above there has been no award of interest that may have reduced the financial impact somewhat.

**Costs**

[51] Mr Main submitted that Ms Costa had incurred considerable costs in attempting to achieve compliance with the record of settlement. Whilst the investigation meeting itself did not exceed one hour this matter had a level of complexity not apparent in every compliance application. I conclude it appropriate to award a quarter of the daily tariff which is \$1,125 as a contribution towards costs and order reimbursement of the filing fee of \$71.56.

**Summary and orders**

[52] Ms Costa has succeeded in her application for a compliance order.

[53] Golden Fleece, Mr Bowler, Ms Burgess and Mr Chin are to jointly and severally comply with clause 2 of the record of settlement and pay within 28 days of the date of this determination the sum of \$1,416.68.

[54] Awards have been made for penalties.

[55] Rodney Bowler within 28 days of the date of this determination is ordered to pay:

- (a) The sum of \$160 to Luana Costa.
- (b) The sum of \$40 to the Authority for payment to the Crown bank account.

[56] Rowena Burgess within 28 days of the date of this determination is ordered to pay:

- (a) The sum of \$160 to Luana Costa.
- (b) The sum of \$40 to the Authority for payment to the Crown bank account.

[57] Samuel Chin within 28 days of the date of this determination is ordered to pay:

- (a) The sum of \$320 to Luana Costa.

(b) The sum of \$80 to the Authority for payment to the Crown bank account.

[58] Golden Fleece, Mr Bowler, Ms Burgess and Mr Chin are jointly and severally ordered to pay costs in the sum of \$1,125 together with reimbursement of the filing fee of \$71.56.

**Helen Doyle**  
**Member of the Employment Relations Authority**