

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2023] NZERA 621
3236419

BETWEEN

DANNIE WANG
Applicant

BIG SKY FOOD LIMITED
First Respondent

MARK MILLAR
Second Respondent

Member of Authority: Marija Urlich

Representatives: Danny Gelb, advocate for the Applicant
Mark Millar, in person

Investigation Meeting: On the papers

Determination: 24 October 2023

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] By application lodged on 21 June 2023 Dannie Wang seeks, by way of compliance order, to enforce a record of settlement entered with her former employer Big Sky Food Limited (Big Sky) and certified by a mediator on 22 May 2023. Ms Wang also seeks the award of penalties against Big Sky for non-compliance and Mr Millar for his role in the non-compliance. Ms Wang seeks an award of interest and a contribution to costs.

[2] By statement of reply lodged on 10 July 2023 Big Sky and Mr Millar appear to accept there has been non-compliance with the record of settlement. They say the breach has been caused by extenuating financial circumstances which are outlined in

the statement in reply and seek more time to make the payments or a discount on the settled amount.

The Authority's investigation

[3] The parties have agreed with the Authority proposal that this matter is suitable for determination on the papers and filed affidavit evidence and submissions in accordance with the confirmed timetable.¹

[4] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received.

Issues

[5] The issues requiring investigation and determination are:²

- (i) should a compliance order be made against Big Sky Food Limited to comply with the record of settlement;
- (ii) if so, whether payment by instalment should be ordered;
- (iii) whether a penalty should be ordered against Big Sky and/or Mark Millar and a portion of any awarded to Ms Wang;
- (iv) interest on the outstanding amount; and
- (v) is either party entitled to an award of costs.

The record of settlement

[6] Clauses 2 and 3 of the record of settlement provide that Big Sky will pay Ms Wang \$5,000 under section 123(1)(c)(ii) of the Act and \$2,925.84 (net). Clause 4 provides these sums are to be paid at the rate of \$1,000 per week commencing seven days after the date the mediator certified the record of settlement.

[7] The record of settlement was signed by Mr Millar on behalf of Big Sky on 19 May 2023 and by Ms Wang on 20 May and certified by a mediator pursuant to s 149 of

¹ Refer Authority direction 6 September 2023.

² Ibid.

the Act on 22 May. The first installment payment of settlement monies was due on 29 May.

[8] The record of settlement provided the terms and conditions of the record of settlement were final, binding and enforceable and were to remain confidential between the parties except in circumstances including Big Sky not paying the settlement monies.

[9] To date Big Sky has paid \$1,000 of the settlement monies. This payment was made on 12 June.

Compliance order

[10] Section 137(1)(iii) of the Act empowers the Authority to order a party to comply with any terms of settlement which s 151 of the Act provides may be enforced by a compliance order. Section 151 applies to any agreed terms of settlement enforceable by the parties under s 149(3) of the Act.

[11] Big Sky says a compliance order should not be made. In the statement in reply lodged on 10 July 2023 on behalf of Big Sky and Mr Millar the reasons why a compliance order should not be made are set out as follows:

- (i) the settlement was made without admission of liability and the employment relationship problem arose because Ms Wang abandoned her employment;
- (ii) the settlement amount could not be paid in accordance with the record of settlement because the business suffered losses due to the impact of the COVID-19 pandemic response and weather events;
- (iii) the business was recovering and would be in a position to make the payment in the next three months; and
- (iv) a discount should be made for the personal grievance.³

[12] In Mr Millar's affidavit sworn 11 October 2023 he avers the record of settlement is unjustified and he has done nothing wrong - he took over the business in early

³ Which is understood to refer to the s 123(1)(c)(i) settlement amount.

February 2023, tried repeatedly to contact Ms Wang and had no intention to end her employment.

[13] Big Sky has failed to comply with the record of settlement and it is appropriate to exercise my discretion under s 137(1)(b) of the Act to order compliance with the sums outstanding. The reasons Big Sky raises to set aside or vary the record of settlement, even if that was jurisdictionally possible, do not release it from the obligation to Ms Wang it freely entered.

[14] Within 21 days of the date of this determination Big Sky Limited is ordered to comply with clauses 2 and 3 of the record of settlement and pay to Dannie Wang, the following total outstanding sum of \$6,925.84 without deduction.

[15] Imposition of a compliance order is a serious matter. Should Big Sky fail to comply with the compliance order as set out in [14] Ms Wang is entitled to pursue the breach in the Employment Court or the District Court. The Employment Court has powers to impose a fine not exceeding \$40,000, order property to be sequestered, or impose a sentence of imprisonment not exceeding 3 months.⁴ Alternatively, a certificate of determination may be obtained from the Authority and enforcement obtained in the District Court.

Interest

[16] Ms Wang seeks interest on the settlement monies. The Authority has the power to award interest under clause 11 of the Second Schedule of the Act. Interest is to reimburse someone for the loss of use of monies to which there is an established entitlement.

[17] It is appropriate where a person has been deprived of the use of money to make an award for interest. Big Sky is ordered to calculate and pay interest within 28 days of the date of this determination on the sum of \$6,925.84.

[18] Interest is to be calculated from the date of this determination until the sum is paid in full.

⁴ Section 139 and 140(6) Employment Relations Act 2000.

[19] Interest is payable in accordance with Schedule 2 of the Interest on Money Claims Act 2016. A calculator to assist in the calculation of interest is available on the Ministry of Justice website.

Payment by instalments

[20] Sections 138(4A) of the Act provides the Authority may order payment of a sum of money to which a compliance order relates be paid by instalment to the employee if the employer's financial position so requires.

[21] Big Sky has provided no information regarding its financial position other than general statements as to the difficult financial circumstances it faces. There is insufficient information before the Authority to exercise the discretion sought and order payment by instalment.

Penalty

[22] Section 149(4) of the Act enables a party to seek the imposition of a penalty in respect of any established breach of a corresponding settlement agreement. The imposition of a penalty is discretionary and is generally imposed for the purpose of punishment as well as discouragement of others. A single breach of a settlement agreement by an individual may attract a penalty up to \$10,000 and for a company a penalty not exceeding \$20,000 may be awarded for a solitary breach.⁵

[23] Ms Wang submits a penalty should be imposed and paid to her given Big Sky's breach of the record of settlement undermines the integrity and security of s 149 settlement agreements which are intended to give parties certainty and finality, that Big Sky is solely responsible for a knowing and ongoing breach of the record of settlement, the nature and extent of the loss and damage suffered by Ms Wang and the benefit to Big Sky of retaining the settlement monies over an extended period.

[24] Big Sky and Mr Millar's evidence makes no direct mention of Ms Wang's application for a penalty. As set out above in the statement of problem they say they

⁵ Section 135(2)(a) and (b) respectively.

hoped Big Sky would be in a position to pay the outstanding settlement sum within 3 months. Three months has passed and the balance of the record of settlement sum remains outstanding.

[25] As a matter of public policy, in this case a penalty against Big Sky is necessary to uphold the integrity of the full, final, binding and enforceable agreements allowed under s 149 of the Act. Although Mr Millar is the sole director of Big Sky there is no direct evidence of his taking active steps to aid or abet its breach of the record of settlement. The penalty claim against Mr Millar does not succeed.

[26] The level of penalty is determined by an assessment of the factors set out in s 133A of the Act alongside judgments of the Employment Court.⁶

[27] Mr Millar signed the record of settlement on behalf of Big Sky as its sole director. The record of settlement records Big Sky understood the binding and enforceable nature of the record of settlement and must be taken to have been aware of its obligations under the record of settlement. Mr Millar repeatedly provided assurances to Ms Wang's representative that the payments would be made.⁷ There is no basis on which to reasonably conclude that Big Sky's breach of the record of settlement was inadvertent, minor or technical.

[28] Since the date the settlement monies were due under the record of settlement Big Sky have made repeated assurances to Ms Wang that it would pay the settlement monies. The assurances Big Sky failed to honour have no doubt contributed to the adverse effects of the breach suffered by Ms Wang. In addition, Ms Wang has been put to considerable inconvenience to enforce the settlement she entered with Big Sky and has suffered serious embarrassment as a consequence of not receiving the settlement sums.

[29] Big Sky has described in broad terms financial difficulties it says have impacted its ability to pay the settlement monies. No detailed evidence has been provided to support this claim. Without a credible basis on which to assess any such financial

⁶ For example *Borsboom (Labour Inspector) v Preet PVT Ltd* [2016] NZEmpC 143; *Nicholson v Ford* [2018] NZEmpC 132; *A Labour Inspector v Daleson Investment Limited* [2019] NZEmpC 12.

⁷ Refer email correspondence between the parties 30 May and 1 and 6 June 2023.

difficulties little weight can be given to this as a factor relevant in assessing the appropriate level of penalty.

[30] A search of the relevant databases has not revealed previous proceedings for similar breaches involving Big Sky.

[31] Taking all the factors into account Big Sky is liable for a penalty of \$2,000, which is within the range of penalties currently imposed for failure to pay monies due under a record of settlement and is proportionate to the seriousness of the breach and harm caused.

[32] In the circumstances of this matter it is just for half the penalty sum (\$1,000) to be paid to Ms Wang by Big Sky, the remainder must be paid to the Authority for payment into a Crown bank account.

Summary of orders

[33] The Authority orders as follows:

Within 21 days of the date of determination Big Sky Food Limited is ordered to:

- (i) pay Dannie Wang the settlement sum of \$6,925.84 without deduction;
- (ii) calculate and pay Dannie Wang interest on the settlement sum; and
- (iii) pay \$2,000.00 penalty half of which is to be paid to Dannie Wang and half to the Crown.

Costs and reimbursement of filing fee

[34] Ms Wang has incurred costs exceeding \$5,000 in seeking to enforce the record of settlement. Supporting invoices have been provided. She is the successful party and is entitled to a contribution to the actual costs of professional representation. When the Authority considers costs, it exercises a discretion. In exercising that discretion, it does so in a principled way. Costs are not to be used as a punishment or an expression of disapproval of the unsuccessful party's conduct. In the Authority, costs are usually

awarded on the basis of a daily tariff which is currently \$4,500 for the first day. This matter was able to be investigated on the papers.

[35] Ms Wang is entitled to a contribution to the costs of representation incurred in seeking compliance with the record of settlement which included the preparation the application, affidavit evidence and written submissions. A fair and reasonable award of costs is \$2,000.

[36] Big Sky Limited is to pay Ms Wang \$2,000 as a contribution towards those costs and the filing fee of \$71.56 within 21 days of the date of determination.

Marija Urlich
Member of the Employment Relations Authority