

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2024] NZERA 341
3292239

BETWEEN KAMAL PITHAWALLA
Applicant

AND PRIME TRANSPORT &
LOGISTICS LIMITED
Respondent

Member of Authority: Robin Arthur

Representatives: Adrian Plunket, advocate for the Applicant
Aaron Kumar for the Respondent

Investigation: 10 June 2024 by telephone conference

Determination: 11 June 2024

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Kamal Pithawalla applied to the Authority for orders requiring Prime Transport & Logistics Limited (PTLL) to pay missed instalments of payments due under a settlement agreement signed in August 2023. An authorised mediator had certified the parties' agreement under s 149 of the Employment Relations Act 2000 (the Act).

[2] Certification under s 149 confirmed the agreement was final, binding, enforceable and, except for the purpose of enforcing its terms, could not be subject to action or review in the Authority or the Employment Court.¹

[3] A person who breaches a term of a certified settlement agreement is liable to a penalty imposed by the Authority. Ms Pithawalla asked for a penalty to be imposed on PTLL for missing agreed payments.

¹ Employment Relations Act 2000, s 149(3).

[4] Although the parties had agreed their terms of settlement would be confidential, it was necessary for the purposes of this determination to disclose that one term required payment of a certain amount as compensation to resolve an employment relationship problem. The amount was to be paid in 12 equal instalments, starting on 21 October 2023 and monthly thereafter.

[5] PTLL paid the amounts due for October, November and December 2023 and January and February 2024. However, at the time Ms Pithawalla applied to the Authority on 19 April 2024, PTLL had not paid the instalment due on 21 March 2024.

[6] PTLL's statement in reply, lodged by its director Aaron Kumar, said the company was struggling financially, had two trucks repossessed under security arrangements with a bank and had work for its sole client suspended for a month in April due to service concerns.

The Authority's investigation

[7] By telephone conference on 10 June 2024 the parties' representatives provided an update on the situation with payments of instalments.

[8] The March instalment remained unpaid and PTLL had not paid the further instalments due on 21 April and 21 May.

[9] Mr Kumar said the company could pay instalments due from 21 June onwards but asked the Authority to allow the amounts that were due for payment in the months of March, April and May to be shifted to become, instead, instalments the company would pay in October, November and December.

[10] Ms Pithawalla, through her representative, did not consent to that proposal. Her representative pointed to email messages sent by Mr Kumar on 4 and 19 April promising to make payments due. On 19 April Mr Kumar had said that month's payment would be "paid promptly on time without delay" and he would "catch up with the missed payment in between". Neither payment was made as promised.

Issues

[11] The issues for resolution were whether the orders for compliance and a penalty sought by Ms Pithawalla should be made and whether any order for costs should be made.

Assessment

[12] The Act allows the Authority to order payment by instalments where a compliance order relates to payment of a sum of money to an employee but “only if the financial position of the employer requires it”.² However, in this case, the final, binding and enforceable agreement made by the parties already provided for instalments and was not subject to adjustment by the Authority. Even if the Authority could adjust the amount or frequency of the instalments agreed in an agreement certified under s 149, PTLL had not established its financial position “requires” this. Mr Kumar confirmed PTLL had resumed providing services to its sole customer, using a truck owned by the company. The information from him did not establish that PTLL could not make arrangements to meet its commitments to Ms Pithawalla by raising the necessary funds from a financial institution or other sources, including by using the truck as security.

Orders

[13] Because settlement agreements certified under s 149 of the Act are made to be kept, Ms Pithawalla was entitled to the orders she sought.

[14] Accordingly, under s 135 and s 149(4) of the Act, PTLL is ordered to pay her the amounts that were due to be paid on 21 March, 21 April and 21 May 2024 by no later than 21 June 2024. PTLL must also, of course, pay the instalment due under its settlement agreement on 21 June as well.

[15] A penalty must also be imposed to mark the serious nature of a failure to pay amounts agreed under certified s 149 agreements. Failure to abide by those terms undermines the integrity of those provisions which resolve a substantial portion of employment relationship problems in Aotearoa New Zealand.

[16] As a first known offence and taking account of PTLL’s financial difficulties, the penalty is set at \$500, an amount of the lowest end of the range for cases of this type. This penalty is imposed to mark PPTL’s failure to pay instalments due on 21 March, 21 April and 21 May 2024 and to discourage other employers from failing to pay amounts due under such settlement agreements.

² Employment Relations Act 2000, s 138(4a).

[17] The penalty must be paid to the Authority by no later than 21 July 2024. When the penalty is paid to the Authority, the Authority must transfer that amount into a Crown Bank Account.

[18] As a result of these proceedings PTLL is also on notice that failure to pay the amounts due as monthly instalments on 21 June, 21 July, 21 August and 21 September would render it liable to a further penalty.

Costs

[19] PTLL must also pay \$500 as a contribution to the costs incurred by Ms Pithawalla in bringing this application and reimburse her for the fee of \$71.55 paid to lodge her application in the Authority. This sum of \$571.55 must be paid to her by no later than 21 July 2024.

Summary of orders

[20] PTLL must pay Ms Pithawalla the full amounts of the instalments due to her on 21 March, 21 April, 21 May and 21 June 2024 by no later than 21 June 2024.

[21] PTLL must pay Ms Pithawalla \$571.55 as costs and expenses by no later than 21 July 2024.

[22] PTLL must pay the penalty of \$500 to the Authority by no later than 21 July 2024.

Robin Arthur
Member of the Employment Relations Authority