

NOTE: This determination contains an order prohibiting publication of certain information

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TAMAKI MAKAUROHE**

[2024] NZERA 543
3275319

BETWEEN	TAIZAN-JAY LUCAS Applicant
AND	PACIFIC HOLDINGS & INVESTMENTS LIMITED First Respondent
AND	JUAN CARLOS CANTOR AKA JUAN CARLOS CANTOR LOPEZ Second Respondent

Member of Authority:	Natasha Szeto
Representatives:	Kim Ahern, counsel for the Applicant Juan Cantor for First and Second Respondents
Investigation Meeting:	On the papers
Submissions received:	28 June and 9 July 2024 from the Applicant 5 July and 9 July 2024 from the Respondents
Determination:	9 September 2024

DETERMINATION OF THE AUTHORITY

The Employment Relationship Problem

[1] Taizan-Jay Lucas was employed by Pacific Holdings & Investments Limited trading as TacoBar NZ. An employment relationship problem arose between Mr Lucas

and his employer Pacific Holdings & Investments Limited (Pacific Holdings), which the parties agreed to resolve on terms set out in a Record of Settlement (the Settlement). Under the Settlement, Mr Lucas was to receive compensation by way of instalment payments. A Mediator from the Ministry of Business, Innovation and Employment (MBIE) endorsed the Settlement on 14 August 2023.

[2] Mr Lucas says Pacific Holdings did not pay the last three instalment payments as agreed. Mr Lucas seeks an order for compliance by the company and Mr Cantor as the director of Pacific Holdings, as well as interest, penalties and costs.

[3] Mr Cantor accepts he is in breach of the Settlement but says he has been unable to pay the final \$900.00 owing to Mr Lucas due to his financial circumstances. He asks to make the final payments by instalment.

Procedural History

[4] The Authority issued directions for this matter on 11 April 2024. On 2 May, the Authority wrote to the parties confirming the issues for investigation. The same day, Mr Lucas confirmed the matter could proceed on the papers. On 8 May, Mr Cantor confirmed that his evidence would be submitted in line with timetabling directions. The Authority issued further directions on 11 June 2024. In those directions, Mr Cantor was advised that if he was seeking to make payment by instalments, he would need to provide financial information to enable the Authority to assess the appropriateness of payment by instalments.

[5] Mr Lucas filed affidavit evidence and his representative filed submissions. On 5 July 2024, Mr Cantor filed a statement signed by himself and his partner. By way of response, Mr Lucas then filed an email on 9 July, which Mr Cantor replied to the same day.

[6] This matter involves a Record of Settlement. While the parties agreed the terms of the Settlement were to remain confidential to them, the terms in dispute must be disclosed for the purposes of this determination. I prohibit from publication the balance of the Settlement under clause 10(1) Schedule 2 of the Act. The effect of certification of the Settlement under the Employment Relations Act 2000 (the Act) is the agreed terms are final and binding and can only be brought before the Authority for the purposes of enforcement.

[7] As permitted by s174E of the Act, this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified the orders made. It has not recorded all the evidence and submissions received, however all information provided has been considered.

Relevant Background

[8] The Settlement was signed by Mr Lucas on 7 August 2023 and Mr Cantor as director – on behalf of Pacific Holdings & Investments Limited on 9 August 2023. It was certified by a Ministry of Business Innovation and Employment Mediator under s 149 of the Act on 14 August 2023.

[9] Under the Settlement, Pacific Holdings agreed to pay Mr Lucas compensation in ten instalments between 1 September 2023 and 12 January 2024. Pacific Holdings made the first seven instalment payments (albeit some late) but then did not make the last three instalment payments, which totalled \$900.00.

[10] Mr Lucas lodged his Statement of Problem in the Authority on 29 January 2024.

[11] Mr Cantor accepts that Pacific Holdings breached the Settlement by failing to make \$900.00 worth of payments (due on 8 December 2023, 22 December 2023 and 12 January 2024) to Mr Lucas. Mr Cantor initially offered a payment plan under which outstanding payments under the Settlement would have been resolved by the beginning of August 2024. No payments have been made.

Issues

[12] The issues identified for investigation and determination are:

- (a) Whether the Authority should order Pacific Holdings to comply with the Settlement and order Mr Cantor to do everything necessary to ensure Pacific Holdings complies.
- (b) Whether the Authority should order interest to be paid on any overdue amount.
- (c) Whether the Authority should order Pacific Holdings and Mr Cantor to pay a penalty of \$6,000.00 with \$3,000.00 being paid to Mr Lucas.
- (d) Whether the Authority should order costs of \$2,250.00 (or half tariff costs) to Mr Lucas, plus reimbursement of the \$71.55 filing fee.

Compliance Orders

Has Pacific Holdings breached the Settlement?

[13] A Record of Settlement made under s 149 of the Act will only be signed by a Mediator after the parties have affirmed their understanding that the terms are final and binding on, and enforceable by the parties, may not be cancelled under the Contract and Commercial Law Act 2017, and except for enforcement purposes may not be brought before the Authority or the court. “Enforcement purposes” in s 149(3)(b) of the Act refers to the procedures for enforcing the terms of agreements and orders or directions, such as the procedures for recovery of wages, and for compliance orders or penalties. A person who breaches an agreed term of settlement is liable to a penalty imposed by the Authority under s 149(4) of the Act.

[14] Based on the evidence before the Authority, which includes witness statements and most importantly, acknowledgement by Mr Cantor of the default in the instalment payments and the debt owed to Mr Lucas, I conclude Pacific Holdings has breached the Settlement and \$900.00 remains outstanding.

[15] If Pacific Holdings had made the instalment payments agreed to under the Settlement, Mr Cantor would have been paid in full by 12 January 2024. It has been over seven months since that date.

Should the Authority order compliance?

[16] Under s 137 of the Act, the Authority has a broad discretion to order compliance with a range of matters including any terms of settlement.¹ The Authority may, by order require a person to do any specified thing for the purpose of preventing further non-compliance. In so doing, the Authority must specify a time within which the order is to be obeyed.² The Authority must exercise the power in a principled way.

[17] I am satisfied Pacific Holdings has not complied with the terms of Settlement. Mr Cantor is the sole director of that company and has admitted to the default and therefore the breach is both accepted and proved. I am satisfied it is appropriate and in the interests of justice for the Authority to exercise its discretion to order Pacific Holdings to comply with the terms of the Settlement.

¹ Employment Relations Act 2000, s 137(1)(a)(iii).

² Employment Relations Act 2000, s 137(2) and s 137(3).

[18] Mr Lucas also seeks a compliance order for Mr Cantor to do everything in his power to ensure Pacific Holdings complies. As the sole director and shareholder of the company, I am satisfied Mr Cantor is the controlling hands and mind of the company. It is appropriate for the Authority to order Mr Cantor to do everything necessary to ensure Pacific Holdings complies with the Settlement.

[19] Section 138(4A) of the Act provides if the compliance order relates in whole or in part to payment of a sum of money the Authority may order payment by instalments but only if the financial position of the employer requires it.

[20] The information about Pacific Holdings' ability to pay is insufficient for me to conclude its financial situation requires an order for payment by instalments. Despite Mr Cantor being advised he would need to provide financial information to enable the Authority to assess whether payment by instalments is appropriate, he declined to do so unless the information was withheld from Mr Lucas. While Mr Cantor has stated in communications that the business ceased trading in April 2023 and he is not in a financial position to pay Mr Lucas anything, as recently as 5 July 2024 Mr Cantor proposed an instalment plan of \$150.00 every fortnight that would have had the entire amount owed to Mr Lucas paid within 12 weeks of that date. Assuming Mr Cantor was genuine in his proposal, I see no reason why the full amount owed to Mr Lucas under the Settlement could not be paid within 28 days from the date of this determination.

[21] Pacific Holdings is ordered to comply with the terms of the Settlement and pay the outstanding amount of \$900.00 to Mr Lucas within 28 days of the date of this determination.

[22] Mr Cantor is ordered to do everything necessary to ensure Pacific Holdings complies with the Settlement under 137(2) of the Act.

Interest

[23] Mr Lucas claims payment of interest on sums owed to him. The Authority has discretion to order interest in any matter involving the recovery of any money, such interest to be calculated in accordance with Schedule 2 of the Interest on Money Claims

Act 2016.³ The court has confirmed interest is payable on sums sought for breach of a Settlement.⁴

[24] Interest is payable on the sum and is sought by Mr Lucas. Mr Lucas says interest should be calculated for each of the three discrete instalment payments that was missed as follows:

- (a) Between 8 December 2023 (being the first date of default) and 1 August 2024.
- (b) Between 22 December 2023 and 1 August 2024.
- (c) Between 12 January 2024 and 1 August 2024.

[25] The correct approach is that more interest accrues as the debt increases. So between 22 December 2023 and 1 August 2024, the amount of interest on \$600.00 is \$22.15, and between 12 January 2024 and 1 August 2024, the amount of interest on \$900.00 is \$30.12. These amounts have been calculated using the Civil Debt Interest Calculator.⁵

[26] The total amount of interest is \$64.04 and it is appropriate to order that Pacific Holdings pay that amount in interest to Mr Lucas within 28 days of the date of this determination.

Penalty

[27] The Authority has full and exclusive jurisdiction to deal with actions for the recovery of penalties under s 133 of the Act. The Authority is able to order a penalty for breaching an agreed term of Settlement⁶ and Mr Lucas asks the Authority to do so.

[28] In deciding whether to impose a penalty, and if I decide to, how much the penalty should be, I need to consider the factors in s133A of the Act and the approach set out by the Full Court in *Borsboom v Preet PVT Limited and Warrington Discount Tobacco Limited*.⁷ These principles have been elaborated on and followed since.

[29] The law in respect of quantification is well established given the content of s 133A of the Act and requires that regard is had to the object of the Act; the nature and

³ Employment Relations Act 2000, clause 11, Schedule 2.

⁴ *Crichton v Dig & Tip Earthworks Limited & Selwyn Torrance* [2024] NZEmpC 98.

⁵ <https://www.justice.govt.nz/fines/civil-debt-interest-calculator/>

⁶ Employment Relations Act 2000, s 149(4).

⁷ *Borsboom v Preet PVT Limited and Warrington Discount Tobacco Limited* [2016] NZEmpC 143.

extent of any breach; whether the breach was intentional, inadvertent or negligent; the nature and extent of any loss or damage; steps taken to mitigate the effects of the breach, circumstances of the breach, including vulnerability of the employee; and previous conduct. This is a non-exhaustive list of considerations.

[30] The purpose of penalties is punitive. They are not imposed to remedy a loss, but to punish the person who has breached a duty under the Act and to condemn that behaviour.

[31] The breach by Pacific Holdings is inconsistent with the object of the Act to promote mediation as the primary problem-solving mechanism. The Act contains provisions encouraging parties to resolve their employment relationship issues between themselves and the Settlement represents such a resolution. The failure by a party to honour the terms of a settlement is a serious matter because public confidence in s 149 settlements will be undermined if it is perceived that parties are permitted to breach these settlements with impunity. It is important that the parties can have confidence in the enforceability of the terms of agreed settlements.

[32] In determining the penalty claim I follow the four-step approach as set out by the Employment Court in *Borsboom v Preet*.⁸

[33] The first step is to assess the nature and extent of the breaches. There is one (admitted) breach of the Settlement. A company that breaches an agreed term of Settlement is liable to a penalty of up to \$20,000.00.⁹

[34] The second step is to assess the severity of the breach. While I am not persuaded Pacific Holdings' failure to comply with the terms of the Settlement was intentional, it is clear the company negligently agreed to make instalment payments to Mr Lucas when it did not have the funds available. It failed to meet the terms of payment plans proposed by it, on more than one occasion. The impact on Mr Lucas has been significant. He says the entire case has been "hell" for him and mentally exhausting. He has felt "wronged and scammed" and said if he had been aware the company was not going to pay him, he would not have settled for the amount he did. He has had to put his studies on hold because he did not have the money to pay course costs. Mr Lucas has been

⁸ *Borsboom v Preet PVT Limited and Warrington Discount Tobacco Limited* [2016] NZEmpC 143 at [137] to [151].

⁹ Employment Relations Act 2000, s 149(4).

without agreed compensation for a considerable amount of time after his employment ended. Pacific Holdings' non-compliance with the Settlement has put Mr Lucas to the cost of bringing this matter to the Authority.

[35] In terms of mitigating factors, there is no evidence before the Authority regarding any previous conduct by Pacific Holdings. However, there is a need for specific deterrence to ensure it appreciates the significance of its obligations to comply with the Settlement. In terms of general deterrence, a message should be sent that payment obligations under a Record of Settlement are not optional.

[36] The third step is to consider the financial circumstances of the person. Mr Lucas has raised a suspicion that Mr Cantor continued in business (moving and rebranding his restaurant) after Mr Lucas' employment had ceased. Mr Cantor disputes this claim. Mr Cantor has provided a statement about Pacific Holdings' financial situation. He says Pacific Holdings has not been trading since April 2023 and he is "broke". Mr Cantor has provided an extensive narrative about the company's and his own financial situation. He concludes the company is not in a financial position to pay anything.

[37] For the sake of completeness, I record that I do not find the issue of the continuation of the business to be relevant to my enquiries because no supporting evidence of the actual financial situation of Pacific Holdings or Mr Cantor personally has been provided by either party. There is accordingly no supporting evidence for Mr Cantor's claims that Pacific Holdings cannot pay a penalty and no basis for me to reduce an otherwise appropriate penalty based on ability to pay. However, I accept Mr Cantor's statement that Pacific Holdings may require time to source funds and I make allowance for this in terms of the timeframe for payment.

[38] The fourth and final step is the proportionality or totality test. Penalties should be set at a level which both punishes a party for its breaches and deters them from future non-compliance but also in proportion to the gravity of the breach. I consider a \$6,000.00 penalty, as sought by Mr Lucas, would be out of proportion to the breach. A penalty should not be set at a level that creates a significant risk of non-payment.¹⁰ I have considered an appropriate figure in comparison to other cases. Standing back and

¹⁰ *Borsboom v Preet PVT Limited and Warrington Discount Tobacco Limited* [2016] NZEmpC 143 at [147].

looking at the matter in totality and taking a proportionate approach, I consider a fair and appropriate penalty in this matter to be \$500.00.

[39] Mr Lucas has been directly affected by Pacific Holding's failures because he was a party to the Settlement and the intended recipient of payments made under it. In this case, the breach has resulted in a non-compensable loss to Mr Lucas, and costs will not adequately compensate him.¹¹ On that basis, I consider it appropriate to award 50 per cent of the penalty to Mr Lucas.

[40] Pacific Holdings is ordered to pay a penalty of \$500.00 within 56 days of the date of this determination, with \$250.00 being paid to the Crown and \$250.00 to Mr Lucas.

Costs and disbursements

[41] The power of the Authority to award costs is set out in Schedule 2, clause 15 of the Act. Costs are at the discretion of the Authority and must be reasonable.¹² The Authority has adopted a daily tariff approach as the starting point for considering costs which is now well known. The current daily tariff is \$4,500 for the first day of hearing, and \$3,500 for subsequent hearing days.¹³ The parties can expect the Authority to adhere to the approach of applying the daily tariff, unless there is good reason to depart from it.

[42] The principles and the approach adopted by the Authority in which an award of costs is made are settled and set out in *PBO Limited (formerly Rush Security Limited) v Da Cruz*¹⁴ as confirmed in *Fagotti v Acme and Co Limited*.¹⁵ It is a principle set out in *Da Cruz* that costs are not to be used as a punishment or an expression of disapproval of the unsuccessful party's conduct. The financial situation of the party paying costs can be a relevant factor to take into account. Awards made should be modest, and consistent with the Authority's equity and good conscience jurisdiction.

[43] This matter was heard on the papers, without the need for an investigation meeting. On that basis, Mr Lucas says costs of half the daily tariff for a one-day investigation meeting (\$2,250.00) would be appropriate. I accept Mr Lucas has

¹¹ *Borsboom v Preet PVT Limited and Warrington Discount Tobacco Limited* [2016] NZEmpC 143.

¹² *NZ Automobile Association Inc v McKay* [1996] 2 ERNZ 622.

¹³ www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1

¹⁴ *PBO Limited (formerly Rush Security Ltd) v Da Cruz* EMC Auckland AC28/06, 12 May 2006.

¹⁵ [2015] NZEmpC 135 at [114].

incurred costs to prepare evidence and submissions. Had the matter proceeded to an investigation meeting, it is likely that it would have concluded within half a day. I therefore consider half a day's costs to be excessive. Given this matter was ultimately investigated on the papers, and involved relatively straight-forward claims, I consider \$500.00 represents an appropriately modest contribution to costs.

[44] As the successful party, Mr Lucas is entitled to a contribution to his costs actually and reasonably incurred. I note again, I accept Mr Cantor's statement that Pacific Holdings may require time to source funds and I make allowance for this in terms of the timeframe for payment. I order Pacific Holdings to make payment of \$500.00 to Mr Lucas as a contribution towards his costs within 56 days of the date of this determination. I also order Pacific Holdings to reimburse Mr Lucas the filing fee of \$71.55 within 56 days of the date of this determination.

Orders

[45] I make the following orders:

- (a) Pursuant to s 137(1)(a), and s 137(2) of the Employment Relations Act 2000, Pacific Holdings & Investments Limited is ordered to comply with the terms of the Record of Settlement and pay \$900.00 to Taizan-Jay Lucas within 28 days of the date of this determination.
- (b) Pursuant to s 137(2) of the Employment Relations Act 2000, Juan Carlos Cantor is ordered to do everything within his power to ensure that Pacific Holdings complies with the order to pay Taizan-Jay Lucas sums owing to him.
- (c) Pacific Holdings & Investments Limited is ordered to pay interest of \$64.04 to Taizan-Jay Lucas within 28 days of the date of this determination.
- (d) Pacific Holdings & Investments Limited is ordered to pay a total penalty of \$500.00 within 56 days of the date of this determination as follows:
 - (i) \$250.00 is to be paid to the Employment Relations Authority. In accordance with s 136 of the Act, that amount will be paid to the Crown bank account.
 - (ii) \$250.00 is to be paid to Taizan-Jay Lucas.

- (e) Pacific Holdings & Investments Limited is ordered to pay Taizan-Jay Lucas costs of \$500.00 towards his legal fees within 56 days of the date of this determination.
- (f) Pacific Holdings and Investments Limited is ordered to reimburse Taizan-Jay Lucas the Authority's filing fee of \$71.55 within 56 days of the date of this determination.

Natasha Szeto

Member of the Employment Relations Authority