

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND OFFICE**

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

[2024] NZERA 716

3292759

BETWEEN	A LABOUR INSPECTOR Applicant
AND	AKREEYI EMPLOYER SERVICES LIMITED First Respondent
AND	ISMAL ISMAEL MUSTAFA Second Respondent

Member of Authority: Nicola Craig

Representatives: Ella Rainthorpe, counsel for the applicant  
No appearance for the respondents

Submissions and other information received: 31 July and 10 September 2024 from the applicant  
Nothing received from the respondents

Determination: 29 November 2024

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1] A Labour Inspector of the Ministry of Business, Innovation and Employment, Eve Cahill, brings proceedings in the Authority against Akreeyi Employer Services Limited (Akreeyi or the company) and its sole director Ismal Ismael Mustafa to enforce a record of settlement (the settlement agreement) regarding wages due to a worker.

[2] Akreeyi operated Evan's Kebab Ōrākei, a kebab shop in Auckland. Mr Mustafa is the sole director and shareholder of Akreeyi.

[3] The Inspector says payments required under the settlement agreement have not been made and seeks a compliance order and penalties for breach of that agreement.

[4] Little is known of the position of Akreeyi and Mr Mustafa.

### **The Authority's process in the compliance application**

[5] When the current application was lodged, Mr Mustafa confirmed to the Authority that his email address was the correct one on which to serve he and the company. The statement of problem was served but no statement in reply was received from either of them.

[6] A case management conference was held but Mr Mustafa could not be reached. The Labour Inspector was agreeable to this matter being dealt with on the papers, through the consideration of documentary evidence and submissions. I am satisfied that the statement of problem and notice of directions, setting out the on the papers arrangements, was served on Akreeyi and Mr Mustafa through the email address he agreed to accept service on. They had the opportunity to be involved.

[7] The Inspector provided submissions.

[8] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has not recorded everything received from the parties but has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter, and specified orders made as a result.

### **Issues**

[9] The issues for determination are:

- Has there been a breach of the settlement agreement by Akreeyi and/or Mr Mustafa?
- If so, should:
  - compliance orders be issued against Akreeyi and/or Mr Mustafa; and/or
  - penalties be imposed on Akreeyi and/or Mr Mustafa for breach of the settlement agreement?
- Should either party have to contribute to the other's costs?

### **The initial proceeding**

[10] Looking back, the Inspector initially lodged a statement of problem identifying that the Akreeyi worker had not been paid the minimum wage for hours worked, as well

as not receiving their sick leave, public holiday and annual leave entitlements. Mr Mustafa was sought to be recognised as a person involved in those breaches, under s 142W of the Act.

[11] Mr Mustafa, on behalf of himself and Akreeyi, sought an extension of time to lodge his statement in reply, which was granted. Instead, however Mr Mustafa emailed the Authority that he was not lodging because the company had not traded since 2021 and was in the process of being removed from the Companies Register. He also advised that he did not have any assets.

[12] Recognising this was a minimum entitlement proceeding, the Inspector still did not oppose being directed to mediation.

### **Settlement agreement concluded**

[13] The parties were able to reach a settlement agreement and the record of it was entered into on 22 December 2023 under s 149 of the Act. Mr Mustafa signed the record on behalf of Akreeyi and also on his own behalf. The record was also signed by a Mediator of the Ministry of Business, Innovation and Employment.

[14] There is express provision in the settlement agreement that its terms are not confidential and may be disclosed, including to the Authority.

[15] The parties also agree that:

- Akreeyi will pay \$27,937.49 to the Ministry of Business, Innovation and Employment account, being total wages and holiday owing to the worker.<sup>1</sup>
- A payment schedule involving a first payment of \$7,000 on 26 January 2024 and the remaining sum paid in equal weekly instalments of \$150 from 2 February 2024 onwards.<sup>2</sup>
- If Akreeyi fails to pay any instalment payment, the outstanding amount becomes due and payable and the Inspector is entitled to demand immediate payment of the outstanding amount.<sup>3</sup>

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<sup>1</sup> Settlement agreement, cl 3.

<sup>2</sup> As above, cl 3.

<sup>3</sup> As above, cl 4.

- In the event Akreeyi is unable to fulfil its obligations to pay, Mr Mustafa shall be jointly and severally liable to fulfil that obligation in accordance with its terms.<sup>4</sup>
- Akreeyi and Mr Mustafa acknowledge and admit their respective breaches outlined in the statement of problem.<sup>5</sup>

### **Breaches are established**

[16] No payments were received from Akreeyi or Mr Mustafa.

[17] A formal demand for payment from both the company and its director was made on the Inspector's behalf on 4 April 2024. Payment was not received from either of them.

[18] On the evidence before the Authority due to non-payment:

- Akreeyi breached its obligation under clause 3 of the settlement agreement
- Mr Mustafa breached clause 5 of the settlement agreement.

### **Compliance order should be made**

[19] Both Akreeyi and Mr Mustafa have failed to meet their obligations under the settlement agreement. The resolution of employment issues through mediated settlements is a crucial part of the dispute resolution system. Parties should take their obligations seriously.

[20] There are no reasons on the material before the Authority why a compliance order would be inappropriate.

[21] Therefore, compliance orders should be issued requiring both Akreeyi and Mr Mustafa to meet their obligations.

### **Penalties are appropriate**

[22] Under s 149(4) of the Act a penalty may be imposed on those who breach agreed terms of a mediated settlement.

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<sup>4</sup> As above, cl 5.

<sup>5</sup> As above, cl 8.

[23] As emphasised above, compliance with actions committed to in mediated settlement agreements are important. That is particularly so when the payments concern employment standards, including in this case, the minimum wage. Penalties should be imposed.

### **Assessment of penalties**

[24] In assessing the quantum, I take into account the factors set out in s 133A of the Act and relevant judgments such as *Borsboom (Labour Inspector) v Preet PVT Limited and Anor*, *Labour Inspector v Daleson Investment Limited* and *Labour Inspector v Prisha Hospitality (2017) Limited*.<sup>6</sup>

[25] I will discuss those elements step by step, referring to the company and Mr Mustafa where appropriate. The calculations involving both are set out in the schedule attached to this determination.

### **Statutory consideration 1 – object of the Act**

[26] The relevant objects of the Act include:

- Recognising the implied mutual obligations of trust and confidence in the employment relationship and requiring good faith behaviour
- Acknowledging and addressing the inherent inequality of bargaining power in employment relationships
- Promoting mediation as the primary problem-solving mechanism
- Promoting the effective enforcement of employment standards, in particular by Labour Inspectors.<sup>7</sup>

### **Statutory consideration 2 – nature and extent of the breaches**

[27] The Labour Inspector relies on two breaches – one each by Akreeyi and Mr Mustafa.

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<sup>6</sup> *Borsboom (Labour Inspector) v Preet PVT Limited and Anor* [2016] NZEmpC 143, *Labour Inspector v Daleson Investment Limited* [2019] NZEmpC 12 and *Labour Inspector v Prisha Hospitality (2017) Limited* [2023] NZEmpC 225.

<sup>7</sup> The Act, s 3.

[28] The maximum penalty for Akreeyi as a company is \$20,000 with Mr Mustafa as an individual being liable to a maximum \$10,000 penalty.<sup>8</sup>

### **Statutory consideration 3 – intentional, inadvertent or negligent breaches**

[29] The company and its director have not lodged a statement in reply in this compliance application. There appears to be no dispute that breaches have occurred. Mr Mustafa emailed a representative of the Inspector on 27 March 2024 saying the reason payments have not been made is that he cannot afford it, being on a benefit and supporting children.

[30] I accept the Inspector's submission that the breach here should be seen as intentional. Mr Mustafa was aware of the obligation to pay and did not comply. He was contacted on multiple occasions over several months on the Inspector's behalf and given opportunity to comply and engage.

### **Statutory consideration 4 – nature and extent of any loss or damage**

[31] The affected worker is owed almost \$28,000 in minimum wage arrears, sick pay, public holiday pay and annual holiday pay. That is a substantial amount of money. The worker first contacted the Inspectorate in October 2020 with employment beginning over two years before that.

[32] The worker has thus been without the benefit of money owing to them for several years. The Inspectorate has also spent considerable resources over a lengthy period to enforce compliance with the employment standards obligations, the settlement agreement and obtain payment.

### **Statutory consideration 5 – steps taken to mitigate effects**

[33] The Inspector acknowledges that Akreeyi and Mr Mustafa co-operated with the initial investigation and provided her with some information. The company and its director then entered into a record of settlement with the Inspector, accepting breaches alleged in the initial proceeding.

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<sup>8</sup> The Act, s 135.

[34] However, when it comes to making things good financially, they have failed, making no payments. No other steps have been taken to mitigate the effects of the breaches.

#### **Statutory consideration 6 – circumstances of the breaches and any vulnerability**

[35] The settlement agreement has now not been complied with for a considerable period. Akreeyi and Mr Mustafa have been able to benefit from money owing by them since, at the earliest, mid-2018.

#### **Statutory consideration 7 – previous conduct**

[36] Neither Akreeyi nor Mr Mustafa had come to the attention of the Labour Inspectorate prior to the investigation which ultimately led to the settlement agreement.

#### **Additional consideration 1 – deterrence**

[37] Breaches of minimum entitlement provisions were involved here. A message needs to be sent to Akreeyi and Mr Mustafa and to others that such non-compliance with standards is not tolerated.

[38] It is not acceptable to simply wait for an extended period, well past agreed times, until a financially convenient time for payment is reached by a company and its director. Commitments made in mediated settlement agreements must be honoured in a timely manner.

#### **Additional consideration 2 – culpability**

[39] The severity of the breaches is considered to establish a provisional starting point for the penalties. Adjustments for any aggravating and ameliorating factors can then be made. These are set out in the attached schedule.

[40] Taking into account the aggravating and mitigating factors outlined above I consider a starting point of 50% of the maximum penalty is appropriate.

[41] Akreeyi and Mr Mustafa deserve some credit for entering into a payment plan, but not nearly as much as if they had actually started making payments under it.

### **Additional consideration 3 – consistency**

[42] The Labour Inspector referred to *King v Premier Forwarding NZ Limited*, where an initial payment of \$2,000 was made towards a total owing of \$12,000 under a record of settlement but nothing further received. A penalty of \$3,000 was imposed on the employer.<sup>9</sup>

[43] In *Cookson v Right Height Scaffolding Limited* two employees were each to be paid \$3,800 and associated advocacy costs under a mediated settlement. The employer was penalised \$2,500.

[44] Further, in *Chrichton v Dig & Tip Earthworks Limited* where the settlement was for unpaid wages and holiday pay a \$6,500 penalty was imposed.<sup>10</sup> There were serious breaches and significant evidence of impact on Mr Chrichton. There is little specific evidence of impact in the current case.

### **Additional consideration 4 – ability to pay**

[45] Akreeyi is no longer operating but is still registered as a company on the Companies Register. There were earlier assertions of it having little in the way of assets.

[46] Mr Mustafa has suggested he has experienced financial difficulty for some time. He has however not provided up to date or accurate information in support of his assertions.

[47] In the absence of specific evidence regarding the financial picture of the company or Mr Mustafa I make no deduction for inability to pay.

### **Additional consideration 5 – proportionality of outcome**

[48] Penalties should not be reduced so as to create perverse incentives and inadvertently encourage non-compliance.<sup>11</sup>

[49] The Inspector accepts that the application of the proportionality test may lead to a reduction in penalties properly and fairly imposed. There is only one breach each by Akreeyi and Mr Mustafa and their penalties should not be significantly out of

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<sup>9</sup> *King v Premier Forwarding NZ Limited* [2023] NZERA 780.

<sup>10</sup> *Chrichton v Dig & Tip Earthworks Limited* [[2023] NZERA 688.

<sup>11</sup> *Labour Inspector v Daleson Investment Limited* [2019] NZEmpC 12.

proportion with the gravity of the breach. The two penalties relate to the same amount of money to be paid.

### **Penalty outcome**

[50] After conducting the above analysis, I conclude Akreeyi should pay a penalty of \$4,000 and Mr Mustafa \$2,000.

### **Portion of penalties to the worker**

[51] The Inspector invites the Authority to order a portion of the penalty to be forwarded to the worker whose complaint triggered this process. No particular proportion is identified.

[52] In the absence of detailed evidence of impact, 25% of each of the penalties should go to the worker.<sup>12</sup>

### **Costs**

[53] Costs can be dealt with in this determination. The Inspector seeks a contribution to her costs of no more than the tariff for a half day hearing.

[54] The Authority has the power to award costs.<sup>13</sup> This power is discretionary and is to be used in a principled manner, considering equity and good conscience. Other factors include costs generally following the event, not being used as a punishment and frequently being based on a notional daily tariff.<sup>14</sup>

[55] The Inspector has been successful in pursuing this matter and is entitled to a contribution towards her costs.

[56] Although this matter was investigated on the papers rather than through an investigation meeting, work was still required on behalf of the Inspector. Her representative attended a case management conference and provided extensive submissions which assisted the Authority.

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<sup>12</sup> The Act, s 136.

<sup>13</sup> The Act, Schedule 2, cl 15.

<sup>14</sup> *PBO Ltd (formerly Rush Security Ltd) v Da Cruz* [2005] ERNZ 808, confirmed in *Fagotti v Acme & Co Ltd* [2015] NZEmpC 135.

[57] The Inspector is entitled to a contribution of \$1,500 towards her costs and also reimbursement for the Authority's filing fee.

## **Orders**

[58] The Authority orders that:

- Akreeyi Employer Services Limited shall comply with the settlement agreement by, within 14 days of the date of this determination, paying the amount due under clause 3
- Ismal Mustafa shall comply with the settlement agreement by, within 28 days of the date of this determination, paying whatever amount still remains owing above by Akreeyi Employer Services Limited; and
- Within 28 days of the date of this determination:
  - Akreeyi Employer Services Limited shall pay to the Ministry of Business, Innovation and Employment for transfer to a Crown bank account a penalty of \$4,000 and the Crown shall transfer \$1,000 of that sum to the worker involved
  - Ismal Mustafa shall pay to the Ministry of Business, Innovation and Employment for transfer to a Crown account a penalty of \$2,000 and the Crown shall transfer \$500 of that sum to the worker involved; and
  - Akreeyi Employer Services Limited and Ismal Mustafa are jointly and severally liable to pay \$1,500 to the Labour Inspector as a contribution to her costs and \$71.55 for the Authority's filing fee.

Nicola Craig

Member of the Employment Relations Authority

## SCHEDULE

<b>Akreeyi Employer Services Limited</b>		
<b>Step 1: Nature and number of breaches – potential maximum following consolidation and globalisation</b>		
Failure to comply with settlement agreement	1 x \$20,000	\$20,000
	<b>Subtotal</b>	\$20,000
<b>Step 2(a): Aggravating factors</b>		
	50%	\$10,000
	<b>Subtotal</b>	\$10,000
<b>Step 2(b): Ameliorating factors</b>		
Less 20% of above total	20%	\$8,000
	<b>Subtotal</b>	\$8,000
<b>Step 3: Ability to pay</b>		
	No deduction	
	<b>Subtotal</b>	\$8,000
<b>Step 4: Proportionality</b>		
	<b>TOTAL</b>	<b>\$4,000</b>

<b>Ismal Mustafa</b>		
<b>Step 1: Nature and number of breaches – potential maximum following consolidation and globalisation</b>		
Failure to comply with settlement agreement	1 x \$10,000	\$10,000
	<b>Subtotal</b>	\$10,000
<b>Step 2(a): Aggravating factors</b>		
	50%	\$5,000
	<b>Subtotal</b>	\$5,000
<b>Step 2(b): Ameliorating factors</b>		
Less 20% of above total	Less 50%	\$4,000
	<b>Subtotal</b>	\$4,000
<b>Step 3: Ability to pay</b>		
	No deduction	
	<b>Subtotal</b>	\$4,000
<b>Step 4: Proportionality</b>		
	<b>TOTAL</b>	<b>\$2,000</b>