

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

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

[2025] NZERA 203  
3342120

BETWEEN

SHAMAL KUMAR  
Applicant

TRUCK SERVICES &  
MAINTENANCE LIMITED  
First Respondent

KELVIN KUMAR SAMI  
Second Respondent

Member of Authority: Marija Urlich  
Representatives: Danny Gelb, advocate for the Applicant  
No appearance for the Respondents  
Investigation Meeting: 7 April 2025 (by audio-visual link)  
Determination: 10 April 2025

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] Mr Kumar seeks to enforce by way of compliance order a record of settlement entered with his former employer Truck Services & Maintenance Limited (TSML) and certified by a mediator. He also seeks interest, penalties against TSML and Mr Sami and an order as to costs. Subsequent to the application being lodged, by 24 March 2025 TSML had paid Mr Kumar in full the amount agreed under the record of settlement. A compliance order is no longer necessary. This determination deals with the balance of the claim.

[2] TSML and Mr Sami have not lodged statements in reply. On the morning of 7 April Mr Sami emailed the Authority including the record of settlement sum had been

paid, he agreed the payments were late but explained this was due to financial difficulties TSML was facing which he outlined and offered to provide documents to support.

### **The Authority's investigation**

[3] Directions dated 7 March 2025 (the directions), the notice of investigation meeting and audio-visual link were served on the addresses provided in the Companies Office for TSML and Mr Sami. In the directions the Authority identified the issues to be investigated and determined and an investigation meeting date. The directions also requested the parties file any relevant information by 31 March.

[4] Mr Kumar filed the relevant information as directed. TSML and Mr Sami did not. At the investigation meeting Mr Kumar provided further information to the Authority in support of his claim for penalties and interest. 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 the information received.

### **Issues**

[5] The issues for investigation and determination are whether:

- (i) an order for interest should be made;
- (ii) a penalty should be ordered against Truck Services & Maintenance Limited;
- (iii) Mr Sami aided and abetted any breach of the record of settlement and the Holidays Act 1983 if so, whether a penalty/ies should be ordered; and
- (iv) either party entitled to an award of costs.

### **Interest**

[6] Mr Kumar seeks interest on the settlement monies paid outside the timeframe agreed by the parties in the record of settlement. 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.

[7] Under the record of settlement the parties agreed TSML would pay Mr Kumar a total of \$19,600 under a payment schedule commencing 6 October 2024.<sup>1</sup> The record of settlement also provided on default of payment the total would become due and owing.<sup>2</sup> There is no dispute TSML defaulted on the first payment. The total settlement sum therefore became due from 6 October 2024.

[8] It is appropriate where a person has been deprived of the use of money to make an award for interest. Interest is to be calculated from the date the total settlement sum became due and when it was paid in full taking account of the 8 payments made up to when the settlement sum was paid in full. TSML is ordered to pay interest of \$300.26 within 21 days of the date of this determination. This interest is payable in accordance with schedule 2 of the Interest on Money Claims Act 2016 and has been calculated using the calculation tool available on the Ministry of Justice website.

### **Penalty**

[9] 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. Section 134 of the Act provides a penalty for aiding and abetting a breach of an employment agreement. Section 75 of the Holidays Act 2003 provides for penalties for failure to comply with obligations owed under that Act. 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.<sup>3</sup>

[10] Mr Kumar says penalties should be imposed against TSML and on Mr Sami individually – TSML for breach of the record of settlement and Mr Sami for aiding and abetting the breach of the record of settlement and breaching Holidays Act obligations. He says any penalties awarded or a portion thereof should be paid to him given TSML'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

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<sup>1</sup> Clause 8 record of settlement 30 September 2024.

<sup>2</sup> Above clause 10.

<sup>3</sup> Employment Relations Act 2000, section 135(2)(a) and (b).

TSML is solely responsible for the knowing breach of the record of settlement, the nature and the extent of the loss and damage suffered by Mr Kumar and the benefit to TSML in retaining the settlement monies over an extended period.

[11] The parties' record of settlement contained a payment schedule for 7 payments. When TSML failed to meet the first payment the total became owing. It is appropriate to globalise the breach.

[12] 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.<sup>4</sup> As a matter of public policy, in this case a penalty against TSML is necessary to uphold the integrity of the full, final, binding and enforceable agreements allowed under s 149 of the Act.

[13] The record of settlement records TSML understood the binding and enforceable nature of the record of settlement and it must be taken to have been aware of their obligations under the record of settlement. TSML accepts it has not met the payment schedule as agreed. There is no basis on which to reasonably conclude that TSML's breaches of the record of settlement were inadvertent, minor or technical. TSML has now paid the total settlement amount to Mr Kumar and there is information before the Authority which suggests the business is facing financial difficulties.

[14] Mr Kumar has been put to considerable inconvenience and used significant resources to enforce the record settlement. He has suffered as a consequence of not receiving the settlement sums including experiencing stress and financial distress as a consequence of the breaches. As a migrant, he is in a recognised category of vulnerable workers. This vulnerability was known to TSML because it employed Mr Kumar under the accredited employer work visa scheme.

[15] A search of the relevant databases has not revealed previous proceedings for similar breaches involving TSML.

[16] Taking all the factors into account TSML 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

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<sup>4</sup> 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.

record of settlement and is proportionate to the seriousness of the breach and harm caused. In the circumstances of this matter, it is just for half the penalty sum (\$1,000) to be paid to Mr Kumar and the balance (\$1,000) to the Crown.

[17] A basis for an award of penalties against Mr Sami is not established. The aiding and abetting penalty relates to employment agreements and on the face of the record of settlement no Holidays Act breach is recorded.

### **Summary of orders**

[18] The Authority orders as follows:

Within 21 days of the date of this determination Truck Services & Maintenance Limited is ordered to comply with the record of settlement and make the following payments without deduction:

- (i) interest of \$300.26 to Shamal Kumar; and
- (ii) \$2,000 in penalty half of which is to be paid to Shamal Kumar and half to the Crown.

### **Costs of representation and reimbursement of filing fee**

[19] Mr Kumar has incurred costs of professional representation in this matter. This matter was able to be investigated using audio-visual technology and took hearing time of about 40 minutes including a delay of some 20 minutes to accommodate lateness on the part of the respondents. It is fair and reasonable for Mr Kumar to recover the filing fee of \$71.56 incurred in lodging this application.

[20] Truck Services & Maintenance Limited is to pay Mr Kumar \$1,500 as a contribution to costs incurred in pursuing compliance and to reimburse the filing fee of \$71.55 within 21 days of the date of determination.