IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON

I TE RATONGA AHUMANA TAIMAHI
TE WHANGANUI-A-TARA ROHE

[2025] NZERA 432
3356084

	BETWEEN	RACHEL WILLIAMS Applicant
	AND	MY GROUP LIMITED First Respondent
	AND	DIHRAJ GOGNA Second Respondent

Member of Authority:	Claire English
Representatives:	Bede Laracy, advocate for the Applicant John Langford, counsel for the Respondent
Investigation Meeting:	On the Papers
Submissions received:	2 May and 19 June 2025 from Applicant 10 June 2025 from Respondent
Determination:	18 July 2025

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The parties entered into a Record of Settlement (ROS), which was counter-signed by a Mediator on 30 January 2025. The first respondent (MGL) made some, but not all, of the payments agreed under the ROS.

[2] The applicant, Ms Rachel Williams, brought a claim in the Authority seeking compliance with the ROS, as well as penalties for MGL's non-compliance, and that the second respondent Mr Dihraj Gogna be joined to the proceedings as the director of

MGL, so that he could be ordered to carry out any necessary steps to enable MGL to comply with any orders of the Authority.

[3] MGL and Mr Gogna submitted that Mr Gogna had mistakenly signed the wrong version of the ROS, which had provided for a different payment schedule, and MGL did not have the cash flow to make payments to Ms Williams any faster. It says that no penalties or costs should be awarded.

The Authority's investigation

[4] At the case management conference, Mr Langford for the respondents, confirmed that the full amounts due under the ROS had been paid to Ms Williams overnight. In those circumstances, both parties agreed that the remaining outstanding matters could be determined "on the papers" following an exchange of written submissions.

[5] 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.

The issues

[6] The issues requiring investigation and determination were:

(a) Should a penalty be ordered against the first respondent for failing to comply with the record of settlement?

(b) If so, should a portion be awarded to the applicant?

(c) Should the second respondent be joined to the proceedings and ordered to take any and all reasonable steps to ensure the first respondent complies with any order made?

(d) Should costs be awarded to the applicant?

(e) Should the filing fee be awarded to the applicant?

Background

[7] Ms Williams filed a substantive claim in the Authority. A hearing was convened, and on that day, the parties entered into without prejudice discussions. These

resulted in the ROS, which was signed by both parties and countersigned by a Mediator. Both parties were represented at the time.

[8] The ROS provided for certain payments to be made to Ms Williams and her representative on the following dates:

a. 3 February 2025;
b. 20 February 2025; and
c. 3 March 2025.

[9] MGL made payments to Ms Williams and her representative on the following dates:

a. 3 February 2025;
b. 3 March 2025;
c. 10 March 2025; and
d. 3 April 2025.

[10] I note that although the first payment was made on the agreed date of 3 February 2025, it was made short of the agreed amount.

[11] MGL argues in its defence that the ROS was signed by mistake, and MGL and Mr Gogna had intended to sign a different agreement with a different payment schedule. This resulted in the final outstanding amount being paid on 3 April 2025, and Mr Laracy (for Ms Williams) was advised that payment had been made on the morning of 4 April 2025, prior to the Authority's scheduled case management conference call at 9.30 am that morning.

[12] It was submitted to me that MGL had made payments in accordance with the agreement Mr Gogna had intended to sign, rather than in accordance with the ROS he had in fact signed. An unsigned settlement document was provided, which set out payment dates of:

a. 3 February 2025;
b. 7 April 2025; and
c. 5 May 2025.

[13] Emails provided to the Authority showed that Mr Gogna had signed the ROS and had provided a signed copy to his lawyer Mr Langford, who had forwarded it to

Ms Williams' advocate Mr Laracy for her to sign and sent to Mediation Services for countersigning by a Mediator.

[14] On receipt of the agreement signed by Mr Gogna, Mr Laracy emailed Mr Langford. He said:

> It appears your client has signed a prior version of the settlement agreement. We are more than happy to accept this as the agreed version.
>
> However, I do not wish to take advantage of something that may be an error on your client's part.
>
> Can you please either confirm that he has signed the correct version, or provide the correct version signed?

[15] Mr Langford replied 2 days later, saying that he would provide his client's details to Mediation Services, and adding "thank you".

[16] The ROS signed by both parties was then countersigned by a Mediator. It is in this context that Ms Williams seeks a penalty be awarded for late payment, and MGL and Mr Gogna resist this, on the basis that MGL was abiding by another unsigned version of the agreement. MGL also says that it did not have the cashflow to make payments any faster.

Analysis

[17] Section 149(4) provides that "a person who breaches an agreed term of settlement…is liable to a penalty…". There is no dispute that the ROS is such an agreement.

[18] As the ROS has now belatedly been complied with, the question then becomes, should a penalty be awarded against MGL and if so, what should that penalty be.

Should a penalty be awarded?

[19] It was submitted on behalf of the applicant that the ROS required three payments be made for agreed sums on agreed dates, and as the respondent failed to pay any of these as required, I should assess the matter as being three separate breaches. It was submitted for the respondent that a genuine error was made and MGL had no funds to pay any faster, so now that the agreed sums had been paid even if belatedly, no penalty should be awarded.

[20] Mr view is that it is not correct to say that three separate breaches of the ROS occurred. The problem is that the respondents entered into the ROS, and then did not make payments in accordance with the timetable as required. This is properly viewed as a single breach.

[21] I do not accept the submission on behalf of the respondent that no penalty should be awarded. Mr Gogna signed the ROS, setting out dates and amounts to be paid to Ms Williams. By signing the ROS, he signalled his agreement to those terms. It was his responsibility to read those terms before he signed and returned the document and be satisfied with the agreement that he was making on behalf of MGL. If he did not want or intend to abide by the ROS, he should not have signed it.

[22] In addition, Mr Laracy checked with Mr Gogna through his lawyer, to make sure that Mr Gogna had intended to sign and return the version of the ROS now in question. Mr Gogna had an explicit opportunity to change his mind, and he chose to re-affirm his agreement to the ROS, with his lawyer agreeing that matters could be forwarded to Mediation Services for completion.

[23] Even after this, Mr Gogna had a third opportunity to change his mind, when he was contacted by the Mediator to confirm that he agreed to the ROS. Again, he confirmed to an independent third party, that he wished to proceed with the ROS.

[24] It was only when it came time to pay that Mr Gogna claims to have had a change of heart. In all the circumstances, I am not persuaded by the submission that the wrong agreement was signed. Mr Gogna was provided with multiple opportunities to change his mind. Instead, he confirmed his agreement to the ROS at every step of the way. He should be held to the agreement that he repeatedly made.

[25] I have also considered the submission that MGL and Mr Gogna were doing noting more than making payments in accordance with what he considers to be the "correct" agreement. The unsigned version before me provided for payments to be made on 3 February, 7 April, and 5 May 2025. MGL and Mr Gogna made payments on 3 February, 3 March, 10 March, and 3 April 2025.

[26] These dates are not consistent with either agreement, and are certainly not consistent with the suggestion that Mr Gogna was intending to abide by the unsigned agreement. They tend rather to suggest that MGL and Mr Gogna were making

payments at their own convenience. My view is that MGL, through Mr Gogna's actions breached the ROS, and should be required to pay a penalty.

What should the penalty be?

[27] There is a breach of the ROS by way of failure to pay agreed sums at agreed times. I shall therefore approach this from the perspective of a single globalised breach, being a potential maximum of $20,000 as set out in s 135(2)(b) of the Act.

[28] The law in respect to quantification is well established given the content of s 133A of the Act and cases such as *Borsboom (Labour Inspector) v Preet PVT Limited and Warrington Discount Tobacco Limited*,[1] *A Labour Inspector v Prabh*[2] and *A Labour Inspector v Daleson Investment*.[3]

[29] The considerations in regard to penalties[4] are as follows:

a. The object of the Act – the relevant objects of the Act are the recognition of the inherent inequality of power in employment relationships, the promotion of mediation as the primary problem-solving mechanism, and the desirability of reducing the need for judicial intervention. By failing to comply with the negotiated ROS, and requiring Ms Williams to return to the Authority in order to enforce nothing more than what had been agreed, MGL as an employer has demonstrated disregard for multiple objects of the Act.

b. The nature and extent of the breach – the failure to pay was repeated and deliberate, despite proper requests for payment made on Ms William's behalf by her advocate. The breach was only rectified once the Authority became actively involved in this penalty claim.

c. Whether the breach was intentional, inadvertent, or negligent – the breach was intentional, in that Mr Gogna was aware of his and MGL's obligations under the ROS, and chose not to fulfil them;

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[1] *Borsboom v Preet PVT Limited and Warrington Discount Tobacco Limited* [2016] NZEmpC 143
[2] *A Labour Inspector v Prabh Limited* [2018] NZEmpC 110
[3] *A Labour Inspector v Daleson Investment Limited* [2019] NZEmpC 12
[4] *Nicholson v Ford*, [2018] NZEmpC 132.

d. The nature and extent of any loss or damage – the applicant suffered loss of money due to her in a timely way, and MGL obtained the benefit of those monies. In addition, Ms Williams was deprived of one of the benefits of settlement, namely that settlement should have brought an end to the costs, trouble, and stress of legal proceedings. Obviously, this has not occurred due to MGL's default.

e. Compensation or other steps in mitigation – MGL has now paid the agreed settlement sums in full. My view is that this can only amount to mitigation in a limited way given that payment was not made until the day before the Authority's scheduled case management conference, was not advised to Ms Williams until just before that conference, and then was relied upon at that conference to support the submission that no further consequences should arise for the respondents.

f. The circumstances of the breach, including the applicant's vulnerability – given the underlying substantive facts which I will not detail here, I am satisfied that Ms Williams was in a vulnerable position including in relation to Mr Gogna personally. She is also a migrant with her family support being overseas.

g. Any similar conduct – there is no issue of past similar conduct.

h. Deterrence – there is a need for deterrence as there is an obvious public interest in having parties abide by the settlement agreements they enter into particularly those which have been properly certified under s 149 of the Act.

i. Degree of culpability – it is relevant that the respondents have not properly taken responsibility for the breaches or their part in the situation;

j. Consistency – I assess the present case as being at the lower end, taking into account that payment was in the end made in full over a period of three months.

k. Ability to pay – it is submitted that MGL has limited ability to pay, however no evidence has been provided in support of this, and the evidence in fact suggests that payments were made at the respondents' convenience.

l. Proportionality – the total amounts involved are modest but are certainly large enough to be of significance to Ms Williams, and I accept that the withholding of funds which she had every reason to expect to be paid on certain dates caused her personal difficulties, upset, and financial embarrassment.

[1] Taking all the above matters into account, a penalty of $4,000 is awarded. In all the circumstances, I agree that a portion of this should be paid to Ms Williams, in recognition of the further actions she was required to take to secure nothing more than what was agreed to. I direct that $3,000 of the penalty is to be paid to Ms Williams, and $1,000 to the Crown account.

Should orders be made against Mr Gogna personally?

[30] Section 137 of the Act provides that the Authority may order compliance with an agreed record of settlement that has been countersigned by a Mediator under s 149 of the Act. Subsection 2 of s 137 provides that the Authority may also by order require a party to a matter to do any specified thing for the purposes of "preventing further non-observance of or non-compliance with that provision, order, determinant, direction, or requirement".

[31] It is submitted for Ms Williams that Mr Gogna should be (a) property joined to these proceedings in his personal capacity, and (b) that orders should be made against Mr Gogna to take any and all reasonable steps as director of MGL to fulfil any orders made by the Authority.

[32] Both s 137 and the cases cited in support make it clear that the Authority has jurisdiction to do this when making compliance orders under s 137 of the Act. However, this is not a compliance matter. The ROS has been complied with, and this is an application for a penalty in accordance with s 149(4) of the Act. Therefore, my view is that the type of orders sought are not available and cannot be awarded.

[33] No orders are made.

Costs

[34] Ms Williams seeks an award of costs in respect of these proceedings. She seeks the amount of $3,500, on the grounds that the sum of $2,500 was the appropriate starting point, and an uplift should be awarded as the persistent breaches meant extra and ongoing communication was required.

[35] It is submitted simply for the respondents that "no punishment or order for costs, is appropriate in this case."

[36] The starting point is that costs follow the event, and that the successful party is entitled to a contribution to their legal costs.

[37] In this case, Ms Williams has been successful. She is therefore entitled to a contribution to her costs.

[38] The Authority has adopted a daily tariff approach as the starting point for considering costs. This is well known, and the current daily tariff is $4,500 for the first day of hearing, and $3,500 for subsequent hearing days[5]. The parties can expect the Authority to adhere to this approach, unless there is good reason to depart from it.

[39] The investigation meeting in this matter was held "on the papers" by consent. The Authority commonly awards the equivalent of a half day tariff in such cases. This amounts to the sum of $2,250.00.

[40] I must therefore consider whether there should be an uplift from the starting point of $2,250.00 to $3,500.00, on the grounds that persistent breaches meant extra and ongoing communication was required.

[41] 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*[6] as confirmed in *Fagotti v Acme and Co Limited*[7]. The principle set out in the above cases is that costs are to be modest. Relevantly to the present matter, costs

[5] For further information about the factors considered in assessing costs, see: https://www.era.govt.nz/determinations/awarding-costs-remedies/
[6] [2005] 1 ERNZ 808.
[7] [2015] NZEmpC 135 at 114.

are not to be used as a punishment or expression of disapproval of the unsuccessful parties conduct.

[42] Rather, costs uplifts are to reflect conduct in the proceedings themselves that lead to wasted additional time. No actions of this sort occurred here. My view is that an uplift would run the risk of being an improper expression of disapproval of the respondents' conduct, which has already been censured by way of the penalty award.

[43] No uplift is appropriate. Accordingly, costs of $2,250.00 are awarded in favour of Ms Williams.

[44] As Ms Williams is the successful party, she is entitled to the reimbursement of the filing fee. Orders are made accordingly for the reimbursement of $71.55.

Orders

[45] MGL has breached the terms of a settlement agreement entered into in accordance with s 149 of the Act.

[46] MGL is ordered to pay within 28 days of the date of this determination a penalty sum totalling $4,000.00 as follows:

a. $3,000.00 without deduction to Ms Rachel Williams;
b. $1,000.00 without deduction to the Crown account.

[47] MGL is ordered to pay within 28 days of the date of this determination a contribution to Ms Rachel Williams costs of $2,250.00 without deduction, and the sum of $71.55 being the reimbursement of the filing fee.

Claire English
Member of the Employment Relations Authority