

[3] In his statement in reply and at the investigation meeting, Mr Nadan made allegations about Mr Bates' conduct while still employed and costs incurred by Mr Nadan as a result. During the investigation meeting, Mr Nadan focused on damage to carpet at his rented business premises as being caused by Mr Bates during his employment. Mr Nadan also stressed that his financial circumstances required that he be allowed to pay off the outstanding ROS amount by way of instalment. He also asks the Authority not to impose a penalty on him, or award interest or costs.

The Authority's process

[4] The Authority application was lodged in March 2024, but there have been delays in progressing this matter.

[5] Firstly, Mr Nadan requested an extension to lodging a statement in reply (SIR), then a delay in holding a case management conference due to a family member's ill health, which were by consent agreed to by Mr Bates.

[6] When a case management conference (CMC) was finally able to be convened in September 2024, Mr Nadan failed to answer the Authority's calls to join the CMC. The CMC was delayed by an hour to make inquiries with Mr Nadan, but proceeded in his absence given no cause was shown for his non-attendance. During the CMC, Mr Bates' representative agreed to the matter being heard "on the papers", without the need for an investigation meeting.

[7] Mr Bates' representative lodged a memorandum outlining his position on the issues for determination as agreed.

[8] Mr Nadan contacted the Authority in the days following the CMC, saying he did not answer the Authority's call on the basis it was a private number. He requested a further CMC. As it was unclear why a further CMC was needed, the Authority issued timetabling directions for the provision of further information, including any response and further documents from Mr Nadan by 4 October 2024. The directions made clear Mr Nadan should advise if he took issue with determining the application on the papers. Mr Nadan did not comply with the timetabling directions or advise his view of determining the matter on the papers.

[9] A further CMC was held on 15 November 2024 at Mr Nadan's continued request. Directions were issued timetabling a "final opportunity" for Mr Nadan to respond to the application by providing a sworn or affirmed affidavit and any documents by 22 November 2024. Mr Nadan again failed to comply with the Authority's directions.

[10] The Authority subsequently received advice from an advocate that they had instructions to represent Mr Nadan. That advocate later advised they no longer had instructions, after which Mr Nadan advised he needed additional time to engage a new representative. Rather than delay the matter further, the Authority proposed holding an investigation meeting by audio visual link on 3 April 2025, to which the parties agreed. Due to some technical difficulties on the day, by agreement Mr Bates and Mr Nadan attended by audio call and gave oral evidence under affirmation. The parties were also given the opportunity to make submissions.

[11] As permitted by s 174E of the Act this determination has stated findings of fact and/or law, expressed conclusions on issues necessary to dispose of the matter and specified orders made as a result. Not all evidence or submissions are referred to but have been considered.

The issues

[12] The issues requiring investigation and determination are whether Mr Nadan has breached the ROS, whether a compliance order should be issued, whether interest on the outstanding amounts should be awarded, whether a penalty should be imposed on Mr Nadan and whether costs should be awarded.

Background

[13] The parties signed the ROS on 27 January 2023. Terms of the ROS included:

3. **KAMAL NADAN** will pay **SAM BATES**, a further **\$1413.60** holiday pay, which is subject to normal deductions such as PAYE AND compensation of **\$4000.00** under Section 123(1)(c)(i) Employment Relations Act 2000.
4. This amount will be paid to **SAM BATES** by way of direct credit to their nominated bank account at a **NET rate of \$100 per week** until the combined total is paid.

...

6. This is the full and final settlement of all matters between **SAM BATES** and **KAMAL NADAN** arising out of their employment relationship.

[14] The ROS was certified under s 149 of the Act by a mediator on 8 February 2023. That certification confirmed that before making the agreement, the parties were advised and accepted they understood the agreed terms were subject to s 148A, s 149(1) and s 149 (3) of the Act, namely that they:

- (a) were final, binding and enforceable; and
- (b) could not be cancelled; and
- (c) could not be brought before the Authority or the court for review or appeal, except for the purposes of enforcing those terms.

[15] At the investigation meeting Mr Nadan acknowledged he has breached of the terms of the ROS. He acknowledged payments had not been made to Mr Bates since June 2023. Mr Nadan acknowledges an amount of \$4,163.60 remains owing.

[16] At the investigation meeting, Mr Nadan claimed he attempted to continue payments to Mr Bates, but at some point Mr Bates changed his bank account number such that the payments he made “bounced back”. Mr Bates’ evidence is that while he closed the bank account into which payments were being made, he notified (or attempted to notify) Mr Nadan before he did so. Mr Nadan acknowledged that at some point he blocked Mr Bates’ phone number, such that he did not receive calls or messages from Mr Bates. Mr Bates says he was in contact with a labour inspector about the failure to pay the amounts under the ROS. Mr Nadan acknowledges being contacted by the labour inspector but that he did not engage with them.

[17] During the investigation meeting Mr Nadan attempted to justify not paying Mr Bates what was owed under the ROS by saying he had discovered damage to carpet in the office room at the workplace premises Mr Nadan leased for business purposes. Mr Nadan says he had allowed Mr Bates to stay in the office room “during COVID” as Mr Bates did not have any other accommodation. Mr Nadan said he has for some time sublet the premises to a third party but that his lease expires in November 2025, at which point he will become liable for any damage to the carpet. He said Mr Bates has previously admitted causing damage to the carpet, which Mr Bates denies.

Findings

Mr Nadan has breached the ROS

[18] Although Mr Nadan is frustrated with the condition in which he says he found the office carpet in, any damage would have been readily discoverable by him at the time he entered into the ROS. By entering into the ROS, the parties resolved their employment relationship problem and agreed that all issues were fully and finally settled. The ROS is a legally binding and enforceable agreement and it is clear Mr Nadan has breached clauses 3 and 4 of the ROS in failing to make the agreed weekly instalment payments since June 2023.

Compliance order to be issued

[19] Section 137(1)(a)(iii) of the Act gives the Authority power to order compliance where a person has not complied with any terms of settlement signed under s 149 of the Act. Having found the ROS has been breached, a compliance order should be issued to prevent recurrence.

[20] Mr Nadan has asked to pay the remaining amounts by way of further instalment payments. The Authority may make a compliance order for payment of monies to an employee by instalment, but only if the financial position of the employer requires it.¹

[21] With his SIR in May 2024, Mr Nadan provided an Inland Revenue letter recording significant tax debts he personally owed as at April 2024, as well as other bills he was facing around that time. Mr Nadan says his household is living only on his income due to a family member's ill health, and due to care arrangements, he only works 20 hours per week. He says his financial circumstances will continue to be constrained in the coming months for these reasons.

[22] I have given careful consideration to Mr Nadan's request to pay the remaining amounts by way of instalment but decline to exercise the discretion under s 138(4A).

[23] Firstly, Mr Nadan has been given opportunities to provide supporting information outlining his financial position since lodging his SIR. He has not done so.

¹ Employment Relations Act 2000, section 138(4A).

While Mr Nadan gave oral evidence about his financial circumstances, this may be self-serving and has not been able to be cross-checked with any supporting documentation.

[24] Additionally, Mr Nadan obviously has a history of non-compliance with the instalment plan in the ROS, and he has made no attempt to recommence payments under the ROS since the Authority application was served on him. He has had the benefit not paying the amounts he owes for a significant length of time already.

[25] Finally, although under questioning at the investigation meeting Mr Nadan belatedly appeared to take responsibility for his obligations under the ROS, it has come at a very late stage and at Mr Bates' time and expense. Mr Nadan's sporadic engagement with the Authority investigation and the delays he has caused to it, leaves the Authority with very real doubt that he can be relied on to comply with further instalment payments.

[26] It is for these reasons the Authority declines to order payments by instalment.

Interest is awarded

[27] It is appropriate where a person has been deprived of the use of money to make an award for interest, and as such Mr Bates is entitled to an award of interest. Interest must be calculated on the full outstanding amount using the civil debt interest calculator from the date Mr Bates' Authority application was served on Mr Nadan, namely from 4 April 2024.²

Penalty claim is adjourned

[28] Section 149(4) of the Act provides that a person who breaches an agreed term of settlement is liable to the imposition of a penalty. Section 135(2)(a) provides that under the Act an individual is liable to a penalty up to \$10,000. Mr Bates asks that a penalty in the vicinity of \$1,000 be imposed on Mr Nadan for breaching the ROS.

[29] I am minded to impose a penalty on Mr Nadan. However, in making a compliance order, I intend to adjourn the penalty claim to enable to compliance order

² <https://www.justice.govt.nz/fines/civil-debt-interest-calculator/>.

to be complied with.³ Mr Nadan should be aware that steps taken to remedy a breach are relevant to whether a penalty should be imposed and if so, in what quantum.

Outcome

[30] Mr Nadan has breached the ROS. Pursuant to section 137 (2) of the Act, within 28 days of the date of this determination, Kamal Nadan must comply with the record of settlement certified on 8 February 2023, by paying Sam Bates \$4,163.60.

[31] Kamal Nadan must pay to Sam Bates interest on the outstanding amount, calculated from 4 April 2024.

[32] The penalty claim is adjourned to enable the compliance order to be complied with.

Costs

[33] It is not appropriate to reserve costs in the circumstances.

[34] Mr Bates is entitled to a contribution to his costs as he has been successful. When considering costs, the starting point is the Authority's daily tariff, which is \$4,500 for a one-day investigation meeting. The investigation meeting was completed in just over an hour. An invoice provided by Mr Bates' advocate says Mr Bates has incurred costs in excess of the relevant portion of the daily tariff.

[35] After the investigation meeting, Mr Nadan was given an opportunity to respond to the application for costs. He has not done so, without explanation.

[36] With additional steps having to be taken during the investigation process as a result of Mr Nadan's sporadic engagement, it is appropriate to award \$1,250 in costs. Accordingly, within 28 days of the date of this determination Kamal Nadan is ordered to pay Sam Bates \$1,250 in costs and reimburse the application of fee of \$71.55.

Sarah Blick
Member of the Employment Relations Authority

³ Employment Relations Act 2000, section 138(5).